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## Trusting Courts with Arbitration Provisions

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# TRUSTING COURTS WITH ARBITRATION PROVISIONS

*Stephen E. Friedman*<sup>†</sup>

## ABSTRACT

The Supreme Court does not trust courts when it comes to arbitration provisions. The Court has constructed a jurisprudence that almost entirely eliminates judicial discretion in deciding whether to enforce an arbitration provision and makes enforcement nearly automatic. Employers and larger companies have taken advantage of the situation by routinely inserting class-arbitration waivers and other restrictions on collective action in their arbitration provisions. Because plaintiffs are not able to join together to pursue their rights, their claims effectively go unresolved and individuals are left with claims but no meaningful ability to remedy them. Arbitration provisions function more like exculpatory clauses than as reasonable efforts to fairly resolve disputes.

This Article argues that the Court has misconstrued the Federal Arbitration Act and that the Act was never intended to limit judicial discretion in this way. Courts should be able to consider the impact of enforcement of an arbitration provision on the ability of a party to pursue other important contractual, common-law, and statutory claims. This proposition might seem unremarkable but it is largely foreclosed by the Court's current jurisprudence. This Article endeavors to dismantle the faulty underpinnings of the current jurisprudence and re-establish meaningful judicial control over the enforcement of arbitration provisions.

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## INTRODUCTION

The Supreme Court has severely diminished judges' discretion in deciding whether to enforce pre-dispute arbitration provisions. These provisions, in which parties agree that they will arbitrate disputes that later arise between them, are ubiquitous.<sup>1</sup> In recent years, the Court has given these provisions something close to blanket approval, even in cases when they function like exculpatory clauses that prevent consumers and small businesses from being able to meaningfully pursue their rights. The Court has reduced state and federal courts to the mere muscle of the operation—the mindless enforcers of arbitration provisions. But courts have more than just brawn. They also have brains and a heart. In passing the United States Arbitration Act,<sup>2</sup> now known as the Federal Arbitration Act ("FAA"), in 1925, Congress intended courts to use all three.

It is particularly important that courts use their brains and their hearts when it comes to arbitration provisions that permit only individual arbitration by requiring waiver of a party's ability to join with other plaintiffs in a collective proceeding, such as class-wide arbitration.

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1. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<http://perma.cc/XNL5-F22M>] (reporting that "[o]ver the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home"); CONSUMER FIN. PROTECTION BUREAU, REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND PROT. ACT § 1028(A) 9 (2015) (reporting to Congress the results of a study finding that "[t]ens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses").
  2. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

If such waivers were imposed outside of an arbitration provision they would almost certainly be struck down, but when they are included in an arbitration provision courts routinely enforce them. When such arbitration provisions are enforced, they serve not as paths to an alternative and efficient form of dispute resolution, but instead as dead ends for millions of consumers and small businesses.

The Supreme Court has brushed aside concerns about the impact that enforcing these arbitration provisions has on the more vulnerable party in a transaction. In one case, the Court enforced an arbitration provision that barred class-wide arbitration even though the consumer claims were worth only about \$30 per consumer.<sup>3</sup> The Court was cavalier about the possibility that the bar on class-wide relief would result in small-dollar claims slipping through the cracks of the legal system.<sup>4</sup> In another case, the Court enforced a class-arbitration waiver in an antitrust claim.<sup>5</sup> The Court did so even though the plaintiffs, restaurant owners suing American Express, had established that the cost of the expert report needed to maintain the case exceeded the likely recovery any individual plaintiff would receive from a successful verdict.<sup>6</sup> The fact that the claim could not realistically or practically be brought on an individual basis did not move the Court, which was satisfied by the fact that a plaintiff could still technically make its claim, despite it not being rational for any individual plaintiff to do so.<sup>7</sup>

Not surprisingly, the consequence of these decisions has been an increase in the use of arbitration provisions that limit or totally eliminate the right of the plaintiffs to maintain a class-wide or other collective proceeding. As Justice Ginsburg recently wrote in a dissenting opinion, it “has become routine, in large part due to this Court’s decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses.”<sup>8</sup> And in its 2015 report to Congress on arbitration provisions in the consumer financial product and services industries, the Consumer Financial Protection Bureau (“CFPB”) found that “[a]lmost all of the arbitration clauses studied contained terms limiting the availability of class proceedings in arbitration.”<sup>9</sup>

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3. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337 (2011).

4. See *infra* Part II.B.1.

5. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–39 (2013).

6. *Id.* at 231.

7. See *infra* Part II.B.2.

8. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting).

9. CONSUMER FIN. PROT. BUREAU, *supra* note 1, at 44 (2015). The study provides that “93.9% of the credit card arbitration clauses, 88.5% of the

Of course, a legislative fix is possible. On July 10, 2017, the CFPB announced a new rule that would have limited the impact of arbitration provisions on class actions involving consumer financial products and services.<sup>10</sup> The rule would have prohibited a provider of such products and services from relying on pre-dispute arbitration provisions for the dismissal or stay of a class action concerning financial products or services.<sup>11</sup> However, President Donald Trump recently signed a measure repealing this rule.<sup>12</sup> Repeal of this rule makes the judicial fix proposed in this Article all the more crucial. And even if the rule had survived, it would have been a blunt and suboptimal approach. It should be open to parties to craft or utilize rules that provide for collective action and protect the rights of the parties even if the procedures crafted fall short of class-wide arbitration. The CFPB rule would have squelched innovation. In contrast, an approach that gives meaningful—but not unlimited—discretion to courts to assess arbitration provisions by empowering courts to consider the impact of enforcement would provide flexibility, foster arbitration, and protect the rights of the parties. This Article argues for such an approach.

The key to establishing the propriety and desirability of such an approach is to first dismantle the underpinnings of the Court's current jurisprudence. To begin with, there is a great deal of irony in the Court so completely disregarding the impact enforcement of an arbitration provision will have on the effectiveness of remedies for other claims. One key driving force behind the FAA was the need to ensure the availability of a meaningful remedy—not merely a technical one—for breaches of arbitration agreements.<sup>13</sup> Congress presumably did not

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checking account arbitration clauses, 97.9% of the prepaid card arbitration clauses, 88.7% of the storefront payday loan arbitration clauses, 100.0% of the private student loan arbitration clauses, and 85.7% of the mobile wireless arbitration clauses” in the sample reviewed by the CFPB contained provisions that “expressly did not allow arbitration to proceed on a class basis.” *Id.*

10. See *CFPB Issues Rules to Ban Companies From Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CONSUMER FIN. PROT. BUREAU (July 10, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/> [<https://perma.cc/NN4R-TW8S>].
11. See 82 Fed. Reg. 137, 137 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040) (summarizing the CFPB's findings in its 2015 report).
12. See *Trump Signs GOP Repeal of Consumer Banking Rule*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/aponline/2017/11/01/us/politics/ap-us-trump-consumer-rule.html> [<https://perma.cc/3TSR-J2FL>] (reporting that the President signed the repeal on November 1, 2017).
13. See *infra* notes 31–41 and accompanying text (discussing the legislative history of the FAA).

intend to ensure a meaningful remedy for breaches of arbitration provisions at the expense of meaningful remedies for other claims. This important component of the FAA's heritage has become buried in the Court's current jurisprudence. This Article seeks to recover and honor that heritage. The Court's current jurisprudence, involving a single-minded focus on enforcing arbitration provisions regardless of the impact on other rights brings to mind President Lincoln's defense of the suspension of the writ of habeas corpus at the outset of the Civil War. He asked: "[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"<sup>14</sup> We might ask in the context of this Article whether all the statutory, common law, and contractual rights should go without vindication lest an arbitration provision go unenforced.

The current jurisprudence is built on a number of misunderstandings of the purpose and history of the FAA as well as of its language. This Article seeks to expose those misunderstandings and to argue for a more appropriate approach to the judicial role in enforcing arbitration provisions. The Supreme Court should place more faith in the ability of courts to decide whether and how to enforce arbitration provisions. Specifically, courts should be permitted to consider the impact that enforcement of an arbitration provision would have on a party's ability to obtain relief for other claims. Permitting courts to weigh this consideration is fully consistent with the FAA but is, perhaps surprisingly, largely foreclosed by the Court's current arbitration-protecting jurisprudence.

This Article proceeds as follows: Part I sets forth some background on the FAA, including its history, purpose and structure. Part II describes the Court's current outcome-ignoring jurisprudence. Part III is the heart of the Article. It explains the many false premises and errors that undergird the Court's jurisprudence on arbitration provisions. With incorrect premises set aside and proper ones substituted in their place, this Article explains a more appropriate approach to the role of the courts in enforcing arbitration provisions. That approach, an application of the generally applicable rules for granting specific performance for breach of contract, is set forth in Part IV.

## I. HISTORY, PURPOSE, AND STRUCTURE OF THE FAA

The law before the passage of the FAA and the other modern arbitration statutes placed pre-dispute arbitration provisions in a hazy netherworld. A number of idiosyncratic rules undermined the effectiveness of these provisions. The first of these rules was the "rule of revocability." The second rule barred courts from granting specific perfor-

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14. Message to Congress in Special Session (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 430 (Roy P. Basler ed., 1953).

mance for breach of arbitration provisions. Under this second rule, courts could neither grant a motion to compel arbitration nor stay litigation of issues that were subject to a valid arbitration clause.

Under the rule of revocability, either party to a pre-dispute arbitration agreement could revoke the agreement any time before the arbitrators issued their award.<sup>15</sup> A New York court in 1855 observed that a pre-dispute arbitration provision was “a mere authority [granted to the arbitrators by the parties], revocable by either party, at any time before the case is finally submitted to the arbitrators for decision, subject only to liability for damages.”<sup>16</sup> An 1871 decision by New York’s highest court also illustrates the rule. In *Wood v. Lafayette*,<sup>17</sup> the court held that an arbitrator’s determination was not binding on the parties because, before the arbitrator had made his decision, one of the parties had revoked the arbitrator’s authority.<sup>18</sup> The court explained that the arbitrator’s “power so to act [as an arbitrator] was revocable by either party, as is the case in every submission to arbitrators, if exercised at the proper time.”<sup>19</sup> The court concluded that “his power having been revoked, his subsequent determination was not binding on the parties.”<sup>20</sup> An 1858 opinion provided some justification for the rule: “Arbitrators being selected, not by law but by the parties themselves, there is danger of some secret interest, prejudice or bias in favor of the party making the selection; and hence the opposite party is allowed, to the latest moment, to make inquiries on the subject.”<sup>21</sup>

The legislative history of the FAA also includes discussion of the rule of revocability. Julius Henry Cohen, a principal drafter of the FAA<sup>22</sup> and a key driving force behind and advocate for the FAA,<sup>23</sup>

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15. See *Southland Corp. v. Keating*, 465 U.S. 1, 32 (1984) (O’Connor, J., dissenting).
  16. *Smith v. Compton*, 20 Barb. 262, 267 (1855).
  17. 46 N.Y. 484 (1871).
  18. *Id.* at 490.
  19. *Id.* at 489–90.
  20. *Id.* at 490.
  21. *Greason v. Keteltas*, 17 N.Y. 491, 496 (1858).
  22. See *Hall St. Assocs., L.L.C. v. Mattel Inc.*, 552 U.S. 576, 589 n.7 (2008) (identifying Julius Henry Cohen as one of the primary drafters of the FAA); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1947 (2014) (describing Cohen as “the chief draftsman of the FAA”).
  23. See IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 42 (2013) (“Cohen played a central role in the enactment of modern arbitration laws”). Szalai’s book provides an excellent overview of the effort to pass the FAA.

noted in his testimony in the joint committee hearings that a party could even begin arbitration proceedings and if struck by a “hunch” that things were not going well, could simply withdraw from the agreement.<sup>24</sup> No other type of contract was subject to this very unusual “rule.”

Other idiosyncratic rules also undermined the effectiveness and usefulness of arbitration provisions by withholding meaningful relief for breach of such provisions. Courts could award monetary damages, typically nominal, but lacked the authority to grant specific performance for this particular type of contract—an anomaly in the world of contract law. *Haggart v. Morgan*,<sup>25</sup> an 1851 decision, illustrates the lack of an effective enforcement mechanism to remedy breaches of arbitration agreements. In *Haggart*, the court affirmed the lower court’s refusal to bar litigation even though the issue being litigated was covered by the arbitration agreement.<sup>26</sup> The motion for nonsuit had been properly overruled “because the agreement to arbitrate only entitled the party to damages, but was no bar to an action.”<sup>27</sup> The same court observed a few years later that “[i]t is well settled that courts of equity will never entertain a suit to compel parties specifically to perform an agreement to submit to arbitration.”<sup>28</sup> The *Restatement (First) of Contracts* also stated that although arbitration provisions were not deemed invalid or improper, courts could not grant specific performance to enforce them.<sup>29</sup> Similarly, it stated that a party could not assert the existence of an arbitration provision as a bar to litigation commenced by the other party.<sup>30</sup>

Concerns about these limitations on the ability of courts to render a meaningful—as opposed to merely technical or nominal—remedy for breach of an arbitration agreement are found throughout the FAA’s

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24. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 14 (1924) [hereinafter *Joint Hearings*] (statement of Julius Henry Cohen).

25. 5 N.Y. 422 (1851).

26. *Id.* at 427.

27. *Id.*

28. *Greason v. Keteltas*, 17 N.Y. 491, 496 (1858).

29. RESTATEMENT (FIRST) OF CONTRACTS § 550 (AM. LAW INST. 1932).

30. *See id.* (stating that under the law before the adoption of the modern arbitration statutes that an agreement to arbitrate is not a “bar to an action on the claim to which the bargain relates”); *see also* WILLIAM F. WALSH, A TREATISE ON EQUITY § 64, at 323 (CALLAGHAN & CO. 1930) (describing the law before the modern arbitration laws as permitting a party to pursue a lawsuit to final judgment and satisfaction “though in violation of his contract to arbitrate.”).



legislative history. The Senate Report notes that arbitration provisions were valid prior to the passage of the FAA, but that the only remedy for breach of such a provision was an award of money damages.<sup>31</sup> The Senate Report then describes the “ancient”<sup>32</sup> rules described above, noting that “the performance of a written agreement to arbitrate would not be enforced in equity”<sup>33</sup> and that an arbitration provision could not be asserted as a bar to litigation or as a basis for a stay of proceedings.<sup>34</sup> Courts were “without power to grant equitable relief.”<sup>35</sup>

This lack of judicial power to grant equitable relief had been a concern for Congress since the beginning of debate on the bill. During the 1923 Senate Judiciary Subcommittee Hearing, Senator Thomas Walsh of Montana stated: “Really, the purpose of this statute is to overcome the rule of equity, that equity will not enforce and [sic] arbitration agreement? That is really the purpose of it, is it not?”<sup>36</sup> Given this state of the law, agreements to arbitrate were, the Senate Report notes, “in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy.”<sup>37</sup>

The legislative history of the FAA, though sparse, is straightforward about the statute’s purpose. The House Report states that the FAA’s purpose was “to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce.”<sup>38</sup> The FAA, the House Report further notes, “declares simply” that arbitration agreements “shall be enforced, and provides a procedure in the Federal courts for their enforcement.”<sup>39</sup> The FAA moved arbitration provisions from the limbo in which they existed into the world of “normal” contract law. As the House Report states, arbitration agreements are, and should be treated as, “purely matters of contract.”<sup>40</sup> The

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31. S. REP. NO. 68-536, at 2 (1924).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 6* (1923) (documenting question asked during the Statement of Charles L. Bernheimer).

37. S. REP. NO. 68-536, at 2 (1924).

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

39. *Id.* at 2.

40. *Id.* at 1.

effect of the FAA is “simply to make the contracting party live up to his agreement,” thus placing an agreement to arbitrate “upon the same footing as other contracts, where it belongs.”<sup>41</sup>

The FAA is not a long or overly complicated statute. The Supreme Court has described Section 2 of the FAA as the statute’s “primary substantive provision”<sup>42</sup> and as its “centerpiece provision.”<sup>43</sup> Section 2 provides that written arbitration provisions in contracts in maritime transactions or interstate commerce “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>44</sup>

While Section 2 effectuates the statute’s purpose of ensuring that arbitration provisions “shall be enforced,” the rest of the statute “provides a procedure” for their enforcement.<sup>45</sup> Sections 3 and 4 set forth the procedures and mechanisms to be used for the grant of equitable relief for breach of an agreement to arbitration.<sup>46</sup> The language of these sections is crucial and has been seized on by the Court to bolster its view that the FAA largely strips courts of discretion and calls for something approaching mandatory enforcement. The Court, as will be discussed, reads each appearance of the word “shall” in these sections as though it says “must.” That, however, is an error. As discussed later in this Article, the language is designed to establish a procedure and empower courts.<sup>47</sup>

Section 3 provides the necessary authority for a court to stay litigation of a matter that is subject to arbitration. Under that section, if such litigation is commenced, 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.”<sup>48</sup> Section 4 is a longer section and provides that a party may petition a court for an order directing that:

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41. *Id.*

42. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

43. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

44. 9 U.S.C. § 2 (2012).

45. See H.R. REP. NO. 68-96, at 2 (1924) (indicating that the FAA provides that arbitration provisions “shall be enforced” and that the Act “provides a procedure” for enforcement).

46. See 9 U.S.C. §§ 3–4 (2012).

47. See *infra* Part III.C.

48. 9 U.S.C. § 3.

arbitration proceed in the manner provided for in [the arbitration] agreement. Five days' notice in writing of such application shall be served upon the party in default. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . 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 [an appropriate district].<sup>49</sup>

The section also states that if an issue is raised as to the making of the arbitration agreement “the court shall proceed summarily to the trial thereof.”<sup>50</sup> Assuming the court determines that the arbitration agreement was made, Section 4 provides that “the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.”<sup>51</sup> The FAA also provides a procedure for the court to name an arbitrator if necessary<sup>52</sup> and empowers the arbitrators to summon attendance by a witness and provides the procedure for so doing.<sup>53</sup>

Section 9 of the FAA provides for the entry of a judgment by a court upon the arbitration award. This section provides the procedure and timeline and directs that in appropriate circumstances the court “must grant such an order unless the award is vacated, modified, or corrected.”<sup>54</sup> Section 10 provides the narrow grounds upon which an arbitration award may be vacated.<sup>55</sup> Section 11 gives courts the ability

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49. *Id.* § 4.

50. *Id.*

51. *Id.*

52. *Id.* § 5.

53. *Id.* § 7.

54. *Id.* § 9.

55. *Id.* § 10 (providing for the award to be vacated if “procured by corruption, fraud, or undue means,” if there was “evident partiality or corruption in the arbitrators,” if various types of misconduct on the part of the arbitrators occurred or if 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”). The Supreme Court articulated an additional ground for vacating an arbitration award when the arbitrators show manifest disregard for the law. The current status of that doctrine is uncertain. *See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 672 n.3 (2010) (declining to definitively address whether the doctrine is still valid).

to modify or correct an award of arbitration, again in narrow circumstances.<sup>56</sup>

Having set forth some of the history and the basic structure of the FAA, this Article now turns to the Supreme Court's current jurisprudence on the role of courts in enforcing arbitration provisions.

## II. THE IMPACT-DISREGARDING JURISPRUDENCE OF THE SUPREME COURT

This Section of the Article focuses on the current impact-disregarding approach to arbitration enforcement illustrated most clearly in the Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion*<sup>57</sup> and *American Express Co. v. Italian Colors Restaurant*.<sup>58</sup> Before discussing those key cases, this Article lays out some of the building blocks of the current jurisprudence. Section II.A begins with what the Court has called the "straightforward"<sup>59</sup> cases and other cases that flesh out the meaning of Section 2's statement that arbitration provisions are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>60</sup> Section II.B sets forth the key cases of *Concepcion* and *Italian Colors*.

### A. "Straightforward" Cases and the "Saving Clause"

The Supreme Court has made clear that it will tolerate no rule that categorically bars arbitration of a particular type of claim. In *Southland Corp. v. Keating*,<sup>61</sup> the Court addressed a California legal doctrine under which the California Supreme Court had interpreted a provision of a state statute to mean that certain claims brought by convenience store franchisees had to be subject to judicial consideration.<sup>62</sup> The United States Supreme Court held that the refusal to enforce an arbitration provision in this context was inconsistent with the FAA. Congress, according to the Court, "mandated the enforcement of arbitration agreements."<sup>63</sup> The blanket prohibition on arbitration of claims under the California statute was not a ground that existed "at

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56. 9 U.S.C. § 11 (2012) (giving court discretion to modify or correct an award in specified circumstances).

57. 563 U.S. 333 (2011).

58. 570 U.S. 228 (2013).

59. See *infra* note 65 and accompanying text.

60. 9 U.S.C. § 2 (2012).

61. 465 U.S. 1 (1984).

62. *Id.* at 10.

63. *Id.*

law or in equity for the revocation of any contract” and so was foreclosed by the FAA.<sup>64</sup> The barrier to arbitration in this case did not sound in contract law. The law at issue may not have exactly been the rule of revocability, but it was similar in many relevant respects. The rule at issue permitted a party to avoid an arbitration provision for reasons having nothing to do with contract law and presumably out of a belief that only a court could reach a just determination. The Court’s decision was correct. A few years later, the Court would describe as follows the situation at issue in *Southland* as the quintessential easy case under the FAA: “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.”<sup>65</sup>

Things get more difficult beyond the so-called “straightforward cases.” A continuing controversial issue is which legal doctrines a court may apply in deciding whether to enforce an arbitration provision. As noted, Section 2 makes arbitration provisions “valid, irrevocable and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.”<sup>66</sup> This section has been referred to as the “saving clause.” The Court first described it as such in *Prima-Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>67</sup> a 1967 decision. The Court in *Prima-Paint* observed that the “saving clause” indicates that Congress’ intent in 1925 was “to make arbitration agreements as enforceable as other contracts, but not more so”<sup>68</sup> and to ensure that arbitration provisions not be elevated above other types of contracts.<sup>69</sup>

In *Perry v Thomas*,<sup>70</sup> the Court gave a narrow reading to the saving clause.<sup>71</sup> In *Perry*, the Court held that the FAA preempted a California law that provided that actions for collection of wages could be brought in court despite the existence of an arbitration agreement.<sup>72</sup> The case

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64. See *id.* at 10–11 (noting that the FAA’s “broad” principle of enforceability is not subject to limitations beyond those set forth in the Act).

65. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011); see also *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (*per curiam*) (holding that a West Virginia rule that barred enforcement of arbitration provisions in nursing home contracts where the claim involves negligence resulting in personal injury was inconsistent with and displaced by the FAA).

66. 9 U.S.C. § 2 (2012).

67. 388 U.S. 395, 404 n.12 (1967).

68. *Id.*

69. *Id.*

70. 482 U.S. 483 (1987).

71. *Id.* at 490–91.

72. *Id.*

thus falls within the category of straightforward cases in that it involved a legislative effort to nullify all arbitration agreements related to a particular type of claim. The Court's dicta, however, further restricts the role of the courts by limiting the grounds that courts can use in assessing arbitration provisions. The Court indicated that it was open on remand for the former employee to establish that the arbitration agreement was an unconscionable and unenforceable contract of adhesion.<sup>73</sup> However, the Court gave a caution. First, it emphasized the word "any," noting that arbitration provisions were valid, irrevocable, and enforceable as a matter of federal law "save upon such grounds as exist at law or in equity for the revocation of *any* contract."<sup>74</sup> The Court continued, noting that "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."<sup>75</sup> In contrast, any state law principle taking its meaning "precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement."<sup>76</sup> The Court further cautioned the court below that courts cannot construe arbitration provisions differently from how they construe non-arbitration agreements under state law.<sup>77</sup> "Nor," the Court cautioned, "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."<sup>78</sup>

The Court built on this dicta in subsequent cases in a way that further reduced the body of law applicable to arbitration provisions. In *Allied-Bruce Terminix Companies v. Dobson*,<sup>79</sup> the Court expounded on the limited scope of applicable state law. According to the Court, under Section 2, states may "regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'"<sup>80</sup> The Court continued by warning that:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any

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73. *Id.* at 492 n.9.

74. *Id.*

75. *Id.* at 493 n.9.

76. *Id.*

77. *Id.*

78. *Id.*

79. 513 U.S. 265 (1995).

80. *Id.* at 281 (quoting 9 U.S.C. § 2 (2012)).

such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.<sup>81</sup>

The Court in both cases focused on the reference to “any contract,” in both instances choosing to emphasize the word “any.”

It was in *Doctor’s Associates, Inc. v. Casarotto*<sup>82</sup> that the Court most clearly delineated the grounds a court could consider in deciding whether to enforce an arbitration agreement. *Casarotto* involved a Montana law that made arbitration provisions unenforceable unless notice of such a provision was “typed in underlined capital letters on the first page of a contract.”<sup>83</sup> Although the law seems innocuous enough—it was not hostile to arbitration, but merely recognized the importance of such provisions and sought to ensure knowledge of them—the Court held that it was inconsistent with and displaced by the FAA.<sup>84</sup> As it had in earlier cases, the Court stressed the word “any” in Section 2. The Court observed that Section 2 provides that arbitration provisions in writing “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract.”<sup>85</sup> The Montana rule, according to the Court, was not applicable to any contract, but only to arbitration provisions.<sup>86</sup> The Court provided crucial guidance, however, stating that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening” Section 2.<sup>87</sup> In a later decision, the Supreme Court provided a crucial further limitation. The Court held that not only may courts consider only fraud, duress, and unconscionability<sup>88</sup> but also mandated that those doctrines not be applied in a way that disfavors arbitration.<sup>89</sup> This Article turns to the development of this extreme limitation now.

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81. *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)).

82. 517 U.S. 681 (1996).

83. *Id.* at 683.

84. *Id.* at 688.

85. *Id.* at 686 (quoting 9 U.S.C. § 2 (2012)).

86. *See id.* at 688.

87. *Id.* at 687.

88. The Court has not explicitly said that these are the only three broadly applicable grounds that a court can consider, but it has never mentioned any others. *See infra* note 102 and accompanying text.

89. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–42 (2011).

*B. Culmination of the Court's Approach to Arbitration*

The two cases most fully embodying the Supreme Court's single-minded focus on enforcement of arbitration provisions in accordance with the exact terms set forth in the arbitration agreement and the Court's accompanying disregard for the consequences of enforcement of arbitration provisions are *Concepcion* and *Italian Colors Restaurant*. These two cases reduce judicial discretion in enforcement of arbitration provisions nearly to the vanishing point. This Section of this Article explores the Court's reasoning in each of these cases.

1. *AT&T Mobility LLC v. Concepcion*

*Concepcion* added a new layer of protection from courts for arbitration provisions. While prior cases had permitted courts to apply only a handful of contract doctrines to arbitration provisions, the Court in *Concepcion* introduced new restrictions on how a court can apply those doctrines. After *Concepcion*, such doctrines can be applied only in such a way as to not disfavor arbitration.

*Concepcion* involved an agreement for the sale and servicing of cell phones by AT&T.<sup>90</sup> The agreement included an arbitration provision but required that claims be brought only in the customers' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."<sup>91</sup> Customers filed a suit against AT&T alleging that the company had engaged in false advertising and fraud for charging sales tax on phones that AT&T had advertised as free.<sup>92</sup> AT&T filed a motion to compel arbitration and the customers responded that the arbitration was unconscionable and improperly exculpatory because it prohibited any sort of class action.<sup>93</sup> The district court and the Ninth Circuit Court of Appeals had agreed with the customers.<sup>94</sup> These decisions were consistent with California case law in which class action waivers in consumer contracts of adhesion involving small dollar amounts had been found unconscionable. This California rule applied whether arbitration or litigation was involved.<sup>95</sup> For the Ninth Circuit, California precedent on this point was a "refinement of the unconscionability analysis applicable to contracts generally in California."<sup>96</sup> Accordingly, in the view of the Ninth Circuit, the FAA did

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90. *Id.* at 336.

91. *Id.*

92. *Id.* at 337.

93. *Id.* at 337–38.

94. *Id.* at 338.

95. *Id.*

96. *Id.*



not preempt California's application of its well settled unconscionability rule.<sup>97</sup>

The Supreme Court saw it differently. The Court noted that what it referred to as the "Discover Bank rule"<sup>98</sup> had been applied "frequently" by California courts to find arbitration agreements unconscionable.<sup>99</sup> The Court observed, first, that the case before it was not the type of straightforward case in which a state law provides a blanket prohibition of arbitration of a particular type of claim. Those type of cases, as discussed earlier,<sup>100</sup> are easy for the Court and in such cases the "conflicting rule is displaced by the FAA."<sup>101</sup> *Concepcion* was not this type of an "easy" case because it did not involve a blanket prohibition on arbitration. Additionally, the doctrine that the courts had applied in *Concepcion* was unconscionability, a well-established and broadly applicable contract law doctrine and one that the Court had previously approved as an appropriate ground for a court to consider.<sup>102</sup> The district court, therefore, would seem to have acted within the parameters set by the Supreme Court when it refused to enforce the arbitration agreement.

The *Concepcion* Court was not satisfied. The Court expressed concerns that courts could use a seemingly neutral doctrine like unconscionability in a way that undermined arbitration. A court could discriminate against arbitration by declaring unconscionable arbitration agreements that did not provide for judicially monitored discovery, or that disallowed arbitration agreements that did not involve ultimate disposition by a jury.<sup>103</sup> The Court saw the case as one in which a facially neutral doctrine—unconscionability—had been applied in a way that disfavored arbitration by requiring class-wide procedures.<sup>104</sup> The Court addressed the situation by adding another layer of protection for

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97. *Id.*

98. *Id.* The doctrine took its name from the California Supreme Court opinion that had applied California's unconscionability doctrine to find an arbitration provision that included a class action waiver was unconscionable in certain contexts. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005).

99. *Concepcion*, 563 U.S. at 340.

100. *See supra* Part II.A.

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

102. *See Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (noting that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA).

103. *Concepcion*, 563 U.S. at 341–42.

104. *Id.* at 341.

arbitration provisions that significantly restricted the manner in which generally applicable contract defenses could be applied to arbitration provisions. The Court based this new restriction on the preemption doctrine.

The preemption doctrine, under which federal law preempts state law, flows from the Supremacy Clause of the Constitution. That clause makes federal law “the supreme Law of the Land; . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding.”<sup>105</sup> In assessing questions of preemption, “the purpose of Congress is the ultimate touchstone in every pre-emption case.”<sup>106</sup> One of the ways that preemption can occur is when the state law in question “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>107</sup> The Court’s analysis in *Concepcion* focused on this form of preemption.

To determine whether Congress’ purposes and objectives in passing the FAA were thwarted by the Discover Bank rule, the Court had to first identify the FAA’s purposes and objectives. The Court determined the “overarching purpose of the FAA” from the text of Sections 2–4.<sup>108</sup> That purpose, according to the Court, “is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”<sup>109</sup>

The Court based its analysis primarily on the language of the statute. It stated that the FAA’s “principal purpose” of “ensur[ing] that private arbitration agreements are enforced according to their terms”<sup>110</sup> was “readily apparent from the FAA’s text.”<sup>111</sup> The Court stated:

Section 2 makes arbitration agreements “valid, irrevocable, and enforceable” as written (subject . . . 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

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105. U.S. CONST. art. VI, cl. 2.

106. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1228, 1297 (2016) (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008)).

107. *Id.* (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

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

109. *Id.* Jodi Wilson discusses this supposed “streamlined proceedings” purpose of the FAA in a fine article on the topic. Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 124–31 (2012).

110. *Concepcion*, 563 U.S. at 344 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

111. *Id.*

accordance with the terms of the agreement” [upon the making of a proper motion].<sup>112</sup>

This language, according to the Court, was intended to give parties discretion in designing arbitration provisions as they see fit “to allow for efficient, streamlined procedures tailored to the type of dispute.”<sup>113</sup> As discussed later, the Court badly mischaracterizes the language of Section 2.<sup>114</sup>

The Court held that the application of the unconscionability doctrine by the California courts as reflected in the Discover Bank rule was inconsistent with the FAA because it “interferes with arbitration” by allowing parties to demand class-wide arbitration.<sup>115</sup> This type of arbitration, the Court noted, “sacrifices the principal advantage of arbitration—its informality.”<sup>116</sup> The resulting procedures are typically slower, more costly,<sup>117</sup> and more procedurally complex and formal than individual arbitration.<sup>118</sup> Additionally, class arbitration increases the risk of a large judgment being entered against a defendant, a particular danger given the relatively limited grounds for appeal from a judgment.<sup>119</sup>

The need to police judicial discretion flowed from the Supreme Court’s deep-seated suspicion of the motives of other courts when it comes to enforcing arbitration agreements. The Court justified its suspicion by noting that the FAA was enacted “in response to widespread judicial hostility to arbitration agreements.”<sup>120</sup> Examples of courts twisting facially neutral doctrines to the detriment of arbitration are not “fanciful” according to the Court, because “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.”<sup>121</sup> Further, the Court noted that “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.”<sup>122</sup>

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112. *Id.*

113. *Id.*

114. *See infra* Section III.B.

115. *Concepcion*, 563 U.S. at 346.

116. *Id.* at 348.

117. *Id.*

118. *Id.* at 349.

119. *Id.* at 350–51.

120. *Id.* at 339.

121. *Id.* at 342 (citations omitted).

122. *Id.*

*Concepcion* did not completely foreclose the possibility that courts could exercise at least some of their traditional discretionary role and take into account the likely impact of specific enforcement of an arbitration provision on a party. The Court in *Concepcion* noted that even though the consumers could not maintain a class arbitration and would have to arbitrate on an individual basis, this did not mean that their small dollar claim would “slip through the legal system.”<sup>123</sup> The arbitration provision in *Concepcion* called for payment of a minimum of \$7,500 plus double a consumer’s attorneys’ fees if a consumer obtained an award in arbitration greater than AT&T’s last settlement offer.<sup>124</sup> The consumers were thus arguably better off with the arbitration agreement than they would have been as class-action participants. As Justice Scalia noted, the claim at issue “was most unlikely to go unresolved.”<sup>125</sup>

Thus, it is possible to conclude that had there truly been no realistic possibility that the claim could be brought, the Court might have ruled differently. At the very least, as Professor David Horton noted in the aftermath of *Concepcion*, given the \$7,500 payment and attorneys’ fees provision at issue, the case “need not stand for the proposition that courts must compel individual arbitration even when doing so would kill off otherwise viable claims.”<sup>126</sup> The Court wasted little time in deciding a case that does stand for that proposition. The next Section discusses that case.

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

*Italian Colors* involved an antitrust claim that could only plausibly be brought on a class-wide basis. It thus addressed the question that had not been fully present in *Concepcion*: What happens when a contractual waiver of class-wide arbitration makes it almost certain, as a practical matter, that a claim will not be brought at all? The Court held that even though the cost of individually arbitrating a federal statutory claim exceeded the potential recovery, the class waiver portion of the arbitration provision had to be enforced. This was true even though the claim at issue was a federal statutory claim.<sup>127</sup>

In *Italian Colors*, merchants who accepted American Express charge cards sued American Express for violations of federal antitrust statutes. The merchants claimed that American Express had misused

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123. *Id.* at 351.

124. *Id.* at 351–52.

125. *Id.* at 352.

126. David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1272 (2013).

127. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–37 (2013).

its monopoly power to force the merchants to pay unduly high fees.<sup>128</sup> The agreement between the merchants and the credit card issuer included an agreement that disputes between the parties were to be resolved by arbitration and that disclaimed any “right or authority for any Claims to be arbitrated on a class action basis.”<sup>129</sup> American Express moved to compel individual arbitration based on the language in the contract.<sup>130</sup>

The merchants responded to the motion by pointing out that the cost of the expert economic analysis necessary to establish their anti-trust claim would be at least several hundred thousand dollars, while the maximum recovery an individual merchant could expect to receive was less than \$40,000.<sup>131</sup> As a technical matter, nothing would prevent the filing of an individual action. However, the likelihood of such an action being brought was effectively zero.

*Italian Colors* gave the Court a chance to flesh out the “effective vindication” doctrine. This doctrine had offered some promise that the consequences of enforcement of an arbitration provision would be considered, at least with respect to claims involving alleged violations of federal statutes. Unfortunately, the Court took the opportunity to interpret this doctrine in an extremely narrow fashion.

The effective vindication doctrine is a judicially created exception to the FAA. Under this exception, a court can invalidate an arbitration agreement that prevents the effective vindication of a federal statutory claim.<sup>132</sup> The doctrine has been mentioned by the Supreme Court on a few occasions, but the Court has never applied the doctrine to invalidate an arbitration agreement. The Court first mentioned the doctrine in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>133</sup> That case repudiated earlier jurisprudence that had questioned the application of the FAA to the arbitration of statutory claims.<sup>134</sup> The Court in *Mitsubishi Motors* found no presumption against arbitration of statutory claims in the FAA and no reason to depart from the FAA’s pro-

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128. *Id.* at 231.

129. *Id.* at 232 (internal quotation mark omitted) (quoting *In re Am. Express Merchs.’ Litig.*, 667 F.3d 204, 209 (2d. Cir. 2012)).

130. *Id.* at 231.

131. *Id.*

132. *Id.* at 235.

133. 473 U.S. 614 (1985).

134. *Id.* at 626–27. For example, in *Wilko v. Swan*, the Court had held that the FAA did not require an agreement to arbitrate disputes arising under the Securities Act of 1933 to be enforced and that the statutory claims were more appropriately subject to resolution by litigation as opposed to arbitration. 346 U.S. 427, 438 (1953).

arbitration policy when it came to statutory claims.<sup>135</sup> A party that agrees in advance to arbitrate a statutory claim “does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>136</sup> So long as there was no basis in the text of the statute or in the legislative history to show Congressional intent to preclude waiver of judicial remedies, the federal statutory claim should be subject to arbitration if the parties had so agreed.<sup>137</sup>

The Court did, however, provide some caution about the arbitrability of federal statute claims. The Court noted that “[this] is not to say that all controversies implicating statutory rights are suitable for arbitration.”<sup>138</sup> But “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral form, the [federal] statute will continue to serve both its remedial and deterrent function.”<sup>139</sup> Where the cause of action cannot be effectively vindicated in the arbitral forum the arbitration provision presumably ought not be enforced. The doctrine, at least in principle, seemed like a promising route to assess the impact of enforcement of an arbitration provision, at least in the case of federal statutory claims. But the doctrine has not lived up to its initial promise.

The Court has given some additional insight into the doctrine’s scope. In *Green Tree Financial Corp.-Alabama v. Randolph*,<sup>140</sup> the court noted that prohibitive expense in bringing a claim could be a basis to refuse enforcement of an arbitration agreement so long as the party seeking to avoid arbitration provides adequate evidence.<sup>141</sup> Prior to the Court’s decision in *Italian Colors*, however, the Court had not addressed the breadth of the doctrine.

Although it did affirm the doctrine’s validity, the Court in *Italian Colors* applied the doctrine in a cramped manner. The Court began its analysis by laying the now familiar foundation, stating that the FAA was enacted in response to “widespread judicial hostility”<sup>142</sup> to arbitration and that courts “must ‘rigorously enforce’ arbitration agreements

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135. *Mitsubishi Motors Corp.*, 473 U.S. at 426.

136. *Id.* at 628.

137. *Id.*

138. *Id.* at 627.

139. *Id.* at 637.

140. 531 U.S. 79 (2000).

141. *Id.* at 92.

142. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232–33 (2013).

according to their terms.”<sup>143</sup> The Court went on to refuse to extend the effective vindication doctrine to the facts before it. The Court focused on the “right to pursue” statutory remedies, not the practicalities of a party actually being able to maintain a claim and resolve it through arbitration.<sup>144</sup> For the Court, something as extreme as a provision in an arbitration agreement “forbidding the assertion of certain statutory rights” would satisfy the effective vindication exception.<sup>145</sup> Beyond that, though, the Court was stingy in its dicta. Even the existence of “filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable” would not make a clear case for the Court, as it indicated that the doctrine would only “perhaps” cover such a situation.<sup>146</sup> With access-restricting fees only “perhaps” qualifying as one of the category of cases warranting application of the effective vindication doctrine, the plaintiffs in *Italian Colors* never stood a chance. The Court held that “the fact that it is not worth the expense of *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>147</sup> The Court noted that before the adoption of the class action procedure, individual suits were considered sufficient to effectively vindicate statutory rights. So, although the class waiver made the maintenance and prosecution of the action practically and virtually impossible, the right to pursue the claim still existed.<sup>148</sup>

A forceful dissenting opinion by Justice Kagan focused on the practical implications of the majority opinion. The procedural bars in the arbitration provision made the pursuit of the antitrust claim a “fool’s errand.”<sup>149</sup> American Express, the dissent noted, had insulated itself from liability and effectively deprived the plaintiffs of their legal recourse.<sup>150</sup> In a stark passage, the dissenting opinion continued: “And here is the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad.”<sup>151</sup>

The consequences of cases like *Concepcion* and *Italian Colors* are unsurprising. As Justice Ginsburg wrote in a dissenting opinion a few years after these two cases, it “has become routine, in large part due to

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143. *Id.* at 233 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

144. *Id.* at 235–36.

145. *Id.* at 236.

146. *Id.*

147. *Id.*

148. *Id.* at 236–37.

149. *Id.* at 240 (Kagan, J., dissenting).

150. *Id.*

151. *Id.*

this Court's decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no class-action arbitration clauses."<sup>152</sup> And as noted in the Introduction, the CFPB reported a striking prevalence of class-action waivers in arbitration provisions in the consumer financial product and service market.<sup>153</sup>

The Court's jurisprudence on arbitration, particularly as illustrated in *Concepcion* and *Italian Colors*, has placed arbitration provisions in bubble wrap, immune from all but the narrowest of grounds of attack. Most significantly, this jurisprudence has turned these provisions into terms that either prevent any realistic possibility of a claim being brought at all or that fail to ensure that a meaningful remedy be available for any other type of claim. This is not what Congress intended or envisioned. The next Part of the Article exposes the fundamental misunderstandings and misinterpretations that undergird the Court's jurisprudence.

### III. DISMANTLING THE PREMISES OF THE COURT'S JURISPRUDENCE

The Court has ignored the FAA's history and purpose and has read into it things that simply are not there. The FAA's jurisprudence is wrong for a number of reasons. Section A discusses the key and crucial irony of enforcing breaches of arbitration agreements at the expense of enforcement of all other types of claims—a strange turn given that the FAA is premised on ensuring that a claim carry a meaningful remedy. Section B argues that the FAA should not be seen as a Congressional effort to constrain courts but rather to empower them. Section C explores two crucial ways in which the Court has misread the language of the FAA. Section D discusses the Court's flawed saving clause analysis. And Section E argues that the preemption analysis that underlies the Court's most recent restrictive jurisprudence misconstrues the purpose of the FAA.

#### A. *The FAA's Heritage on Meaningful Remedies*

The FAA is premised on ensuring that a wrong has a meaningful remedy. As discussed earlier, Congress enacted the FAA in large part to ensure that the breach of an agreement to arbitrate would have a meaningful remedy and not be enforceable by mere monetary damages.<sup>154</sup> Thus, arbitration provisions were given a remedy that actually made sense and that was appropriate to the breach. The point was to

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152. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting).

153. See *supra* note 9 and accompanying text.

154. See *supra* Part I.



make arbitration provisions as enforceable as other contracts, not to impair the ability to enforce other contractual, statutory, or common law rights.

Given this background, it is difficult to fathom the Court's disregard for the impact that enforcement of an arbitration provision has on these other rights. That disregard was on display in *Concepcion* when the Court brushed aside concerns that small dollar claims that could have been brought as a class action if litigation were permitted might "slip through the legal system" if an arbitration provision prohibiting collective action were enforced.<sup>155</sup> The Court stated as follows: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."<sup>156</sup> Somewhere along the line, preventing claims from being lost in the system apparently became merely "desirable."

In some ways, *Italian Colors* was even more harmful in that it reduced a promising doctrine that would have required consideration of the impact of enforcement on the parties and reduced it to almost nothing. In *Italian Colors*, the Court quoted an earlier case for the proposition that the effective vindication doctrine emanates from a need to prevent "prospective waiver of a party's *right to pursue* statutory remedies."<sup>157</sup> The Court added the emphasis, as though all that matters is that the *right* to bring a claim be left intact, regardless of how minimal the chance that such claim will actually be brought. According to the Court, a "provision . . . forbidding the assertion of certain statutory rights" would run afoul of the effective vindication doctrine.<sup>158</sup> Does that really need to be said? Maybe it does, because the Court goes on to say that the doctrine might perhaps—only "perhaps"—"cover filing and administrative fees . . . that are so high as to make access to the forum impracticable."<sup>159</sup> While it is nice to see the Court conceding the possibility that costs may make access to dispute resolution "impracticable" and that these costs might be a basis to refuse enforcement, it is puzzling why the Court has so little regard for practical realities. Whether a claim cannot be brought because of high filing fees or because it cannot be maintained on an individual basis, the result is the same: the claim is not capable of effective vindication.

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155. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).

156. *Id.*

157. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. at 235 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

158. *Id.* at 236.

159. *Id.*

The Court's application of the effective vindication doctrine ignored the doctrine's rationale. While the Court drew the language that it quoted and emphasized from a footnote of dicta in an earlier opinion, the fuller text of that opinion explains that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal antitrust] statute will continue to serve *both its remedial and deterrent function*."<sup>160</sup> This critical language didn't make it into *Italian Colors*. If it had, it would have been difficult for the Court to have justified enforcing an arbitration provision that makes a remedy or a deterrent practically unobtainable.

The language of the FAA also shows that the FAA is premised on arbitration actually occurring in lieu of litigation. As noted above, Section 3 provides for the stay of a suit brought in court on an issue covered by an arbitration provision. Under Section 3, a court stays "the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ."<sup>161</sup> The stay of an action that has been brought in court is premised on the assumption that the same action can be brought and maintained in arbitration. Congress would not expect a court to enter an injunction in favor of something that will, in all reasonable likelihood, never happen.

We are left with the strangeness of a jurisprudence that requires meaningful enforcement of arbitration agreement even if it strips such enforcement from other claims. The FAA was premised on breaches of arbitration provisions being subject to meaningful remedies *like* any other claim, not *instead* of any other claim. The Court, with an apparent lack of self-awareness, quoted earlier precedent to explain that the antitrust statutes could be enforced through arbitration because "[n]o legislation pursues its purposes at all costs."<sup>162</sup> It is equally true of the FAA as it is of the antitrust laws.

*B. FAA as Court-Empowering, Not Court-Limiting, Legislation*

The Court's current jurisprudence construes the FAA as a statute designed to limit—really, to nearly eliminate—judicial discretion. The Court in *Dean Witter Reynolds, Inc. v. Byrd*<sup>163</sup> stated that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been

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160. *Mitsubishi Motors Corp.*, 473 U.S. at 637 (emphasis added).

161. 9 U.S.C. § 3 (2012).

162. *Italian Colors Rest.*, 570 U.S. at 234 (internal quotation marks omitted) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam)).

163. 470 U.S. 213 (1985).

signed.”<sup>164</sup> In a later opinion, the Court reiterated that the FAA “requires courts to enforce [arbitration agreements] according to their terms.”<sup>165</sup> This mandatory enforcement regime is at the core of *Concepcion*, which stated that courts were required to enforce arbitration provisions as written and according to their terms,<sup>166</sup> and of *Italian Colors*, which provided that pursuant to the text of the FAA “courts must ‘rigorously enforce’ arbitration agreements according to their terms.”<sup>167</sup>

The FAA’s origin story, as told in *Concepcion* and *Italian Colors*, is of a statute born out of judicial hostility towards arbitration. The first words of legal analysis in *Concepcion* are as follows: “The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.”<sup>168</sup> Similarly, the Court begins its legal analysis in *Italian Colors* with nearly identical language: “Congress enacted the FAA in response to widespread judicial hostility to arbitration.”<sup>169</sup> The Court remains ever skeptical that other courts cannot be trusted to avoid this judicial hostility if given half a chance. Accordingly, given this judicial hostility, the Court must, in its view, be on the lookout for any backdoor efforts to undermine arbitration. The same sentiment is expressed in a more recent opinion in which the Court indicated that the FAA displaces any rule that “covertly” prohibits arbitration “by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration.”<sup>170</sup> The language used by the Court—“covertly” and “oh so coincidentally”<sup>171</sup>—nearly drips of distrust for the courts, which is somewhat strange coming from the Supreme Court.

By the time Congress passed the FAA, however, judicial hostility towards arbitration had largely vanished. By 1925, courts were following the old rules, but not out of hostility. Instead, they followed those rules because they felt bound by a precedent they no longer agreed with but which they felt required legislative action to undo. Though the origins of the anachronistic doctrines disfavoring meaningful enforcement of arbitration provisions are not clear,<sup>172</sup> the judicial attitude

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164. *Id.* at 218.

165. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

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

167. *Italian Colors Rest.*, 570 U.S. at 233 (internal quotation marks omitted) (quoting *Byrd*, 470 U.S. at 221).

168. 563 U.S. at 339.

169. 570 U.S. at 232.

170. *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

171. *Id.*

172. Possible explanations are a concern by courts that such agreements served to “oust the jurisdiction” of the courts in favor of arbitrators. *Kulukundis*

towards arbitration provisions in the years before Congress passed the FAA cannot be ascribed to hostility towards arbitration. As early as 1872, New York's highest court observed that the rule of revocability was itself "an anomaly in the law" that represented a failure "to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties."<sup>173</sup> The court viewed the rule, however, as "too well established to be now questioned."<sup>174</sup> Similarly, in 1906 the Pennsylvania Supreme Court noted that it was "much to be regretted that agreements to arbitrate . . . should be exempted from the general law of contracts and treated as revocable by one party without consent of the other."<sup>175</sup> Nonetheless, the court still upheld the rule which it deemed "too firmly settled to be changed without legislative authority."<sup>176</sup> Other courts also reluctantly acceded to the well-settled rule, putting aside their disapproval and distaste for it.<sup>177</sup> Thus, there was not judicial hostility towards or disapproval of arbitration as a means of dispute resolution. There was, however, a perceived limitation on the ability of a court to enforce a provision meaningfully absent a statutory authorization to do so.

That point was also made clear in the legislative history. The Senate Report indicated that the weight of precedential authority had perpetuated rules restricting the ability of courts to effectively enforce arbitration provisions "long after the courts themselves could no longer see that they were founded in reason or justice."<sup>178</sup> The House Report, too, noted the FAA was necessary because "courts have felt that the precedent was too strongly fixed to be overturned without legislative

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Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983–84 (2d Cir. 1942) (internal quotation marks omitted). Another possible reason was that courts feared that arbitration tribunals lacked the means to give redress. S. REP. NO. 68-536, at 2 (1924) (describing this as a possible reason for the rule). Julius Henry Cohen speculated that that resistance to arbitration was based on a concern that stronger parties would take advantage of weaker ones. *Joint Hearings, supra* note 24, at 15 (1924).

173. *President of Del. & Hudson Canal Co. v. Pa. Coal Co.*, 50 N.Y. 250, 258–59 (1872).

174. *Id.* at 258.

175. *Henry v. Lehigh Valley Coal Co.*, 64 A. 635, 636 (Pa. 1906).

176. *Id.*

177. *See, e.g., U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007–12 (S.D.N.Y. 1915) (criticizing the rule of revocability but upholding it in light of the rule's firmly settled nature); *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 292 (N.Y. 1921) (noting that the archaic rules had been criticized by many courts who nonetheless felt bound by "deference to early precedents").

178. S. REP. NO. 68-526, at 3 (1924).

enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.”<sup>179</sup> And, in an article by the American Bar Association Committee on Commerce, Trade and Commercial Law—the committee that drafted the FAA—the authors note that by the time the FAA was adopted, judicial hostility was “more apparent than real and was due to an adherence to precedent.”<sup>180</sup>

The FAA was not needed to correct any judicial hostility towards arbitration that existed in 1925, but rather to give courts power they lacked. American courts seemed very willing to enforce arbitration provisions in a meaningful way, but felt restricted by a precedent that resulted from an old English hostility. The FAA freed the courts from those precedents. The FAA was designed not to restrict the courts but to empower them.

The modern arbitration statutes were understood as expanding, not limiting, judicial power. In 1924, the Supreme Court in *Red Cross Line v. Atlantic Fruit Co.*<sup>181</sup> addressed the New York Arbitration Law on which the FAA was based.<sup>182</sup> The Court noted that the New York Arbitration Law “authorizes” a court to direct that arbitration proceed or to stay a court action that has been brought on issues subject to arbitration.<sup>183</sup> The Court used the word “authorizes.” It did not speak in terms of what the act “requires” or “compels.”

Julius Henry Cohen also indicated that the modern arbitration laws were designed to enhance judicial authority. In his article on the New York Arbitration Law, Cohen observed that in addition to annulling the rule of revocability, the law also “establishes legal machinery for protecting, safeguarding and supervising commercial arbitration. Instead of narrowing the jurisdiction of [a New York state trial court] it broadens it. It adds to its equity powers.”<sup>184</sup>

The FAA’s legislative history and case law are in accord with this view. For instance, the Senate Report notes that with the passage of the FAA courts would no longer be “without power to grant equitable

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179. H.R. REP. NO. 68-96, at 2 (1924).

180. Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 155 (1925).

181. 264 U.S. 109 (1924).

182. *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 589 n.7 (2008) (noting that the “text of the FAA was based upon that of New York’s arbitration statute”); *see also* S. REP. NO. 68-536, at 3 (1924) (“The bill . . . follows the lines of the New York arbitration law enacted in 1920.”).

183. *Red Cross Line*, 264 U.S. at 118.

184. Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 150 (1921).

relief.”<sup>185</sup> The language of a 1932 Supreme Court case, *Marine Transit Corp. v. Dreyfus*<sup>186</sup> is also telling. In that case the Court stated that “Section 4 *authorizes* a court . . . to ‘make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.’”<sup>187</sup> Again, the Court does not say the Act “requires” or “mandates” a court to make such an order, but rather that it authorizes a court to do so. The Court understood the FAA as empowering courts to do something they previously could not.

Despite the strong indications that the FAA was designed to empower courts, the Court has still read the FAA as largely having been designed to strip courts of their discretion. This is in large part due to the Court’s significant misreading—in one instance a literal one, and in the others interpretative errors—of the FAA. I discuss those in the next part of the Article.

*C. The Court’s Misreading and Misinterpretation of the FAA’s Text*

The Court has misinterpreted the FAA. One group of errors involves the Court’s reading of the word “shall” in the FAA as though it means “must.” The other errors involve references to enforcement according to the terms of the arbitration agreement. This Section of the Article discusses these crucial errors.

As noted earlier, the Court has read the FAA as largely eliminating judicial discretion.<sup>188</sup> The *Concepcion* Court spoke in terms of what the FAA requires of the courts as follows:

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.”<sup>189</sup>

The *Concepcion* Court’s supposed focus on the text of the FAA is undermined by a surprising lack of fealty towards what that text actually says and a blatant misreading of the statute. The Court began with Section 2: “Section 2 makes arbitration agreements ‘valid, irrevocable, and enforceable’ as written.”<sup>190</sup> Section 2 does not say this. It

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185. S. REP. NO. 68-536, at 2 (1924).

186. 284 U.S. 263 (1932).

187. *Id.* at 273–74 (emphasis added) (quoting 9 U.S.C. § 4 (2012)).

188. *See supra* Part III.B.

189. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2016).

190. *Id.*

actually says that written arbitration provisions are valid, irrevocable, and enforceable,<sup>191</sup> not that arbitration provisions are valid, irrevocable, and enforceable as written. That is a pretty big difference.

The Court has also misinterpreted the text of Sections 3 and 4, though this misreading is more understandable. The Court says that Section 3 “requires courts to stay litigation” and that section 4 “requires courts to compel arbitration.”<sup>192</sup> Neither Section 3 nor 4 actually uses the word “requires.” Nor do they use the word “must.” The word Congress used in both of these sections is “shall.” Section 3 states that when the conditions of the statute are satisfied the court “shall . . . stay the trial of the action.”<sup>193</sup> Section 4 states, among other things, that when the conditions of the statute are satisfied the court “shall make an order directing the parties to proceed to arbitration.”<sup>194</sup> It is certainly true that “shall” can mean “must.” In this instance, however, it does not, a point discussed below.

The *Concepcion* Court did correctly quote the language “in accordance with the terms of the agreement,” but read it as a mandate to enshrine the precise terms of the arbitration agreement.<sup>195</sup> The Court in *Italian Colors* similarly read this language as calling on courts to “‘rigorously enforce’ arbitration agreements according to their terms.”<sup>196</sup> That, too, is a misconstruction of the text.

#### 1. “Shall” and “Must” in the FAA

The word “shall” appears many times in the FAA, but, as noted above, the Court has given special attention to its appearance in Sections 3 and 4, the key procedural sections of the FAA. Section 3 provides that a court shall order a stay of litigation as follows:

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 had in accordance

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191. 9 U.S.C. § 2 (2012).

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

193. 9 U.S.C. § 3 (2012).

194. *Id.* § 4.

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

196. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.<sup>197</sup>

Similarly, Section 4 provides that “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.”<sup>198</sup> It also provides that if the making of the agreement is at issue and the matter is referred to a jury, then “if the jury find that no agreement in writing for arbitration was made or that there is no 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.”<sup>199</sup>

The Court has, in recent years, read this “shall” as mandating court action. As already noted in *Byrd*, the Court emphasized the word “shall” and stated that “[b]y its terms, the [Federal Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”<sup>200</sup> The Court in *Concepcion* also read these “shalls” as telling a court what is was “require[d]” to do.<sup>201</sup>

“Shall” carries many possible meanings. *Black’s Law Dictionary* includes five different meanings, among them are these: “[h]as a duty to . . . ,” “[s]hould,” “[m]ay,” “[w]ill” and “[i]s entitled to.”<sup>202</sup> Bryan Garner notes in his text on legal writing that although “shall” often signifies must, “the word frequently bears other meanings—sometimes even masquerading as a synonym of ‘may’ . . . . In just about every jurisdiction, courts have held that ‘shall’ can mean not just must’ and ‘may,’ but also ‘will’ and ‘is.’”<sup>203</sup> Judge Easterbrook described the word shall as “notoriously slippery”<sup>204</sup> and observed, regarding a statute providing that certain information “shall be disclosed” by the state of Illinois, that it was possible that shall was “permissive rather than

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197. 9 U.S.C. § 3.

198. *Id.* § 4.

199. *Id.*

200. *Byrd*, 470 U.S. at 218.

201. *See supra* Part II.B.1.

202. *Shall*, BLACK’S LAW DICTIONARY (10th ed. 2014).

203. BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES 105 (2001).

204. *McCready v. White*, 417 F.3d 700, 702 (7th Cir. 2005).



compulsory” in that context.<sup>205</sup> While Judge Easterbrook described “shall” as notoriously slippery, Justice Antonin Scalia and Bryan Garner characterize it as a “semantic mess” in their book *Reading Law: The Interpretation of Legal Texts*.<sup>206</sup> Legal drafters, they observe, “have been notoriously sloppy with their shalls.”<sup>207</sup>

While in recent opinions the Court has read “shall” in the FAA as meaning “must,” two opinions by the Court much closer in time to the passage of the FAA read the word differently. In 1932, the Court, in *Dreyfus*, assessed a claim that the FAA was not constitutional. The claim was that the application of the FAA was not compatible “with the maintenance of the judicial power of the United States as extended to cases in admiralty and maritime jurisdiction.”<sup>208</sup> The Court held that the FAA was constitutional. Congress had the power to “authorize” a court to grant specific performance when appropriate,<sup>209</sup> even in admiralty jurisdiction where such a remedy is not usually given.<sup>210</sup> Nowhere was this described as a restriction on the maritime court, but rather, it was seen as a grant of authority on those courts.

The Court decided another case less than one decade after the FAA became effective. In *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*,<sup>211</sup> the Court analyzed the import of Section 3 and in doing so, the Court read “shall” to mean “may.”<sup>212</sup> The Court addressed a claim that a federal district court lacked power to grant a stay under the terms of the arbitration agreement.<sup>213</sup> The Court observed that the agreement by its terms applied only to the grant of specific performance, not the entry of a stay under Section 3. The Court described Section 3 as follows: “Section 3 . . . provides broadly that the court may ‘stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.’”<sup>214</sup> And the Court also described Section 3 as providing the “power to grant a stay” and Section 4 as providing the “power to compel arbitration.”<sup>215</sup> So, at least for the

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205. *Id.*

206. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 113 (2012).

207. *Id.* at 112.

208. *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 277 (1932).

209. *Id.* at 278.

210. *Id.*

211. 293 U.S. 449 (1935).

212. *Id.* at 452–53.

213. *Id.* at 452.

214. *Id.* at 452–53.

215. *Id.* at 453.

first decade of the statute's existence, "shall" meant "may" and was intended to bestow power on the courts.

The language of the statute also supports the proposition that "shall" in Sections 3 and 4 does not mean "must." Within the FAA, when Congress wanted to indicate clearly that court action was required, it knew the word to use was "must," which is the word it used in Section 9.<sup>216</sup> That section addresses, among other things, situations in which the agreement of the parties provides that a judgment of the court is to be entered on entry of an arbitration award and specifies the court to enter such a confirming order. Upon application to the specified court for an order, Section 9 provides that "the court *must* grant such an order" unless the award is vacated, modified, or corrected in accordance with the FAA.<sup>217</sup>

The Court has interpreted this "must grant" language of Section 9. In *Hall Street Associates, LLC v. Mattel, Inc.*,<sup>218</sup> the Court observed: "There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases" except where one of the statutory exceptions applies.<sup>219</sup> The key relevant sections of the FAA—the ones that provide for the grant of a stay of litigation or a motion to compel arbitration—do not use this non-malleable language but instead use "shall."

Julius Henry Cohen also flagged the importance of the use of the word "must" in Section 9. In a 1926 article co-authored by Cohen, he described the then newly-passed law, and characterized the grant of a motion to compel arbitration as part of a sequence: "The court *then enters an order* directing that the arbitration shall proceed."<sup>220</sup> Three paragraphs later, the authors describe the Section 9 requirement in much more forceful and direct terms: "Under the statute, if the [arbitration] award is not voluntarily performed, it *must* be entered as a judgment of the court."<sup>221</sup>

Courts have always exercised discretion in deciding whether to grant specific performance. As the Supreme Court noted 130 years ago, the "question in cases of specific performance . . . is not what the court must do, but what, under the circumstances, it may do, in the

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216. See 9 U.S.C. § 9 (2012).

217. *Id.* (emphasis added).

218. 552 U.S. 576 (2008).

219. *Id.* at 587.

220. Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 272 (1926) (emphasis added).

221. *Id.*

exercise of its discretion to grant or withhold relief of that character.”<sup>222</sup> As a leading treatise in contract law notes, “[a]n action for specific performance is equitable in nature, and therefore, equitable principles are to be followed in determining its availability and its implementation.”<sup>223</sup>

Given that the “normal” rule of contract law is that such discretion exists and that the FAA is designed to make arbitration provisions into “normal” contracts, a very clear signal—a “must” or an “is required”—would be expected if Congress intended to so drastically change the role of courts in granting equitable relief. Some cases roughly contemporaneous with the passage of the FAA demonstrate the point. In *Becker v. Lebanon & Myerstown Railway Co.*,<sup>224</sup> the Pennsylvania Supreme Court noted that when statutory language directs what a court “shall” do in areas where courts traditionally exercise discretion, the typical understanding of “shall” as mandatory may be inappropriate.<sup>225</sup> The court addressed a refusal by a court of equity to grant injunctive relief. The court refrained from granting this remedy because the disproportionate injury to the respondent outweighed the benefit to the complainant property owner.<sup>226</sup> The property owner claimed that the court had erred in not granting the injunction. The owner argued that the statute at issue made an injunction mandatory because it provided that after ascertaining that a corporation acted without the right to do an act from which alleged injury occurs, courts “if exercising equitable power, shall by injunction . . . restrain such injurious acts.”<sup>227</sup>

The court did not read the language of the statute as mandatory, as the property owner urged. Instead, the court stated that the “word ‘shall,’ when used by the legislature to a court, is usually a grant of

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222. *Hennessey v. Woolworth*, 128 U.S. 438, 442 (1888) (citations omitted). *See also* *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 236 (1892) (“[F]rom time immemorial it has been the recognized duty of [courts of equity] to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law.”).

223. 25 WILLISTON ON CONTRACTS § 67:1 (4th ed. 2002); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 357 (AM. LAW INST. 1981) (providing that the grant of specific performance is to be made in light of referenced discretionary considerations); RESTATEMENT (FIRST) OF CONTRACTS § 359 (AM LAW INST. 1932) (stating that if money damages are inadequate as a matter of law then the determination as to whether specific performance should be granted is left in the discretion of the court).

224. 41 A. 612 (Pa. 1898).

225. *Id.* at 613.

226. *Id.* at 612.

227. *Id.* at 613 (quoting Act of June 19, 1871, Pub. L. No. 1361).

authority, and means ‘may.’”<sup>228</sup> This reading of the word “shall” was particularly appropriate because the statute related to equitable relief, a type of relief traditionally grounded in general discretionary principles. The court observed that “[n]otwithstanding, therefore, the use of the imperative, ‘shall,’ the injunction is not to be granted, unless a proper case for injunction be made out, in accordance with the principles and practice of equity.”<sup>229</sup>

The same reasoning applies to the FAA. Like the statute in *Becker*, the FAA includes the word “shall” in a statute that seems to require courts to grant injunctive relief once a certain set of circumstances has been established. But in light of *Becker* and its reasoning, we would expect a much stronger legislative signal than a mere “shall” to demonstrate Congressional intent to remove completely a court’s ability to weigh equitable considerations before granting equitable relief. Lacking such indication of intent, the FAA should be read as largely maintaining the usual role of the courts in granting equitable relief.

Nor is *Becker* alone in standing for the proposition that when the word “shall” appears in a statute directed towards the courts there is reason to doubt that it means “must.” The New York State Court of Appeals in *State v. Munro*,<sup>230</sup> a case decided just two years before New York passed the arbitration law on which the FAA’s language was based,<sup>231</sup> observed that the “word ‘shall,’ when used by the Legislature to a court, is usually a grant of authority and means ‘may.’”<sup>232</sup> As in *Becker*, a statute impacting on judicial authority was deemed to be permissive, not mandatory. The statute at issue authorized the Court of Claims to hear the claim of an individual who had been injured while in the employ of the state and provided that “[i]f the court finds that such injuries were so sustained, damages therefor shall constitute a legal and valid claim against the state, and the court shall award to and render judgment for the claimant for such sum as shall be just and equitable.”<sup>233</sup> The court rejected the implication that the word “shall” in this context was intended to “make it compulsory to award

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228. *Id.*

229. *Id.*

230. 119 N.E. 444 (N.Y. 1918).

231. *See* Hall Street Assocs., LLC v. Mattel Inc., 552 U.S. 576, 589 n.7 (2008) (noting that the “text of the FAA was based upon that of New York’s arbitration statute”); *see also* S. REP. NO. 68-536, at 3 (1924) (“The bill . . . follows the lines of the New York arbitration law enacted in 1920.”).

232. *Munro*, 119 N.E. at 445 (quoting *In re Supervisor of Nether Providence Twp.*, 64 Pa. 443, 444 (1906)).

233. *Id.* at 445.

damages.”<sup>234</sup> As the court noted, the word “shall” in a statute is not always compulsory and that the “clear intent of the Legislature was to confer authority and power upon the Court of Claims, and not to direct or control its action.”<sup>235</sup>

Legislatures do not lightly limit courts in areas that have traditionally been left to judicial discretion. In the 1902 decision *Clancy v. McElroy*,<sup>236</sup> the Washington Supreme Court read the word “shall” in a statute directed at a court as not mandatory in nature. The court addressed a statute that dealt with the duty of an executor to file an inventory of an estate in a timely manner. That statute provided that if an executor failed to make a timely filing, “the court *shall revoke* the letters testamentary or of administration.”<sup>237</sup> The court in *Clancy* rejected the argument that this section was mandatory and that the legislature intended to eliminate judicial discretion as to the removal of an executor who failed to file the inventory in a timely manner. The court observed that determining the meaning of “shall” in a statute requires considering both the letter and spirit of the statute. The court noted that the words “‘may’ and ‘shall’ may be used according to the context and intent found in the statute, and are frequently construed interchangeably.”<sup>238</sup> Reading this statute in light of the general “nature of probate procedure and the ordinary discretion of the superior court in such proceedings,”<sup>239</sup> the court held that the word “shall” was not mandatory, and that the superior court retained its usual discretion despite the use of the word “shall.”<sup>240</sup> Other cases roughly contemporaneous with the passage of the FAA also show that “shall” need not be considered to be mandatory.<sup>241</sup>

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234. *Id.*

235. *Id.*

236. 70 P. 1095 (Wash. 1902).

237. *Id.* at 1096 (emphasis added).

238. *Id.*

239. *Id.*

240. *Id.*

241. *See, e.g.*, *Barkley v. Pool*, 169 N.W. 730, 732 (Neb. 1918) (noting that “[t]he word ‘shall’ in statutes, as in colloquial speech, is frequently interpreted to mean a direction, rather than a mandate” and that it should be interpreted as such, and holding that language in the state’s constitution about when an election “shall” be held is directory because the legislature may pick a different date in some situations); *Fagan v. Robbins*, 117 So. 863, 865–66 (Fla. 1928) (determining the word “shall” in a statute calling for a court to enter a deficiency decree was discretionary, not mandatory, and was merely intended to provide authorization and not to require judicial action). The California Supreme Court went so far, in a 1913 opinion, to set forth as a general rule of construction of the time that “the word ‘shall’ when found in

Examining how the word “shall” is used in other places in the FAA also shows Congress intended to establish the steps in a procedure. The word comes up many times in the FAA and even in Section 4. The section starts by indicating how the process for obtaining an order to compel arbitration begins—with a party petitioning a court for such an order. Then Section 4 describes what a court does after such a petition is made: “The court *shall* hear the parties.”<sup>242</sup> Section 4 provides that later in the process “[i]f 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 . . . the court *shall* hear and determine such issue.”<sup>243</sup>

Substituting the mandatory “must” for “shall” strikes the wrong chord. It seems unlikely that Congress would command that a court *must* hear the parties. Nor would Congress likely command that a court *must* hear and determine an issue. That is what courts do. The phrase “the court shall hear the parties” is probably better rendered as the “court then hears the parties,” establishing a step in the procedure, rather than a requirement that “the court must hear the parties.” The phrase “the court shall hear and determine such issue” is better rendered “next, the court hears and determines the issue” rather than requiring that “the court must hear and must determine the issue.” Congress is simply setting forth a sequence and a procedure.

Later in Section 4 we find another instance that a court “shall” do something, and in this case a reading of the language as mandatory is internally illogical. Section 4 provides that if an issue as to contract formation is raised and a demand for jury trial is made, “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.”<sup>244</sup> The “shall” in this instance cannot mean “must.” If it did, the sentence would effectively be stating that the court must do one thing—make an order referring the matter to a jury in the manner provided by the Federal Rules of Civil Procedure—but it may do something different, that is call a jury specially for the purpose. “Shall” is not “must,” and reading it as “must” would be inconsistent with the discretionary aspect of the rest of the sentence. Reading “shall” instead as articulating a step in a new procedure makes for a perfectly sensible interpretation—a party demands a jury trial and then

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a statute is not to be construed to be mandatory, unless the intent of the Legislature that it shall be so construed is unequivocally evidenced.” *Cake v. City of Los Angeles*, 130 P. 723, 725 (Cal. 1913).

242. 9 U.S.C. § 4 (2012) (emphasis added).

243. *Id.* (emphasis added).

244. *Id.* (emphases added).

the court refers the matter to a jury in accordance with the Federal Rules of Civil Procedure or specially calls a jury.

This Article does not argue that the word “shall” in the FAA simply means a fully discretionary “may,” although “shall” can have that meaning. Just as this Article argued that Congress knew how to use the word “must” to indicate a true mandate to a court in Section 9, it must also concede that Congress also knew how to use the word “may” to indicate complete judicial discretion. In Section 10, the FAA states that a court “may make an order vacating” an arbitration award,<sup>245</sup> while Section 11 states that a court “may make an order modifying or correcting the [arbitration] award.”<sup>246</sup> So when the FAA uses the word “shall” it means neither “must” nor “may.”

The “shalls” of Section 3 and 4 are best understood as establishing a procedure and a sequence and are best read as meaning “then” or “is to.” What is set forth is the usual and ordinary procedure. Such an understanding is fully consistent with the legislative history. The FAA, the House Report notes, “declares simply” that arbitration agreements “shall be enforced,” which it does in Section 2, and “provides a procedure in the Federal courts for their enforcement.”<sup>247</sup> That is all Sections 3 and 4 do; they establish a sequence and a procedure that will, in the ordinary course of events, be followed.

## 2. Enforcement “According to Its Terms”

The supposed mandate to enforce arbitration provisions exactly on the terms set forth in the agreement is not present in the FAA. So eager was the Court in *Concepcion* to establish such a mandate that it disregarded the actual language of Section 2. As noted above, the Court incorrectly stated that Section 2 provides that arbitration provisions are “‘valid, irrevocable, and enforceable’ as written.”<sup>248</sup> It is understandable why the Court would want the central provision of the FAA to include a requirement that arbitration provisions are enforceable as written. If the language were there, it would strengthen the argument that the precise terms of an arbitration agreement are due some special form of protection. But Section 2 does not say this. Instead, it states that written arbitration provisions are enforceable, not that arbitration provisions are enforceable as written.<sup>249</sup> The absence of this language from the central provision can only weaken the Court’s position.

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245. *Id.* § 10.

246. *Id.* § 11.

247. H.R. REP. NO. 68-96, at 2 (1924).

248. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (quoting 9 U.S.C. § 2).

249. *See supra* Part III.C.

While the language supposedly requiring enforcement of an arbitration provision according to its terms is not in Section 2, it does appear in the procedural sections. For instance, Section 4 provides for the court to “make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”<sup>250</sup> Section 3 provides for a stay of litigation until “arbitration has been had in accordance with the terms of the agreement[s].”<sup>251</sup>

But this does not make the language of the arbitration agreement sacrosanct. The purpose of the FAA is to make arbitration provisions as enforceable as other contract provisions. Arbitration provisions are to be treated like “normal” contracts. But courts are not required to enforce “normal” contracts exactly as written. Consider unconscionability, one of the generally applicable contract defenses the Court has also applied to arbitration provisions. Under the common law, a court has the authority to refuse to enforce an unconscionable contract, but it may also “enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term to avoid any unconscionable result.”<sup>252</sup> Article 2 of the Uniform Commercial Code, covering sales of goods, provides essentially the same rule.<sup>253</sup>

And the precise words of an agreement are certainly not inviolable when it comes to equitable relief. The *Restatement (Second) of Contracts* provides that an order compelling performance or granting an injunction “will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires *need not be identical with that due under the contract.*”<sup>254</sup> Congress did not intend to make arbitration provisions into super-contracts, just into normal ones. Normal contracts need not be enforced to their exact letter, particularly when it comes to enforcement through specific performance.

We are still left with the references to enforcement of arbitration agreements according to their terms. We can use Section 4 as an

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250. 9 U.S.C. § 4.

251. *Id.* § 3.

252. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

253. *See* U.C.C. § 2-302(1) (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017) (providing that if a court finds a contract or contract clause unconscionable it may refuse to enforce the contract “or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”).

254. RESTATEMENT (SECOND) OF CONTRACTS § 358(1) (AM. LAW INST. 1981) (emphasis added).



example. It provides that a court “shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”<sup>255</sup> The Court has read this language as though it provides that a court “must make an order directing the parties to proceed to arbitration using the exact procedures set forth in the arbitration agreement.” First, we know this is not what Congress intended because the exact terms of a typical contract are not sacrosanct in this way. Second, the Court is reading too much into language that is nothing more than a description of specific performance.

Prior to the passage of the FAA, courts were not authorized to grant specific performance for the breach of an agreement to arbitrate, but were only authorized to grant money damages. The FAA provides a procedure for the specific performance of arbitration provisions in Sections 3 and 4. Section 3 provides for what we might consider negative specific relief by preventing a party from maintaining a lawsuit in court when an issue being litigated is subject to arbitration by calling for a court ordered stay.<sup>256</sup> Section 4 provides for an order to compel the parties to arbitrate.<sup>257</sup> Both sections include the language “according to the terms,” or variations of it.<sup>258</sup>

The language simply describes specific performance. Unlike when a court awards money damages, when a court orders specific performance it is ordering performance in accordance with the terms of the agreement. Consider the language of one treatise on contract law—edited by no less than Arthur Corbin—from 1924 that notes various types of relief available for a breach of contract.<sup>259</sup> First, the treatise states that a plaintiff can ask for “[d]amages, or compensation for the non-performance of a contract.”<sup>260</sup> These are the type of damages that Congress deemed inadequate for breach of an agreement to arbitrate, which is why Congress provides for specific performance under the FAA. The treatise describes specific performance as follows: “[s]pecific performance, or an order that a contract should be carried into effect by the defendant according to its terms.”<sup>261</sup> This same language is used

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255. 9 U.S.C. § 4.

256. *See id.* § 3.

257. *Id.* § 4.

258. Section 3 calls for a stay until arbitration “has been had in accordance with the terms of the agreement.” *Id.* § 3. Section 4 calls for an order “directing the parties to proceed to arbitration in accordance with the terms of the agreement.” *Id.* § 4.

259. WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 15 (Arthur L. Corbin ed., 16th ed. 1924).

260. *Id.*

261. *Id.*

in a leading treatise on Equity from 1918 to describe what a court does when it grants specific performance of a contract. That treatise states that the “Court of Equity enforces a contract according to its terms” when merely granting money damages “would violate the real object of the contract in the minds of the parties when the contract was made.”<sup>262</sup>

The Court has taken a simple description of what specific performance is—a court ordering performance of a contract’s terms as opposed to granting money damages—and read it as though it were a directive to enforce a term exactly as written. No other type of contract is treated this way in the law.

*D. The Court’s Unduly Narrow Reading of the Saving Clause*

The Court has focused quite a bit on what has been called the “saving clause” of Section 2. As noted, Section 2 makes arbitration provisions in interstate commerce “valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.”<sup>263</sup> The Court first described the emphasized language as a saving clause in *Prima-Paint*, a 1967 decision in which the Court observed that the “saving clause” indicates Congress’ intent in 1925 “to make arbitration agreements as enforceable as other contracts, but not more so” and to ensure that arbitration provisions not be elevated above other types of contracts.<sup>264</sup> Despite the understanding of the Court in *Prima-Paint* that this language was not intended to shield arbitration provisions from judicial review, since then, the Court has read it very narrowly, emphasizing on several occasions that only grounds applicable to “any contract” can be applied to arbitration provisions, presumably reading “any contract” to mean “every single type of contract.”<sup>265</sup>

A more sensible understanding of the saving clause, comes from a somewhat unexpected source—the 1982 amendment to a statute related to patent law. Prior to that amendment, there was a question as to whether pre-dispute agreements to arbitrate a dispute involving patent

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262. 2 JOSEPH STORY, LL.D., COMMENTARIES ON EQUITY JURISPRUDENCE § 1027, 408 (W.H. Lyon Jr. ed., 14th ed. 1918).

263. 9 U.S.C. § 2 (emphasis added).

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

265. See discussion *supra* Part II.A. Stephen Ware has suggested that this language must be taken literally: “A permissible ground for revocation . . . must be a ground for the revocation of ‘any contract,’” and not “‘any contract in the relevant class of contracts.’” Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 47 (2003). According to Ware, if the results of taking the language both seriously and literally are undesirable, then legislation to fix the problem is the appropriate approach. *Id.*

law were covered by the FAA. Some cases casted doubt as to whether they were.<sup>266</sup> The legislative history of the 1982 amendment shows that Congress amended the statute to resolve that doubt, to clearly authorize agreements to arbitrate disputes as to the validity and infringement of patents, and to assure parties that they could avail themselves of the benefits of arbitration.<sup>267</sup> The amended language of the statute makes clear that a contract can include a provision for the arbitration of patent validity and infringement issues.<sup>268</sup> The statute further provides that such a provision “shall be valid, irrevocable, and enforceable, except for any grounds that exist at law or in equity for revocation of a contract.”<sup>269</sup> Sound familiar?

This language is very similar to that found in Section 2 of the FAA. Congress was not attempting to come up with a new standard for arbitration provisions relating to patent disputes. In making this amendment, Congress was overriding cases that questioned the applicability of the FAA to patent statutes and indeed, the patent statute specifically makes arbitration of patent disputes subject to the FAA.<sup>270</sup> The choice of language by Congress in 1982 is simply an effort to restate and modernize the phrasing from the Section 2 saving clause. Congress did not use the “any contract” language in articulating a standard that was surely intended to mirror the coverage of the FAA. Instead, it made arbitration provisions subject to “any grounds that exist in law or in equity for revocation of a contract.” That is an important change because “any” modifies not “contract” but rather “grounds.” This has a much more expansive feel to it and can probably be understood as this: An arbitration provision can only be revoked on grounds that sound in contract law. This is a much more sensible approach than the “any contract” perspective. And if we are searching for Congressional intent, then the language Congress uses in a statute meant to replicate the effect of Section 2 is highly probative.

The Court’s analysis of the saving clause took another unfortunate turn in the *Casarotto* case. As discussed earlier, in *Casarotto*, the Court held that a Montana law that made arbitration provisions unenforce-

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266. See, e.g., *Beckman Instruments, Inc. v. Tech. Dev. Corp.*, 433 F.2d 55, 63 (7th Cir. 1970) (affirming trial court’s holding that issues relating to patent validity are not appropriate for arbitration and that they should be decided by a court); *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184, 185–86 (D. Del. 1930) (holding that agreements to arbitrate patent disputes are not subject to the FAA).

267. H.R. REP. NO. 97-542, at 12–13 (1982).

268. See 35 U.S.C. § 294(a) (2012) (authorizing arbitration provisions relating to patent disputes arising out of a contract).

269. *Id.*

270. See *id.* § 294(b).

able unless the parties met certain notice requirements conflicted with the FAA.<sup>271</sup> Such a law, according to the Court, was not applicable to “any contract” but just to arbitration provisions and so was inconsistent with the FAA.<sup>272</sup> But the Court could easily have reached the opposite result.

Congress was not motivated to pass the FAA because of rules, like that in the Montana statute, that try to ensure that the parties have knowledge of arbitration provisions in contracts. It was motivated instead by rules like the rule of revocability, which exiled arbitration provisions from the world of contract law, and rules that disabled courts from enforcing arbitration provisions by specific performance. These rules were premised on a belief that arbitrators were not capable of reaching equitable determinations. But rules requiring varying levels of disclosure for different types of contract provisions are not foreign to contract law. For example, written disclaimers of the implied warranty of merchantability in sales of goods must be conspicuous and mention the word “merchantability” to be effective.<sup>273</sup> This is not an expression of hostility towards warranty disclaimers, but rather a recognition that such a term is significant and that it is important that a buyer understand and be aware of any waiver of the implied warranty of merchantability. The Montana statute was in this same vein: a determination by the Montana legislature that arbitration is important and that the parties should have notice of such a provision in a contract.

But the error of *Casarotto* is really overshadowed by the *Concepcion* Court’s misapplication of the preemption doctrine to provide new layers of protection for arbitration provisions.

*E. The Court’s Flawed Preemption Analysis*

The *Concepcion* Court’s application of the preemption doctrine to its FAA analysis poses significant danger to the ability of courts to make meaningful assessments of arbitration provisions. Even neutral doctrines must only be applied so as not to disfavor arbitration. The Court in *Concepcion* identified the “overarching purpose of the FAA” as being “to ensure the enforcement of arbitration provisions according to their terms so as to facilitate streamlined proceedings.”<sup>274</sup> The Court held that the Discover Bank rule interfered with that purpose by requiring a less streamlined procedure than the one set forth in the arbitration

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271. *See* *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

272. *Id.*

273. *See* U.C.C. § 2-316(2) (AM. LAW INST. & NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2017) (providing that written disclaimers of the implied warranty of merchantability must mention merchantability and be conspicuous).

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

provision, and was therefore preempted.<sup>275</sup> *Concepcion* seems to make any application of the law that would make an arbitration proceeding less streamlined than provided for in the arbitration agreement inconsistent with the FAA.

The Court stated that it had identified the purpose of the FAA from the statute's text, from which the Court deemed the purpose was "readily apparent."<sup>276</sup> But it read the statute incorrectly. It did so on a literal level by stating that Section 2 makes arbitration agreements "'valid, irrevocable, and enforceable' as written."<sup>277</sup> Section 2 does not say arbitration provisions are valid as written, but rather that written arbitration provisions are valid.<sup>278</sup> The Court made a number of other questionable interpretations, such as reading Sections 3 and 4 as "requir[ing]" action by a court when those sections merely establish a process, and by calling for enforcement of terms exactly as written even though such a reading would turn arbitration provisions into super-contracts rather than normal ones.

Further, the Court's focus on streamlined proceedings is badly undermined by the fact that two prior cases calling for "rigorous enforcement" of arbitration provisions resulted in less streamlined proceedings. In *Byrd*, rigorous enforcement actually resulted in an inefficient process, with some claims being arbitrated and some litigated, not in streamlined proceedings and certainly not in the denial of a plaintiff's realistic hope of pursuing any right or remedy.<sup>279</sup> Similarly, another case premised on the need for courts to rigorously enforce arbitration provisions resulted in a stay of arbitration pursuant to California law and hence a less efficient process. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,<sup>280</sup> the Court held that the parties' agreement that arbitration be held in accordance with California law meant that such law would apply instead of federal law.<sup>281</sup> California law gave the courts the power to stay arbitration pending resolution of related litigation. Rigorous enforcement thus required that this non-streamlined approach to arbitration be followed.<sup>282</sup> Neither of these cases stand for the proposition that "rigorous

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275. *Id.* at 346.

276. *Id.* at 344.

277. *Id.*

278. See 9 U.S.C. § 2 (2012) (providing that written arbitration agreements are valid, irrevocable and enforceable).

279. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220–22 (1985).

280. 489 U.S. 468 (1989).

281. *Id.* at 470.

282. See *id.* at 478–79.

enforcement” means ignoring the impact enforcement would have on the ability of a party to bring and maintain a claim.

The legislative history does not hide the purpose of the FAA. The House Report states as follows in its first sentence: “The purpose of this bill is to make valid and enforc[ea]ble agreements for arbitration contained in contracts involving interstate commerce.”<sup>283</sup> The Senate Report simply notes that the purpose of the FAA is “clearly set forth in section 2,” which the report simply quotes in its entirety.<sup>284</sup> Thus, it is Section 2, not Section 3 or Section 4, we should look to in determining the legislative intent of the FAA. The FAA simply moves arbitration provisions to the category of “normal” contracts. An arbitration agreement is “placed upon the same footing as other contracts, where it belongs.”<sup>285</sup>

Because the Court got the purpose of the FAA wrong, its “purposes and objectives” pre-emption analysis is premised on a mistake. Courts ought not be trying to make arbitration provisions into super-contracts, or ensuring that streamlined proceedings are made sacrosanct regardless of how onerous they are in their impact. We should, instead, be trying to effectuate the goal of the FAA to treat arbitration provisions like any other contractual terms.

#### IV. TRUST THE COURTS

The key goal of the previous Part of this Article was to clear away the misunderstandings and errors that undergird the current jurisprudence on the FAA in order to create space for a simple proposition: Before enforcing an arbitration provision by specific performance, a court should engage in the same analysis it does before granting specific relief for any type of contract. Permitting this analysis would put arbitration provisions in the same category as other contracts. Insulating arbitration agreements from this analysis would actually run afoul of the FAA, as it would place arbitration provisions once again in their own special non-contract world when it comes to enforcement.

Prior to granting equitable relief for breach of contract, a court engages in a two-step process. First, a court considers whether money damages would serve as an adequate remedy for the breach of contract and, if they would, a court will not grant specific performance.<sup>286</sup> On

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

284. S. REP. NO. 68-536, at 2 (1924).

285. H.R. REP. NO. 68-96, at 1.

286. See RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (AM. LAW INST. 1981) (“Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.”); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 839 (4th ed. 2001)

this point, it is fair to say that Congress has made a meta-finding that money damages are not an adequate remedy for breach of an arbitration agreement. The insufficiency of money damages for such breaches was a large reason for the passage of the FAA. A party seeking to enforce an arbitration provision should not be required to make such a showing.

The second step requires a court to weigh a number of equitable considerations. As one treatise notes, “[i]t is important to emphasize the discretionary nature of equitable relief” and a court may deny relief if it “would be unfair to grant it.”<sup>287</sup> The discretionary considerations are well established. The most recent edition of a leading treatise on Contract law begins its discussion of the factors considered in granting specific relief by providing the “apt[ ] summary[ ]” from an 1884 opinion as follows:

The equitable remedy of specific performance of agreements . . . rests largely in judicial discretion, directed and regulated by defined rules. Well settled elements and incidents are requisite to granting relief, but whether relief shall be granted depends upon an equitable consideration of the particular circumstances of each case. The contract must be just, fair, and reasonable, must not have originated in mistake, surprise, violation of confidence, breach of trust, advantage of condition, nor been obtained by any unconscientious or unfair methods. The contract must also be reasonably certain in respect to the subject matter, terms, and stipulations; it must be founded on a valuable consideration and *its performance not work hardship or injustice*.<sup>288</sup>

These considerations are, of course, grounds that exist at equity and that apply to all contracts when specific performance is sought, and therefore satisfy the saving clause.

One concern might be that the breadth of these considerations could create a way for courts to do exactly what the Supreme Court feared and to tilt the playing field against arbitration provisions. But judicial discretion is not unfettered in this area. As the Nebraska Supreme Court recently observed, a “court’s discretion to order specific performance is controlled by established principles of equity and depending upon the facts and circumstances of the particular case. It is

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(observing that “[s]cores of cases” indicate that specific performance is not to be granted when money damages are adequate).

287. MURRAY, *supra* note 286, at 843.

288. 25 WILLISTON ON CONTRACTS, *supra* note 223, § 67:17 (quoting Carlisle v. Carlisle, 77 Ala. 339, 341 (1884)) (emphasis added). Note that the treatise included a determination that specific performance will create a hardship or give rise to an injustice.

not a discretion in the sense that it may be granted or denied at the will or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies.”<sup>289</sup>

Another objection, which hopefully is already adequately addressed by this Article, is that the FAA is intended to mandate action by courts and that maintenance of discretion would be inconsistent with that intent. As discussed, the FAA was not intended to restrict courts, but to empower them,<sup>290</sup> and the “mandatory” language of Section 2 has simply been misread.<sup>291</sup> Given that judicial discretion in granting specific enforcement was firmly in place when the FAA was drafted Congress would presumably have clearly indicated an attempt to curtail such discretion. There is nothing in the FAA that indicates that the statute was designed to strip the courts of the ability to make these equitable determinations. The Second Circuit Court of Appeals in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*<sup>292</sup> observed in dicta in its 1942 opinion that:

It may well be that in a proceeding under Section 4 [of the FAA], there are open many of the usual defenses available in a suit for specific performance. It would seem that a court, when exercising equity powers, should do so on the basis of a fully informed judgment as to all the circumstances. We recognize that some authorities have held to the contrary under similarly worded state arbitration statutes, interpreting them to require the courts automatically to decree specific performance without regard to the usual equitable considerations. It is difficult for us to believe that Congress intended us so to construe Section 4, although we do not here decide that question.<sup>293</sup>

We do trust courts to exercise their discretion for all other types of contracts and given that judicial hostility had largely subsided by the time Congress passed the FAA, there seems little reason not to trust them with arbitration.

To the extent there is some hesitation to opening up arbitration provisions to the full panoply of equitable considerations—even the

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289. *Tierney v. Four H Land Co.*, 852 N.W.2d 292, 301 (Neb. 2014) (quoting *Mainelli v. Neuhaus*, 59 N.W.2d 607, 610 (Neb. 1953)).

290. *See supra* Part III.B.

291. *See supra* Part III.C.

292. 126 F.2d 978 (2d Cir. 1942).

293. *Id.* at 987. The court did state that it did not believe those considerations applied to a Section 3 stay. *Id.* Yet, the stay is really nothing more than an injunction against pursuing a cause of action and should be subject to the same considerations.



*Kulukundis Shipping* court spoke of only “many,” and not “all,” of these defenses as being applicable to arbitration provisions—considerations relating to hardship and injustice through the loss of a meaningful remedy for other claims have the strongest claim to judicial consideration under the FAA.

As discussed earlier, the heritage of the FAA is all about ensuring meaningful—not merely technical or nominal—remedies.<sup>294</sup> Arbitration provisions were to be made enforceable in a meaningful way alongside other types of claims, not instead of them. Second, the language of the FAA assumes that when the court stays litigation, the agreed upon arbitration will actually occur.<sup>295</sup> Section 3 provides for a stay of litigation pending arbitration.<sup>296</sup> Presumably, Congress assumed that arbitration would serve as a meaningful substitute for litigation and actually occur in lieu of the litigation.

Permitting courts to consider the impact on parties will have other positive effects, as well. It will enable parties and the providers of arbitration to innovate to find creative and cost-effective ways to ensure that collective arbitration can occur. That is, a ban on class-action arbitration need not be fatal even where small consumer claims are involved so long as the arbitration provision provides adequate incentives and procedures to ensure that a claim can realistically be brought in arbitration instead of in litigation. The procedures do not have to mimic class action litigation, but merely need be adequately protective of the rights of the parties.

## CONCLUSION

Empowering courts to consider the impact of the enforcement of arbitration provisions is fully consistent with the FAA. Indeed, ignoring such impact amounts to a disregard for the heritage, structure, and language of the FAA. The proposal here is relatively modest and should be uncontroversial. Courts should be able to consider the impact of enforcement of arbitration provisions on the ability of a party to receive a meaningful remedy for other claims. The fact that even this basic aspect of judicial authority has to be wrested back from the Supreme Court shows how far off course we are with our current jurisprudence. The proposal in this Article represents an effort to bring the Court back to the correct course; one more consistent with the intent of Congress in enacting the FAA more than ninety years ago.

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294. *See supra* Part I.

295. As discussed earlier, the FAA provides for a stay of litigation pending arbitration. *See* 9 U.S.C. § 3 (2012). Presumably, Congress assumed that an arbitration claim could be as readily brought as a claim in court.

296. *Id.*