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Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration

Jill I. Gross[†]

INTRODUCTION

I have long been a fan of arbitration and have defended most forms of it as fair,¹ bucking the trend of many legal scholars who have criticized the process, particularly that resulting from mandatory² or “forced” arbitration.³ For many disputants,

[†] James D. Hopkins Professor of Law, Pace Law School. I am grateful for the valuable feedback I received from discussants in the SEALS 2014 program, Mandatory Arbitration and the Question of Justice, and for the opportunity Pace Law School gave me to present these ideas at the school's James D. Hopkins Memorial Lecture on November 12, 2014. I also am grateful for the insights of Barbara Black and Don Doernberg, as well as the thorough research assistance of Pace Law students Rana Abihabib, C.J. Croll, and Olivia Darius.

¹ See, e.g., Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174 (2010) (defending securities arbitration as a fair process); Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349 (2008) (theorizing explanations for customers' negative perceptions of the fairness of securities arbitration); Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493 (2008) [hereinafter Gross, *McMahon Turns Twenty*] (concluding that securities arbitration is a fair process). *But see* Jill I. Gross, *AT&T Mobility and the Future of Small Claims Arbitration*, 42 SW. U. L. REV. 47 (2012) [hereinafter Gross, *Small Claims Arbitration*] (critiquing “paper” arbitration of low-dollar-value claims as unfair).

² “Mandatory” arbitration in this context means arbitration resulting from a predispute arbitration clause in an adhesive agreement between parties of unequal bargaining power.

³ See, e.g., Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 L. & CONTEMP. PROBS. 133 (2004) (arguing that arbitration is “unavailable to many consumers because its cost is too great”); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014) (“[R]ather than enhancing equality, mandatory arbitration exacerbates inequality in access to justice in the workplace.”); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015) (critiquing employers' use of mandatory arbitration to decrease employees' access to justice); Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration*

arbitration provides a cost-efficient, prompt, private, and final mechanism to resolve disputes. In most forums, panels of unbiased arbitrators provide parties with a full and fair hearing, as an award risks vacatur if the panel deprives parties of the opportunity to present relevant evidence.⁴

The existence of arbitration as a viable dispute resolution process empowers disputants by providing them with a binding alternative to traditional litigation. Indeed, the availability of varied dispute resolution processes allows parties to tailor the decisionmaking mechanism to their particular dispute. “Process pluralism,” an ideology that rejects legal centrism (the notion that courts, law, and lawyers are the primary means of handling disputes) and favors a multiplicity of dispute mechanisms,⁵ promotes utilizing the most appropriate dispute resolution process to enhance the delivery of substantive and procedural justice.⁶

No doubt arbitration is an increasingly important dispute resolution mechanism in the United States, fueled in part by the Supreme Court’s jurisprudence interpreting section 2 of the Federal Arbitration Act (FAA)⁷—which declares the validity,

of Employment and Consumer Disputes, 60 U. KAN. L. REV. 985, 988-91 (2012) (identifying fairness concerns surrounding the growth of mandatory arbitration clauses).

⁴ See 9 U.S.C. § 10(a)(3) (2012) (authorizing courts to vacate an award upon proof that “the arbitrators were guilty of misconduct in refusing to . . . hear evidence pertinent and material to the controversy”); see also Gross, *McMahon Turns Twenty*, *supra* note 1, at 506 (“[T]oday’s FAA jurisprudence makes it incontrovertible that an arbitration hearing arising under the FAA must include the classic hallmarks of fairness: notice, a right to be heard, and a neutral decision-maker.”).

⁵ See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 147, 149 (2000) (“A key element of process pluralism is the belief in the legitimacy of a multiplicity of disputing mechanisms.”); see also Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 92 (2012) (theorizing that mediation’s move towards an arbitration model is an example of process pluralism); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 89 (1998) (“Maintaining the integrity of the alternatives to adjudication ensures ‘process pluralism’ in our dispute resolution system.”). Some disagreement persists about the origins of the term “process pluralism.” See Kovach & Love, *supra*, at 89 n.100.

⁶ See Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 107 (2000) (describing the evolution of the theory of “appropriate” rather than just “alternative” dispute resolution and defining it as an “array” of dispute resolution mechanisms that “are complementary to one another in the sense that they each have their own strengths and weaknesses and are therefore appropriate in some situations, and inappropriate in others”).

⁷ FAA § 2 provides:

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

irrevocability, and enforceability of arbitration agreements—to reflect “an emphatic federal policy in favor of arbitral dispute resolution”⁸ (the process) *and* a “liberal federal policy favoring arbitration agreements” (the contract to use the process).⁹ Thus, the Court’s decisions depend on both characterizing arbitration as a favored dispute resolution process and rigorously enforcing arbitration agreements against virtually any challenge.

While in recent years the Court has bolstered the arbitrability of claims and sharply curtailed most defenses to the enforcement of agreements to arbitrate disputes,¹⁰ I had held out hope that a safety valve existed. Specifically, I hoped that the federal-law-based “vindicating rights” doctrine would provide some relief to parties who found themselves bound to an unfair arbitration clause, particularly in contracts of adhesion. That doctrine permits a party to challenge the enforceability of an arbitration agreement with proof that the arbitration clause prevented it from vindicating its federal statutory rights in arbitration.¹¹

My hopes were dashed in the spring of 2013 when the Court decided *American Express Co. v. Italian Colors Restaurant*.¹² The third in a series of recent FAA opinions authored by Justice Scalia,¹³ the Court in *Italian Colors* ruled that—to the extent it exists at all—the vindicating rights doctrine precludes the enforcement of an arbitration clause only when a party can show that the clause deprived it of the *right* to prove its federal

⁸ 9 U.S.C. § 2 (2012) The final phrase of this section is called the FAA’s “savings clause,” as it preserves common law contract defenses to challenge arbitration agreements.

⁹ *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (quoting *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (internal quotation marks omitted)); see also *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (declaring that the FAA reflects a “national policy favoring arbitration”).

⁹ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

¹⁰ See, e.g., *Marmet*, 132 S. Ct. at 1203 (preempting West Virginia law barring enforcement of a predispute arbitration clause in a nursing home agreement in a negligence suit); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (preempting California law declaring unconscionable consumer arbitration agreements with class action waivers).

¹¹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 659 (1985) (recognizing in dicta that a court could refuse to enforce an arbitration agreement on public policy grounds if a party shows that it cannot vindicate its federal statutory rights in the arbitration forum); see also *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (recognizing in dicta that, if a party showed that pursuing its statutory claims through arbitration would be prohibitively expensive, and thus it could not vindicate its statutory rights, a court could validly refuse to enforce a predispute arbitration agreement); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 2018 (2014) (describing the vindicating rights doctrine as an “equitable safety valve”).

¹² *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

¹³ The first two are *AT&T Mobility*, 131 S. Ct. 1740, and *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

statutory claims in arbitration (as opposed to the *ability* to prove those claims).¹⁴ An arbitration clause waiving a party's right to pursue a claim on an aggregated basis did not remove the party's *right* to bring a claim, just the *method* of bringing it. Thus, the vindicating rights doctrine did not void an arbitration agreement with a class action waiver even though a party to that agreement could not afford to bring a low-dollar-value claim individually in arbitration (e.g., because expensive expert testimony was necessary to prove elements of a federal antitrust claim). The disputant simply could not pursue the claim at all.

Italian Colors discouraged many scholars who believed that eliminating the ability of parties bound to mandatory arbitration clauses to pursue class action claims stripped them of some statutory rights.¹⁵ A closer look at the *Italian Colors* decision, however, reveals what I believe to be a factual mistake in Justice Scalia's majority opinion.¹⁶ While I have no doubt that this mistake¹⁷ had no bearing on the ultimate outcome of the case, it triggered my thinking about what other mistakes¹⁸ the Court might have made in its arbitration decisions.

In this article, I report on the results of my close examination of more than two dozen opinions the Court has handed down interpreting the FAA—arising primarily from commercial, consumer, employment, or securities disputes—since the beginning of the twenty-first century only fifteen years ago.¹⁹ I

¹⁴ *Italian Colors*, 133 S. Ct. at 2311.

¹⁵ See, e.g., David Garcia & Leo Caseria, *Opinion Analysis: A Class Action Waiver in an Arbitration Agreement Will be Strictly Enforced Under the Federal Arbitration Act*, SCOTUSBLOG (June 21, 2013, 10:45 AM), <http://www.scotusblog.com/2013/06/opinion-analysis-a-class-action-waiver-in-an-arbitration-agreement-will-be-strictly-enforced-under-the-federal-arbitration-act/> [http://perma.cc/KD9A-G92D] (“The Court’s view of the effective vindication exception is so narrow that it may not serve a useful purpose going forward.”); Jean Sternlight, *American Express Co. v. Italian Colors Restaurant Guts Enforcement of Federal Laws*, INDISPUTABLY (June 20, 2013), <http://www.indisputably.org/?p=4750> [http://perma.cc/84D4-J44K].

¹⁶ This surely is not the only factual error made by a court. See Andrew D. Hurwitz, *When Judges Err: Is Confession Good For The Soul?*, 56 ARIZ. L. REV. 343, 344 (2014) (arguing that judges whose opinions contain factual or legal errors should “freely acknowledge[] and transparently correct[] the occasional ‘gool’”); cf. Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540 (2014) (discussing the Supreme Court’s practice of revising its opinions to correct errors before the opinions’ bound publication).

¹⁷ See *infra* Section III.A.3.

¹⁸ By “mistake,” I don’t mean legal interpretations with which I disagree. See, e.g., Margaret L. Moses, *Statutory Misconstruction: How The Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006) (arguing that the Court wrongly decided *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984)). Rather, I mean provably inaccurate factual statements.

¹⁹ *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014); *Italian Colors*, 133 S. Ct. 2304; *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012);

focus on cases in which the Court was asked to decide a question of arbitrability—whether a claim is arbitrable or whether an agreement to arbitrate is enforceable under FAA section 2. I have concluded that these decisions are built on a narrative of an arbitration process that no longer exists, although it may have existed in the twentieth century when Congress passed the FAA. The Court's antiquated understanding of the process threatens to undermine arbitration as a just alternative dispute resolution (ADR) mechanism.

Part I of this article describes the process of arbitration, the law that regulates the process, and how both law and process have evolved from the twentieth to the twenty-first century. Part II zeroes in on three opinions enforcing arbitration agreements challenged by consumers seeking to bring statutory claims as class actions. All three opinions were authored by Justice Scalia in 2011, 2012, and 2013²⁰—what I call Scalia's "Hat Trick."²¹ As I see it, Justice Scalia scored three times in the game of arbitration—and corporate counsel were likely cheering on the sidelines as their "goals" were achieved: to suppress consumers' ability to bring individual class actions against companies based on claims arising under federal statutes.²² Many arbitration

KPMG LLP v. Cocchi, 132 S. Ct. 23 (2011); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); Arthur Andersen LLP v. Carlisle, 556 U.S. 624 (2009); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009); Vaden v. Discover Bank, 556 U.S. 49 (2009); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008); Preston v. Ferrer, 552 U.S. 346 (2008); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003); Pacificare Health Sys. v. Book, 538 U.S. 401 (2003); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193 (2000); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000). Though my selection of the year 2000 as a cutoff was largely based on its simplicity, ironically enough, the first arbitration decision of the century was the one that gave disputants hope that the vindicating rights doctrine provided the very safety valve that now seems closed. See *Green Tree Fin.*, 531 U.S. 79 (recognizing vindicating rights doctrine in dicta).

²⁰ See *Italian Colors*, 133 S. Ct. 2304; *CompuCredit Corp.*, 132 S. Ct. 665; *Concepcion*, 131 S. Ct. 1740.

²¹ When a hockey player scores three goals in a single game, he has achieved a "hat trick." See *Hat Trick*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). Fans typically celebrate the third goal by throwing their hats onto the ice.

²² See *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407 (S.D.N.Y. 2014) (detailing concerted actions, including 28 group meetings of issuer banks across the credit card industry, to include PDAs in their customer agreements so as to suppress consumers' ability to bring class action suits against the industry); see also Nancy A. Welsh & Stephen J. Ware, *Ross et al. v. American Express et al.: The Story Behind the Spread of Class Action-Barring Arbitration Clauses in Credit Card Agreements*, 21 DISP. RESOL. MAG. 18 (2014) (detailing findings of the *Ross* court); cf. CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 58-60 (2013) (describing very low number of claims filed by consumers across four industries). *But see* Peter B. Rutledge

scholars have sharply criticized those decisions as anti-consumer or anti-employee, claim suppressing, and at odds with the fundamental right to have a dispute heard in a courtroom.²³

Part III argues that, in the Court's twenty-first-century arbitration cases, when justifying its holdings, the Court assumes without factual basis that arbitration is a one-size-fits-all process that is quick and inexpensive for all disputants who have ultimate control over the procedures. This part demonstrates that the Court's oversimplified and out-of-touch decisions have crafted a legal framework that regulates an arbitration process that largely no longer exists.

The article concludes by arguing that the Court's expansion of the FAA improperly rests on an outmoded understanding of the modern arbitration process and fails to recognize the many varieties of arbitration that exist today. Those decisions have led to concerns and criticisms that arbitration is no longer a fair process and have promoted a flight from arbitration. This flight necessarily decreases the range of ADR options that parties have at their disposal and ultimately hurts the values of process pluralism.

By setting the record straight, I hope to provide some insights into challenges to the Court's FAA decisions that may still exist and that have the potential to lead to a reinvigoration of many types of arbitration as appealing alternatives to litigation.

I. A BRIEF HISTORY OF ARBITRATION

A. *Premodern History*

Arbitration is a dispute resolution process in which parties agree to submit their dispute to a third-party neutral who hears from all parties and imposes a binding decision, or award, on the disputants.²⁴ Arbitration is based on the theory that parties agree

& Christopher R. Drahozal, "Sticky" Arbitration Clauses? *The Use Of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955 (2014) (finding no empirical evidence that companies are inserting arbitration clauses coupled with class action waivers since *Concepcion*).

²³ See Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012) [hereinafter Sternlight, *Tsunami*]; David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2012).

²⁴ See IMRE STEPHEN SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 7 (2013); see also Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 435-36 (2007) (listing four elements of arbitration as "(a) a process to settle disputes between parties; (b) a neutral third party; (c) an opportunity for the parties to be heard; and (d) a final, binding decision, or award by the third party after the hearing").

to trade the formal process of court-based adjudication for efficiency and equity.²⁵ It is generally considered a speedy and efficient form of dispute resolution, as it uses streamlined procedures to reach an outcome based on principles of law, equity, and custom and practices unique to a particular industry.

The process has deep historical roots and is known to have been used in the United States to resolve internal industry disputes dating back to colonial times.²⁶ Historically, however, judges were hostile to arbitration and refused to enforce predispute arbitration agreements (PDAAs), instead treating them as revocable.²⁷ This “revocability doctrine,” which declared PDAAs unenforceable and revocable, stemmed from two grounds. First, courts viewed arbitrators as improperly ousting courts of their jurisdiction. Second, courts were reluctant to compel parties to participate in arbitration when courts could not ensure that the arbitration process would be fair and equitable.²⁸ This judicial hostility limited disputants’ use of arbitration to resolve commercial disputes.

B. *The Rise of Modern Arbitration Statutes*

Increased court congestion in the early twentieth century and the growing popularity of arbitration as a cheaper and faster means of resolving disputes arising out of commercial transactions led merchants, particularly in New York, to lobby for an arbitration statute.²⁹ The drafters of the 1920 New York Arbitration Act,³⁰ the first arbitration statute in the country, intended it to reverse the common law revocability doctrine.³¹ Congress followed soon after by passing the 1925 U.S. Arbitration Act, now known as the FAA, to reverse the ancient judicial hostility to arbitration.³² By

²⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate . . . , [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”).

²⁶ See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 43 (1999) (describing historical roots of “folklore” arbitration); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969-72 (1999) [hereinafter Stone, *Rustic Justice*] (describing the history of arbitration). George Washington’s 1789 Last Will and Testament included an arbitration clause. See David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1035 (2012).

²⁷ Stone, *Rustic Justice*, *supra* note 26, at 973-74 (describing nineteenth-century courts’ reluctance to enforce PDAAs).

²⁸ *Id.* at 975-76.

²⁹ See SZALAI, *supra* note 24, at 21-25; Stone, *Rustic Justice*, *supra* note 26, at 979.

³⁰ Arbitration Law, 1920 N.Y. Laws 803 (codified as amended at N.Y. C.P.L.R. 7501-14 (McKinney 2015)).

³¹ See generally SZALAI, *supra* note 24 (detailing legislative history of the FAA).

³² *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

declaring arbitration agreements as enforceable as any other kind of contract in the FAA's primary substantive section (section 2),³³ Congress eliminated lower courts' ability to refuse to enforce a PDAA simply on the ground that it was an agreement to arbitrate. Unless the ground for revocation, such as fraud, duress or unconscionability, applied generally to all contracts, the ground for revocation was not available.³⁴

C. *Characteristics of Twentieth-Century Arbitration*

The FAA does not define "arbitration,"³⁵ though the legislative history suggests that FAA proponents envisioned a process in which a neutral party provided disputants with an opportunity to be heard and imposed a final and binding resolution of the dispute.³⁶ Early twentieth-century arbitration (the type that existed when the FAA was passed) was characterized as simple, speedy, and inexpensive.³⁷ Early twentieth-century arbitrators were experts in the dispute's subject matter and applied their understanding of custom, industry practice, and principles of law and equity to decide the merits.³⁸ Parties selected their own arbitrators, the process involved minimal motion practice and discovery, parties received a full and fair hearing via a flexible, party-driven process (parties could tailor the process to fit their needs), and the outcome was a final and binding award that

³³ 9 U.S.C. § 2 (2012).

³⁴ *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012). For a reconceptualization of the FAA's purpose as promoting procedural reform rather than freedom of contract, see Aragaki, *supra* note 11.

³⁵ Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 OHIO ST. J. ON DISP. RESOL. 329, 350 (2006) [hereinafter Gross, *Securities Mediation*].

³⁶ *Id.* at 355-56.

³⁷ Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 148 (1921) ("The experience of many business men and lawyers testifies to the advantage of these methods of adjusting differences [by arbitration] wherever possible. They are inexpensive, speedy and peaceful." (quoting proceedings of New York State Bar Association Committee on the Prevention of Unnecessary Litigation)).

³⁸ See Stone, *Rustic Justice*, *supra* note 26, at 971-72; Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 11 (1983). For example, diamond merchants arguing over the quality of a delivery relied on a diamond expert to resolve a dispute. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992). Cotton merchants looked to experts in the cotton industry to resolve disputes with cotton mills. See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1728 (2001). Investors who had disputes with their brokers had securities industry members with an understanding of the industry's customs and practices arbitrate their disputes. Gross, *Securities Mediation*, *supra* note 35, at 336-38 (describing the history of securities arbitration).

parties could appeal on limited grounds.³⁹ Participants perceived that the process delivered rough though speedy justice and was fair.⁴⁰ In fact, widely held perceptions of overall fairness fueled the business community's late twentieth-century flight from congested courts to arbitration.⁴¹

D. *Characteristics of Twenty-First Century Arbitration*

With its explosion in popularity, arbitration evolved into a different process than that practiced when Congress enacted the FAA.⁴² Though it still retains the hallmarks of a binding decision by a neutral decision maker after a hearing, as actually practiced today in the most oft-used forums, such as the American Arbitration Association (AAA),⁴³ JAMS,⁴⁴ and Financial Industry Regulatory Authority (FINRA) Dispute Resolution,⁴⁵ arbitration involves more formalities and litigation-like processes. In turn, these formalities increase costs due to more expansive discovery, prehearing conferences, and motion practice.⁴⁶ For example, FINRA arbitration now includes complex procedures for serving subpoenas;⁴⁷ AAA commercial arbitration rules list 19 different

³⁹ Brunet, *supra* note 26, at 43-44 (describing features of nineteenth and early twentieth-century arbitration).

⁴⁰ See Stone, *Rustic Justice*, *supra* note 26, at 976-77.

⁴¹ Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 7-8 (2014) [hereinafter Stipanowich & Lamare, *Living with ADR*] (reporting that “[f]or much of the latter half of the twentieth century, out-of-court dispute resolution centered on binding arbitration as an alternative to litigation of commercial disputes,” and participants generally were satisfied with the process); Stone, *Rustic Justice*, *supra* note 26, at 956-57 (attributing growth of arbitration in the late twentieth century to “near universal disdain for civil litigation” and appeal of arbitration to its “speed, accessibility, economy and substantive justice”).

⁴² Kovach & Love, *supra* note 5, at 90 (1998) (“The evolution of arbitration exemplifies how a dispute resolution process can begin as a true alternative to litigation and then gradually migrate towards the prevailing norm. Arbitration has assumed problems similar to those of litigation, and, in the process, has lost many features that made it appealing initially.”).

⁴³ See AMERICAN ARBITRATION ASSOCIATION, <http://www.adr.org> [<http://perma.cc/8KYC-KXDS>] (last visited Dec. 6, 2015).

⁴⁴ See JAMS, <http://www.jamsadr.com> [<http://perma.cc/9E5H-VKKH>] (last visited Dec. 6, 2015). The name JAMS evolved from the company's origins as J*A*M*S, an acronym for Judicial Arbitration and Mediation Services. See *About the JAMS Name*, JAMS, <http://www.jamsadr.com/about-the-jams-name/> [<http://perma.cc/6KMY-PZK5>] (last visited Dec. 6, 2015).

⁴⁵ See *Arbitration and Mediation*, FINRA, <http://www.finra.org/ArbitrationAndMediation/> [<http://perma.cc/3QH6-7MVP>] (last visited Dec. 6, 2015).

⁴⁶ See Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 12-19 (2010) (describing changes in the nature of arbitration that made it more like litigation).

⁴⁷ FINRA, CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES r. 12512 (2008) [hereinafter FINRA, CUSTOMER CODE]; FINRA, CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES r. 13512 (2008) [hereinafter FINRA, INDUSTRY CODE].

topics that arbitrators should cover during a prehearing conference;⁴⁸ and JAMS arbitration rules explicitly permit arbitrators to admit deposition testimony into evidence.⁴⁹

Arbitrator selection methods have also evolved in recent times. Today, parties usually select their arbitrators pursuant to forum rules and from the forum's roster, and not all forums permit the parties to select an arbitrator with expertise in the subject matter of the dispute.⁵⁰ In particular, under most forums' procedures, the smaller the dollar value of the claim,

⁴⁸ AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES, r. R-21, r. P-2 (2013) [hereinafter AAA, COMMERCIAL ARBITRATION RULES]. The 19 topics (not counting subtopics) are:

- (i) the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9; (ii) whether all necessary or appropriate parties are included in the arbitration; (iii) whether a party will seek a more detailed statement of claims, counterclaims or defenses; (iv) whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses; (v) which (a) arbitration rules; (b) procedural law; and (c) substantive law govern the arbitration; (vi) whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, . . . (vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters; (viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues; (ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne; (x) whether any measures are required to protect confidential information; (xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports; (xii) whether, according to a schedule set by the arbitrator, the parties will (a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing; (b) exchange and pre-mark documents that each party intends to submit; and (c) exchange pre-hearing submissions, including exhibits; (xiii) the date, time and place of the arbitration hearing; (xiv) whether, at the arbitration hearing, (a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means; (b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it; (xv) whether any procedure needs to be established for the issuance of subpoenas; (xvi) the identification of any ongoing, related litigation or arbitration; (xvii) whether post-hearing submissions will be filed; (xviii) the form of the arbitration award; and (xix) any other matter the arbitrator considers appropriate or a party wishes to raise.

Id. at r. P-2.

⁴⁹ JAMS, COMPREHENSIVE ARBITRATION RULES AND PROCEDURES r. 22(e) (2014), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf [<http://perma.cc/U82N-9VGK>] [hereinafter JAMS, ARBITRATION RULES].

⁵⁰ For example, FINRA customer arbitrations must include at least two public arbitrators (on a three-member panel case) who are arbitrators with no affiliations past or present with the securities industry. FINRA, CUSTOMER CODE, *supra* note 47, r. 12403(a), (e).

the less input the claimant has in arbitrator selection.⁵¹ Additionally, forum fees and neutral costs can escalate rapidly to tens of thousands of dollars for complex disputes, and hearings can drag on for months and even years.⁵²

With the increased use of arbitration, litigation arising from arbitration awards also has increased.⁵³ Judges have had more occasion to consider the grounds to vacate awards listed in FAA section 10,⁵⁴ as well as the grounds to modify or correct awards listed in FAA section 11,⁵⁵ and have construed those grounds narrowly.⁵⁶ The resulting body of law makes it extremely difficult to overturn an award on any ground other than a

⁵¹ For example, under the AAA commercial arbitration rules, for claims under \$75,000, parties receive only one list of five names from which they must choose their arbitrator. See AAA, COMMERCIAL ARBITRATION RULES, *supra* note 48, r. E-4. In contrast, for claims above \$75,000, parties have a wider choice of arbitrator appointment methods, including a list of 10 names if the parties proceed via the roster appointment method. *Id.* r. R-12, L-2. In addition, at a recent AAA arbitrator training, AAA staff confirmed orally to me that, generally, parties had more input into arbitrator selection as the value of the claim increased.

⁵² See Stipanowich, *supra* note 46, at 9 (describing corporate counsel bemoaning the loss of speed and cost advantages in modern arbitration).

⁵³ See, e.g., Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 HARV. NEGOT. L. REV. 167, 205 (2008) (describing results of empirical study of employment arbitration awards showing that "court review of arbitration is rapidly growing").

⁵⁴ Those grounds are:

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

9 U.S.C. § 10(a) (2012).

⁵⁵ Those grounds are:

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11 (2012).

⁵⁶ See *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) ("Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances.'" (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995))).

fundamental defect in the process.⁵⁷ In particular, arbitrator error, no matter how egregious, is not a ground for vacatur.⁵⁸ And the Supreme Court has blocked parties from expanding by contract the grounds for vacating FAA-governed awards.⁵⁹

Contemporary arbitration is not a one-size-fits-all process; rather, the mechanism has branched out into several different variants—creating pluralism within one process. Different industries use different types of arbitration, each featuring procedures and norms unique to the industry. The AAA has developed unique rules for more than a dozen different types of arbitration.⁶⁰ For instance, labor arbitration procedures differ from those of securities arbitration.⁶¹ Labor arbitrators typically write reasoned awards; FINRA arbitrators rarely do.⁶² Investor-state arbitration and international commercial arbitration are other varieties of arbitration practiced in the transnational arena, typically with arbitration selection methods different from those in the domestic arena.⁶³ As these all involve interstate commerce, they are governed by the FAA, yet describing them as the same process is a misleading oversimplification.

⁵⁷ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 586 (2008) (stating that grounds for vacatur listed in FAA section 10(a) all “address egregious departures from the parties’ agreed-upon arbitration”).

⁵⁸ *Oxford Health Plans*, 133 S. Ct. at 2071 (stating that when evaluating a vacatur challenge alleging that arbitrators exceeded their powers, the only question for the court under section 10(a)(4) “is not whether the arbitrator construed the parties’ contract correctly, but whether he construed it at all”).

⁵⁹ *Hall St.*, 552 U.S. at 586 (holding that “the text [of the FAA] compels a reading of the §§ 10 and 11 categories as exclusive”).

⁶⁰ See *Rule Search Result*, AM. ARBITRATION ASSOC., https://www.adr.org/aaafaces/rules/searchrules/rulesearchresult?x_rule_status=A&_afLoop=129962718894948&_afWindowMode=0&_afWindowId=ro1wt9gu8_152#%40%3F_afWindowId%3Dro1wt9gu8_152%26_afLoop%3D129962718894948%26x_rule_status%3DA%26_afWindowMode%3D0%26_adf.ctrl.state%3Dro1wt9gu8_192 [<http://perma.cc/SER6-2CEZ>] (last visited Dec. 6, 2015) (listing arbitration rules for accounting, class, commercial, construction, consumer, employment, healthcare payor provider, insurance, international, labor, Olympic sport doping, and wireless industry arbitration).

⁶¹ Kovach & Love, *supra* note 5, at 90-91 (“In labor arbitration, a ‘trend to legalism’ has developed, at least partly, because lawyers have brought to hearings the trappings of courtrooms: formality, objections, transcripts, briefs, and case citations.”).

⁶² Compare AM. ARBITRATION ASS’N, LABOR ARBITRATION RULES r. 37 (2013) (“The parties shall advise the AAA whenever they do not require the arbitrator to accompany the award with an opinion.”), with FINRA, CUSTOMER CODE, *supra* note 47, r. 12904(g). See also *Walton v. Cantor Fitzgerald & Co.*, [2015-03] Securities Arbitration Alert (Sec. Arb. Commentator) (Jan. 22, 2015) (reporting that the 2009 amendment to the FINRA arbitration code that required arbitrators to write an explanation of an award if the parties jointly request one has “resulted in the issuance of only 17 explained Awards”).

⁶³ See, e.g., INT’L CHAMBER OF COMMERCE, INT’L COURT OF ARBITRATION, ICC RULES OF ARBITRATION arts. 12-13, http://iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_11 [<http://perma.cc/9Y94-VP6N>] (describing arbitrator appointment process for international arbitration in the International Chamber of Commerce (ICC), which involves nomination by parties or appointment by the Court of Arbitration rather than list selection).

E. Arbitrability Challenges

As more parties to commercial transactions added PDAs to their contracts, challenges to the arbitrability of disputes increased. When parties entered into a PDA, they may not have known what dispute might arise, if any, or more commonly today, one party may not have known that there was a PDA in the contract.⁶⁴ Once a dispute arises, one party may no longer want to arbitrate for a variety of reasons. Parties may not believe that the forum is suitable for resolving the dispute that did arise, such as any kind of discrimination claim or some other complex, federal statutory claim. Others may perceive the forum as unfair. Still others may not fully understand the process, and that lack of knowledge produces skepticism and fear. So the reluctant party may challenge the existence of a valid arbitration agreement or argue that, even if there is an agreement, it does not cover the dispute.

The Supreme Court has provided ample guidance in connection with those arbitrability challenges. Since 2000 alone, the Court has accepted more than 25 cases involving arbitration that required an interpretation of the FAA—about the same number as all the cases decided in the first 75 years under the Act.⁶⁵ More than half of the decisions since 2000 involved arbitration at the American Arbitration Association.⁶⁶ An overwhelming majority arose out of mandatory arbitration clauses in labor or employment contracts, consumer products or services agreements, or customer agreements in the financial services industries. More than half involved an interpretation of the FAA's section 2.⁶⁷

⁶⁴ A recent study indicated that 91% of consumers surveyed did not know there was an arbitration clause in their contract that prevented them from bringing their claims in court. See Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements 50 (St. John's Legal Studies Research Paper No. 14-0009, 2015) [hereinafter *Whimsy Little Contracts*].

⁶⁵ My research yielded 30 decisions from 1925 to 1999.

⁶⁶ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

⁶⁷ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Nitro-Lift Techs.*, 133 S. Ct. 500; *Marmet Health Care*, 132 S. Ct. 1201; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Concepcion*, 131 S. Ct. 1740; *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen*, 559 U.S. 662; *Preston*, 552

The Court's numerous decisions in FAA-related cases have contributed to the rapid development of the federal substantive law of arbitrability. Starting in the 1980s, the Court has held that courts must apply a presumption of arbitrability when deciding such claims,⁶⁸ the FAA applies to arbitration clauses in all agreements "involving commerce,"⁶⁹ and federal statutory claims are arbitrable as a matter of public policy unless Congress explicitly says they are not.⁷⁰ Moreover, the Court has made it clear that in both federal and state courts, the FAA preempts conflicting state law, including state consumer protection laws that try to shield consumers from unfair PDAAs.⁷¹ The Court's twenty-first-century arbitrability decisions have had the cumulative effect of eliminating virtually all arbitrability defenses and converting PDAAs into "super contracts."⁷² The next Part demonstrates just how far the judiciary has evolved from its hostility towards PDAAs to its strong endorsement of them under the FAA.

II. JUSTICE SCALIA'S HAT TRICK: *CONCEPCION*, *COMPUCREDIT*, AND *ITALIAN COLORS*

The Court decided perhaps the three most important modern arbitration law cases in rapid succession at the end of its term in each of the years 2011, 2012, and 2013, and Justice Scalia

U.S. 346; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Alafabco*, 539 U.S. 52; *Randolph*, 531 U.S. 79.

⁶⁸ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11 (1983).

⁶⁹ By its terms, the FAA governs agreements to arbitrate "transactions involving commerce." 9 U.S.C. § 2 (2012). The Supreme Court has interpreted this phrase broadly to include any transaction that *in fact* involves interstate commerce, even if the parties did not anticipate an interstate impact. See *Allied-Bruce Terminix Cos., v. Dobson*, 513 U.S. 265, 273-74, 281 (1995) (interpreting the reach of the FAA broadly to include all transactions "involving commerce" and stating that "involving" is broad and is indeed the functional equivalent of "affecting"); *Alafabco*, 539 U.S. 52 (applying the FAA to debt restructuring agreements as "involving commerce"); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (applying FAA to securities arbitrations).

⁷⁰ See *CompuCredit*, 132 S. Ct. at 669.

⁷¹ See *Nitro-Lift Techs.*, 133 S. Ct. 500 (preempting Oklahoma Supreme Court's invalidation of a noncompetition agreement on the grounds that under the FAA, the arbitrator determines the enforceability of underlying contracts); *Marmet Health Care*, 132 S. Ct. at 1203 (preempting West Virginia rule prohibiting enforcement of predispute agreements to arbitrate wrongful death claims against nursing homes); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (preempting Montana statute requiring specific type of notice in contract containing arbitration clause); *Allied-Bruce Terminix*, 513 U.S. at 272-73 (preempting Alabama statute invalidating PDAAs in consumer contracts); *Perry v. Thomas*, 482 U.S. 483, 488-89 (1987) (preempting California statute requiring wage collection actions to be resolved in court).

⁷² See Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531 (2014); Stipanowich, *supra* note 46, at 9 ("In the twentieth century, predispute (or 'executory') arbitration agreements evolved from disfavored status to judicially denominated 'super-clauses.'").

wrote the majority opinion for each one.⁷³ These three cases, which I collectively refer to as the “Hat Trick” decisions, sharply reduced defenses available to parties to challenge the enforcement of arbitration agreements. This Part describes these cases and explains their significance to modern arbitration law and identifies a factual error that the Court made in *Italian Colors*. This error is characteristic of the Court’s recent FAA decisions, which reflect either a misunderstanding or mischaracterization of how arbitration works in the twenty-first century.

A. *The Hat Trick Decisions*

1. *Concepcion*

In April 2011, in *AT&T Mobility, LLC v. Concepcion*,⁷⁴ the Court ruled that the FAA preempts California’s *Discover Bank* rule, which “classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable.”⁷⁵ Vincent and Liza Concepcion accepted an AT&T Mobility offer for a free cell phone. When they discovered they were charged \$30.22 in sales tax, the Conceptions sued AT&T Mobility in federal district court on behalf of a class of similarly situated consumers, alleging that AT&T Mobility’s “practice of charging sales tax on a cell phone advertised as ‘free’ was fraudulent.”⁷⁶

After the Conceptions’ case was consolidated with another putative class action alleging, inter alia, identical claims of false advertising and fraud, AT&T Mobility moved to compel individual arbitration under the PDAA in the cellular phone service contract.⁷⁷ That PDAA included a provision prohibiting plaintiffs from bringing class-wide arbitrations, instead requiring arbitration of claims on an individual basis.

The district court refused to enforce the arbitration agreement on the grounds that the class action waiver was

⁷³ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013) (holding that claimants can establish they cannot vindicate their federal statutory rights only if they show they are stripped of the *right* to pursue them, not the *ability* to pursue them); *CompuCredit*, 132 S. Ct. at 669 (reaffirming that federal statutory claims are arbitrable absent an explicit “contrary congressional command”); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (ruling that class action waivers in consumer agreements are not per se unconscionable).

⁷⁴ *Concepcion*, 131 S. Ct. 1740.

⁷⁵ *Id.* at 1746. In *Discover Bank v. Superior Court of L.A.*, 113 P.3d 1100, 1103 (Cal. 2005), the California Supreme Court applied California’s unconscionability law to void class action waivers in arbitration agreements.

⁷⁶ *Laster v. AT&T Mobility, LLC*, 584 F.3d 849, 853 (9th Cir. 2009). *Concepcion* was consolidated with *Laster* in September 2006.

⁷⁷ *Id.* at 852.

unconscionable under *Discover Bank*.⁷⁸ The Ninth Circuit affirmed, and AT&T Mobility secured review in the Supreme Court.⁷⁹

In a 5-4 decision authored by Justice Scalia,⁸⁰ the Court held that the FAA preempts California's *Discover Bank* interpretation of the state's unconscionability rule. The Court concluded that the *Discover Bank* rule created a different law of unconscionability for a special type of contract: an adhesive PDAA with a class action waiver.⁸¹ Thus, the Court held that the FAA preempts the *Discover Bank* rule, as the rule treats arbitration clauses differently than nonarbitration contracts.⁸²

Persuaded by research demonstrating that state courts had become more likely to find arbitration agreements unconscionable than nonarbitration contracts,⁸³ the Court concluded that the *Discover Bank* rule was "tantamount to a rule

⁷⁸ *Id.* at 853-54.

⁷⁹ *Concepcion*, 131 S. Ct. at 1745.

⁸⁰ *Id.* Joining Justice Scalia in the majority were Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Justice Thomas filed a concurring opinion. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, filed a dissenting opinion.

⁸¹ The Supreme Court noted that, under California law, a court may refuse to enforce a contract that it finds "to have been unconscionable at the time it was made," or it may "limit the application of any unconscionable clause." *Concepcion*, 131 S. Ct. at 1746 (quoting CAL. CIV. CODE ANN. § 1670.5(1) (1985)). "A finding of unconscionability requires a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." *Concepcion*, 131 S. Ct. at 1746 (citations omitted). The *Discover Bank* court applied the unconscionability statute and resulting doctrine to class action waivers in PDAAAs and reasoned:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

Discover Bank, 113 P.3d at 1110 (quoting CAL. CIV. CODE § 1668 (West 2015)).

⁸² Under the FAA preemption doctrine, the FAA preempts any state law that "actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Court has repeatedly held that the FAA preempts conflicting state law. *See, e.g.*, *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (preempting Oklahoma Supreme Court rule that a court, not an arbitrator, determines the validity of a covenant not to compete in a contract containing an arbitration clause); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (preempting West Virginia Supreme Court rule voiding as against public policy PDAAAs in nursing home contracts with respect to negligence claims); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (preempting Florida judicial rule that precluded arbitrators from deciding the legality of an allegedly usurious contract containing a PDAA).

⁸³ *Concepcion*, 131 S. Ct. at 1747.

of nonenforceability of arbitration agreements.”⁸⁴ The Court noted that, although California’s “rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*,” thus defeating the purposes of the FAA.⁸⁵ The Court discussed three characteristics of class arbitration that it concluded defeated the FAA’s purposes and hindered the flexible, party-driven process of arbitration: (1) it “sacrifices the principal advantage of arbitration—its informality”; (2) it “*requires* procedural formality”; and (3) it “increases risks to defendants” due to the lack of judicial review.⁸⁶ In response to the dissent’s concern that class proceedings are necessary to protect against small-value claims falling through the cracks of the legal system,⁸⁷ Justice Scalia wrote that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”⁸⁸

Harsh criticism of *Concepcion* immediately followed.⁸⁹ By limiting the use of a state’s unconscionability doctrine to void class action waivers, the Court made it more difficult for consumers and employees to bring class action claims. The Court in *Concepcion* thus further incentivized companies to insert class action waivers in adhesive contracts.⁹⁰

2. *CompuCredit*

The following year, the Court in *CompuCredit v. Greenwood*⁹¹ reiterated the doctrine first articulated in the late

⁸⁴ Jill I. Gross, *AT&T Mobility and FAA Over-Preemption*, 4 Y.B. ON ARB. & MEDIATION 25, 29 (2012).

⁸⁵ *Concepcion*, 131 S. Ct. at 1750.

⁸⁶ *Id.* at 1751-52.

⁸⁷ *Id.* at 1760-61 (Breyer, J., dissenting).

⁸⁸ *Id.* at 1753.

⁸⁹ See, e.g., Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457 (2011) [hereinafter Cole, *On Babies and Bathwater*] (critiquing current arbitration law after *Concepcion* because it prevents claimants from pursuing low value claims); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011); Sternlight, *Tsunami*, *supra* note 23, at 704; Maureen A. Weston, *The Death of Class Arbitration after Concepcion?*, 60 U. KAN. L. REV. 767 (2012). *But see* Christopher R. Drahozal, *FAA Preemption after Concepcion*, 35 BERKELEY. J. EMP. & LAB. L. 153, 154 (2014) (arguing that “in several respects, the impact of *Concepcion* has been overstated”).

⁹⁰ See Sternlight, *Tsunami*, *supra* note 23, at 704 (“By permitting companies to use arbitration clauses to exempt themselves from class actions, *Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued.”).

⁹¹ *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

1980s⁹² that claims arising under federal statutes are arbitrable as a matter of public policy absent a “contrary congressional command.”⁹³ The *CompuCredit* plaintiffs were individuals who had applied for and received a credit card marketed by CompuCredit and issued by defendant Columbus Bank & Trust.⁹⁴ Plaintiffs alleged that CompuCredit marketed the credit card as a means to rebuild the cardholder’s poor credit by immediately granting a \$300 line of credit but failed to disclose that the cardholder would be assessed fees against the credit limit, sharply reducing the available credit.⁹⁵

Plaintiffs filed a class action lawsuit against CompuCredit and the issuing bank in the U.S. District Court for the Northern District of California under the Credit Repair Organizations Act (CROA),⁹⁶ a consumer-protection statute barring deceptive practices by credit repair organizations. The district court denied defendants’ motion to compel arbitration, holding that “Congress intended claims arising under the CROA to be non-arbitrable.”⁹⁷ The Ninth Circuit affirmed, disagreeing with two other circuits and reasoning that Congress intended to preclude arbitration of claims arising under the CROA when it provided consumers with a “right to sue” violators of the statute.⁹⁸

The Supreme Court resolved the circuit split. Justice Scalia’s 6-3 majority opinion concluded that the CROA’s disclosure provision requiring credit repair organizations to notify consumers that they “have a right to sue a credit repair organization that violates the Credit Repair Organization Act” does not reflect congressional intent to preclude arbitration of claims arising under the Act.⁹⁹ The Court similarly concluded that the Act’s nonwaiver provision, which voids enforcement of a consumer’s waiver of protections and rights under the CROA, did not render unenforceable an arbitration agreement that waives the right to bring CROA claims in court.¹⁰⁰ These two provisions—

⁹² A notable example is the Court’s watershed decision, *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that claims arising under the Securities Exchange Act of 1934 are arbitrable).

⁹³ *CompuCredit*, 132 S. Ct. at 669 (quoting *McMahon*, 482 U.S. at 226) (internal quotation marks omitted).

⁹⁴ *Id.* at 668.

⁹⁵ *Id.* at 676 (Ginsburg, J., dissenting).

⁹⁶ 15 U.S.C. § 1679 (2012).

⁹⁷ *CompuCredit*, 132 S. Ct. at 668.

⁹⁸ *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1206-07 (9th Cir. 2010).

⁹⁹ *CompuCredit*, 132 S. Ct. at 669-70 (quoting 15 U.S.C. § 1679(c) (2012)). Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Alito joined the majority opinion. Justices Sotomayor and Kagan concurred in the judgment. Justice Ginsburg dissented. *Id.* at 667-68.

¹⁰⁰ *Id.* at 670-71. The nonwaiver provision reads: “[a]ny waiver by any consumer of any protection provided by or any right of the consumer under this

disclosure and nonwaiver—did not create a consumer's right to bring a CROA claim in court; they created only a consumer's right to receive the statutory notice.¹⁰¹ Thus, the provisions did not constitute a “contrary congressional command” sufficient to overcome the default rule that federal statutory claims are arbitrable. Such a command must be far more explicit.¹⁰²

As a result of *CompuCredit*, unless Congress explicitly states in a statute that claims created by that or any other statute are not arbitrable¹⁰³ or delegates the power to decide the arbitrability of claims to an administrative agency,¹⁰⁴ a plaintiff will be hard pressed to show that Congress intended to supersede the FAA's mandate to enforce arbitration agreements as written.

3. *Italian Colors*

In the third case, *Italian Colors*,¹⁰⁵ a group of merchants sued in federal court, challenging some of the terms in the agreement American Express imposed on merchants that accepted customers' payments on American Express charge

subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.” 15 U.S.C. § 1679f(a).

¹⁰¹ *CompuCredit*, 132 S. Ct. at 669-70.

¹⁰² The Court cited a few examples of congressional language more explicit than that in the CROA, including: “No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.” *Id.* at 672 (citing 7 U.S.C. § 26(n)(2) (Supp. IV 2006)).

¹⁰³ For example, § 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010), declares that PDAs purporting to require arbitration of whistleblower claims arising under the Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745 (2002), are not enforceable. 18 U.S.C. § 1514A(e)(2) (2012) (“No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”). Section 806 of SOX gives a right of action to “whistleblowers” who report fraud at publicly traded companies. 18 U.S.C. § 1514A (2012).

¹⁰⁴ In Dodd-Frank, Congress amended the Securities Exchange Act of 1934, 15 U.S.C. § 78a-78pp (2012), to give the SEC explicit authority to prohibit, or to impose conditions or limitations on the use of,

agreements that require customers or clients . . . to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

15 U.S.C. § 78o(o). Also in Dodd-Frank, Congress created the Consumer Financial Protection Bureau (CFPB) and gave the CFPB the authority to adopt rules to “prohibit or impose conditions or limitations” on the use of PDAs if it finds that such rules are “in the public interest and for the protection of consumers.” Dodd-Frank § 1011, 12 U.S.C. § 5491 (2012); Dodd-Frank § 1028(b) (2012), 12 U.S.C. § 5518 (2012). For an analysis of how an administrative agency's delegated authority can supersede the FAA, see Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1 (2012).

¹⁰⁵ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

cards as constituting an illegal tying arrangement under the federal antitrust laws.¹⁰⁶ As in *Concepcion* and *CompuCredit*, the parties' agreement contained an arbitration clause and a class action waiver. In response to defendant's motion to compel arbitration, the merchants challenged the enforceability of the class action waiver, arguing that if they could not proceed as a class, they had no financially reasonable means of pursuing their antitrust claims.¹⁰⁷ An expert estimated that if the allegations were proven, an individual plaintiff's maximum recovery would be \$12,850.¹⁰⁸

After the district court granted the motion to compel arbitration, the merchants appealed. Three times, the Court of Appeals for the Second Circuit held that the class action waiver was unenforceable under the "effective vindication" doctrine because it precluded plaintiff merchants from vindicating their statutory rights under the federal antitrust laws.¹⁰⁹ That doctrine allowed a disputant to argue that an arbitration agreement is unenforceable if an unfair aspect of the arbitration process precludes the party from vindicating its federal statutory rights.¹¹⁰ The rule was derived from the Supreme Court's pronouncement in *Mitsubishi Motors* that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal] statute [providing that cause of action] will continue to serve both its remedial and deterrent function."¹¹¹ The Second Circuit concluded that the merchant plaintiffs had demonstrated through expert testimony that pursuing their statutory claims individually, as opposed to

¹⁰⁶ A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6 (1958). Tying arrangements may violate § 1 of the Sherman Act, which prohibits "contracts . . . in restraint of trade." 15 U.S.C. § 1 (2012).

¹⁰⁷ Antitrust claims are very expensive to litigate, as proof of collusion and market power require extensive discovery and expert testimony. See, e.g., *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003).

¹⁰⁸ *Italian Colors*, 133 S. Ct. at 2308.

¹⁰⁹ See *In re Am. Express Merch. Litig. (Amex I)*, 554 F.3d 300 (2d Cir. 2009); *In re Am. Express Merch. Litig. (Amex II)*, 634 F.3d 187 (2d Cir. 2011); *In re Am. Express Merch. Litig. (Amex III)*, 667 F.3d 204 (2d Cir. 2012), *rev'd sub nom. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). The Court of Appeals reconsidered *Amex I* in light of the Supreme Court's subsequent ruling in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (holding that arbitrators cannot apply their own policy views when construing an arbitration agreement that is silent on the allowability of class arbitration), and reconsidered *Amex II* in light of the Supreme Court's 2011 ruling in *Concepcion*.

¹¹⁰ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); see also *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (recognizing, in dicta, that if a party showed that pursuing its statutory claims through arbitration would be prohibitively expensive, and thus it could not vindicate its statutory rights, a court could validly refuse to enforce a PDAA).

¹¹¹ *Mitsubishi Motors*, 473 U.S. at 637.

through class arbitration, would not be economically feasible, “effectively depriving plaintiffs of the statutory protections of the antitrust laws.”¹¹²

The Supreme Court reversed. In the 5-3 majority opinion, Justice Scalia recognized the validity of the “effective vindication” doctrine generally:

As we have described, the [effective vindication] exception finds its origin in the desire to prevent “prospective waiver of a party’s *right to pursue* statutory remedies.” That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.¹¹³

The Court held, however, that in this case, “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”¹¹⁴ Because the class action waiver in the merchants’ charge card service agreements with American Express did not eliminate the *right to pursue* individual claims under the antitrust laws, the Court found the waiver enforceable.

Italian Colors’ sharp curtailment of the vindicating rights doctrine surprised many scholars, including me, who thought the doctrine served a valuable function as an escape valve from adhesive arbitration clauses that contained one-sided provisions.¹¹⁵ While the Court’s modern arbitration jurisprudence sharply limited the defenses available to challenge an arbitration contract, the effective vindication doctrine had seemed to remain a defense to the enforcement of a clause that *de facto* (as opposed to *de jure*) precluded a party from pursuing a claim. By limiting the vindicating rights doctrine to the narrow situation where an arbitration clause strips a party of the right to prove its case, or where forum fees are “so high as to make access to the forum impracticable,”¹¹⁶ the Court sealed off that escape valve—even though other costs might make it unfeasible for the party to pursue the case.

¹¹² *Amex III*, 667 F.3d at 217.

¹¹³ *Italian Colors*, 133 S. Ct. at 2310-11 (internal citations omitted). Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined the majority opinion. *Id.* at 2307. Justice Thomas filed a concurring opinion, as he did in *Concepcion*. *Id.* Justice Kagan filed a dissenting opinion, which was joined by Justices Ginsburg and Breyer. Justice Sotomayor did not participate in the decision. *Id.*

¹¹⁴ *Id.* at 2311.

¹¹⁵ See Aragaki, *supra* note 11, at 2020-21 (describing the *Italian Colors* holding as “surprising” and proposing a new paradigm for the FAA to “breathe some life back into” the vindicating rights doctrine).

¹¹⁶ *Italian Colors*, 133 S. Ct. at 2310-11.

B. *Consequences of Justice Scalia's Hat Trick*

Justice Scalia's Hat Trick ensures that virtually no ground exists to challenge an unfair arbitration clause. The resulting law governing the enforceability of an arbitration agreement is arguably draconian. Courts must enforce arbitration agreements according to their precise terms unless (1) there is an explicit contrary congressional command; (2) the arbitration agreement expressly strips one party of the substantive right to pursue a federal statutory claim; or (3) a state law contract defense invalidates the agreement, but only if that defense does not discriminate against arbitration and does not frustrate the purposes of the FAA.¹¹⁷ No longer do courts enforce PDAAs like all other contracts; they may even enforce them in the face of common law defenses to the enforcement of nonarbitration agreements.¹¹⁸

These developments have led to widespread criticism that large corporations now use arbitration as a mechanism to force consumers to give up their right to go to court and that arbitration agreements ferry consumers into a forum that is more hospitable to the repeat player, the large corporation.¹¹⁹

¹¹⁷ *Id.* (holding that claimants can establish they cannot vindicate their federal statutory rights only if they show they are stripped of the *right* to pursue them, not the *ability* to pursue them); see *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 665-67 (2012) (reaffirming that federal statutory claims are arbitrable absent an explicit "contrary congressional command"); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (ruling that the FAA preempts the state law unconscionability defense, which declares class action waivers in consumer arbitration agreements per se unconscionable as inconsistent with the FAA); see also *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (holding that an arbitration agreement that waives an employee's ability to bring a collective action under the Fair Labor Standards Act is enforceable under recent Supreme Court FAA cases); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (same); *Walhour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1327 (11th Cir. 2014) (same).

¹¹⁸ *Concepcion*, 131 S. Ct. 1740 (preempting state law unconscionability doctrine that applied in both the litigation and arbitration contexts to uphold PDAAs with class action waiver). While *Concepcion* delivered a blow to courts' use of the unconscionability defense on a per se basis, even after *Concepcion*, some lower courts continue to invalidate individual arbitration agreements on the grounds that they are unconscionable. See Richard Frankel, *Concepcion and Mis-Concepcion: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. DISP. RESOL. 225, 242-49 (2014) (collecting cases).

¹¹⁹ See Schwartz, *Claim-Suppressing Arbitration: The New Rules*, *supra* note 23, at 240; Sternlight, *Tsunami*, *supra* note 23. Consumer advocates working to eliminate mandatory arbitration of consumer, employment, and civil rights disputes between parties of unequal bargaining power have coined the term "forced arbitration." See *Forced Arbitration Rogues Gallery*, PUBLIC CITIZEN, <http://www.citizen.org/forced-arbitration-rogues-gallery> [<http://perma.cc/Y8WU-7RYC>] (last visited Dec. 6, 2015); *Forced Arbitration*, NAT'L ASS'N OF CONSUMER ADVOC., <http://www.consumeradvocates.org/issues/forced-arbitration> [<http://perma.cc/8WQ9-YR4Q>] (last visited Dec. 6, 2015); Video, *Lost in the Fine Print*, ALLIANCE FOR JUST. (2014), <http://www.afj.org/multimedia/first-monday-films/films/lost-in-the-fine-print> [<http://perma.cc/XG99-WMQV>] (last visited Dec. 6, 2015).

Seemingly one-sided clauses hidden in consumer agreements are enforceable, including class action waivers and provisions that delegate the question of arbitrability itself to the arbitrators.¹²⁰ While industry associations and corporate conglomerates tout forced arbitration as a preferable device,¹²¹ some scholars write about the parade of horrors that is modern arbitration law.¹²² They use dramatic words to describe these cases and the resulting doctrine, including: “Flaunts and Flunks,”¹²³ “Little Monsters,”¹²⁴ “Claim-Suppressing,”¹²⁵ “Thwarted,”¹²⁶ “Form Over Fairness,”¹²⁷ “Under Attack,”¹²⁸ “Tragedy of Errors,”¹²⁹ and “Taming the Kraken.”¹³⁰

¹²⁰ *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010) (enforcing a clause in an employment agreement delegating arbitrability questions to the arbitrator). “Delegation” clauses in adhesive PDAs may be problematic for consumers. See Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. 1, 6 (2011) (arguing that “in the context of mandatory arbitration of employment, franchise, and consumer disputes, such a delegation of authority to the arbitrator effectively removes an important check (the unconscionability doctrine) on the use of one-sided arbitration clauses”).

¹²¹ See, e.g., *Arbitration and Dispute Resolution*, MICROSOFT CORP. LEGAL RESOURCES, <http://www.microsoft.com/en-us/legal/arbitration/default.aspx> [<http://perma.cc/9TC6-SZXZ>] (last visited Dec. 6, 2015) (declaring that “[o]ur arbitration agreements offer speedy and fair individual dispute resolution”); *Pre-Dispute Arbitration Resource Center*, Securities Industry and Financial Markets Association, SEC. INDUSTRY & FIN. MKTS. ASS’N, <http://www.sifma.org/issues/legal-compliance-and-administration/pre-dispute-arbitration/overview/> [<http://perma.cc/46TN-53FX>] (last visited Dec. 6, 2015) (“securities arbitration promotes fair, efficient, and economical dispute resolution for all parties”); *Resolve a Dispute With AT&T Via Arbitration*, AT&T MOBILITY, <http://www.att.com/esupport/article.jsp?sid=KB72565&cv=820> [<http://perma.cc/PSH5-VCXY>] (last visited Dec. 6, 2015) (explaining arbitration as a mechanism to meet AT&T’s commitment to “ensur[e] that any dispute a customer may have is resolved in a fair, effective, and efficient manner”).

¹²² See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2810 (2015) (arguing that “the cumulative impact of recent Supreme Court decisions on arbitration also produces an unconstitutional system, providing insufficient oversight of the processes it has mandated as a substitute for adjudication and shifting control over third-party access away from courts and to the organizations conducting arbitrations and the commercial enterprises drafting arbitration clauses”).

¹²³ See Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 L. & CONTEMP. PROBS. 129 (2012).

¹²⁴ See Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035 (2011).

¹²⁵ Schwartz, *supra* note 23.

¹²⁶ See Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91 (2012).

¹²⁷ See Michelle L. Caton, *Form over Fairness: How the Supreme Court’s Misreading of the Federal Arbitration Act Has Left Consumers in a Lurch*, 21 GEO. MASON L. REV. 497 (2014).

¹²⁸ See Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL’Y 477 (2009).

¹²⁹ See Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21 (2012).

¹³⁰ See Mac R. McCoy & D. Matthew Allen, *Taming the Kraken: The Supreme Court Weighs in on Class Actions in 2011*, BUS. L. TODAY, Jan. 2012, at 1.

While I am reluctant to jump on the bandwagon, I do not believe the Court reached defensible results in the Hat Trick cases. The FAA should not have preempted California's *Discover Bank* doctrine, and the class action waiver should have been found unconscionable in *Concepcion*. Congress's use of "right to sue" language should have been sufficient evidence of a "contrary congressional command" in *CompuCredit*. And plaintiffs' demonstration that it was not financially feasible to bring their antitrust claims individually in *Italian Colors* should have resulted in a finding that the class arbitration waiver was void as a matter of public policy because the plaintiffs could not vindicate their statutory rights. How could the Court have gotten it so wrong?

C. Mistake in Italian Colors

Given the already-abundant literature critiquing the Court's recent arbitration jurisprudence,¹³¹ I sought to add something new to the debate. A closer look at *Italian Colors* reveals that, in part, Justice Scalia justified the holding to enforce a class action waiver on the ground that the Court has done this before. The Court cited *Gilmer v. Interstate/Johnson Lane Corp.*¹³² as an example of when it previously enforced a class action waiver in an arbitration agreement:

A pair of our cases brings home the point [that a class action waiver does not equate to ineffective vindication]. In *Gilmer, supra*, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions.¹³³

Gilmer involved a claim arising under the Age Discrimination in Employment Act (ADEA) brought by an employee of a New York Stock Exchange (NYSE) member firm against his employer.¹³⁴ When the firm fired Gilmer in 1987 at the age of 62, Gilmer sued the brokerage firm.¹³⁵ The firm moved to compel arbitration,

¹³¹ See *supra* notes 110-16 and accompanying text.

¹³² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹³³ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013).

¹³⁴ *Gilmer*, 500 U.S. at 23-24. Since 2007, when NYSE merged its arbitration and enforcement functions into NASD to create FINRA, FINRA Dispute Resolution has handled all NYSE arbitrations. See Press Release, FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority-FINRA (July 30, 2007), <http://www.finra.org/Newsroom/NewsReleases/2007/P036329> [<http://perma.cc/A6QA-V79N>].

¹³⁵ *Gilmer*, 500 U.S. at 23-24. As a condition of employment with a broker-dealer, an associated person was required to sign a Uniform Application for Securities Industry Registration (Form U-4), which provided in relevant part: "[I] agree to arbitrate any dispute, claim or controversy [that may arise between me and my firm, or

relying on NYSE and industry rules that required arbitration of employment disputes.¹³⁶ The district court denied the motion to compel on the grounds that the ADEA claims were not arbitrable; the Court of Appeals for the Fourth Circuit reversed.¹³⁷

The brokerage firm appealed to the Supreme Court, which held that the employee's ADEA claims were arbitrable. The Court applied the presumption of arbitrability it first identified in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*¹³⁸ and imposed the burden on the party opposing arbitration to show that Congress intended "to preclude a waiver of judicial remedies for the statutory rights at issue."¹³⁹ The Court explained its view that arbitration can protect statutory rights: the process has protections against biased arbitrators, offers sufficient discovery procedures, and empowers arbitrators to issue written awards and provide parties with broad equitable relief.¹⁴⁰ In addition, an award containing a written opinion explaining the outcome was not necessary for the claimant to obtain appropriate relief.¹⁴¹ The potential inequality in bargaining power was not enough to make the claims nonarbitrable, in the Court's view.¹⁴²

Unlike what Justice Scalia wrote in *Italian Colors*, the question of the availability of a class action for the employee was never an issue in *Gilmer*. In fact, the parties did not enter into a class action waiver in that case. The Fourth Circuit quoted the arbitration agreements governing the parties' dispute; those agreements said nothing about a class action waiver.¹⁴³ Rather, the NYSE as a forum had a policy expressed through a rule that it would not accept class arbitrations; investors or employees retained the right to bring those claims in court.¹⁴⁴ Notably, in approving amendments to that rule, the

a customer, or any other person,] that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register." *Id.* at 23 (quoting the Application). *Gilmer* signed a Form U-4 at the time of his hiring in 1981. In addition, when an employee becomes a registered representative of the New York Stock Exchange, that employee is subject to its Rule 347, which states: "Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative [by and with such member or member organization shall be settled by arbitration]." *Id.* (quoting NYSE Rule 347).

¹³⁶ *Id.*

¹³⁷ *Id.* at 24.

¹³⁸ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

¹³⁹ *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

¹⁴⁰ *Id.* at 30-32.

¹⁴¹ *Id.* at 31-32.

¹⁴² *Id.* at 32-33.

¹⁴³ *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 196-97 (4th Cir. 1990).

¹⁴⁴ NYSE Rule 600(d) provides: "(i) a claim submitted as a class action claim shall not be eligible for arbitration under the Rules of the [New York Stock] Exchange." Rule

Securities and Exchange Commission stated that “access to the courts for class action litigation should be preserved for claims filed by . . . associated persons against other members . . . , as well as for claims involving investors.”¹⁴⁵ Not only was there no class action waiver—but the employee had the choice of bringing his claim as part of a class action in court or in an individual arbitration proceeding.¹⁴⁶

Thus, the *Italian Colors* Court incorrectly described the *Gilmer* arbitration agreement and the *Gilmer* arbitration forum’s practices. The Court dispensed with the plaintiff merchants’ argument that class action waivers are not enforceable in the context of a federal statute that permits collective actions based on a plainly inaccurate retelling of the facts in *Gilmer*.

While I have little doubt that the *Italian Colors* Court would have reached the same result even without the *Gilmer* precedent, the error did provoke my thinking about what else the Court might have gotten wrong in its arbitration cases. If Scalia’s Hat Trick rests on inaccurate facts, assumptions, premises, and understandings, then the holdings could collapse. So I looked more closely at the Court’s factual statements in those cases. My troubling findings follow.

IV. THE SUPREME COURT’S DESCRIPTION OF TWENTY-FIRST-CENTURY ARBITRATION

In light of the Court’s mistaken premise in *Italian Colors* that the parties in *Gilmer* had agreed to a class action waiver, I searched for other mistakes in the Court’s recent arbitration decisions. Specifically, I looked closely at how the Court described the arbitration process and compared it to the current actual practice of arbitration. To the extent the Court discusses the arbitration process in its twenty-first-century opinions, it consistently describes arbitration as it was practiced when

600(d)(iii) provides that no associated person or member firm can enforce an arbitration agreement against the other if that party initiated in court a putative or certified class action encompassing the claim, unless the class certification was denied, a certified class was decertified, or the party was excluded or opted out of the class action. See ARBITRATION RULES, N.Y. STOCK EXCH. r. 600(d)(iii), http://nyserules.nyse.com/nysetools/PlatformViewer.asp?SelectedNode=chp_1_9&manual=/nyse/rules/nyse-rules/ [<http://perma.cc/CW35-23D9>] (last visited Dec. 6, 2015).

¹⁴⁵ Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to Amendments to Rules 600 (Arbitration), 619 (General. Provision Governing Subpoenas, Production. of Documents, etc.), 629 (Schedule of Fees), and 637 (Failure to Honor Award), 60 Fed. Reg. 48576-01 (Sept. 19, 1995).

¹⁴⁶ For a fuller discussion of the invalidity of class action waivers in the securities industry, see Black & Gross, *supra* note 104.

Congress enacted the FAA in the early twentieth century and not as practiced in the late twentieth and early twenty-first century. Thus, the Court premised its decisions on an outdated understanding of many aspects of arbitration, including why parties enter arbitration agreements, forum costs, speed of the proceedings, how arbitrators are selected, the parties' ability to tailor the arbitration process to suit their needs, the arbitrators' expertise, and the process for reviewing an award.¹⁴⁷

Additionally, the opinions do not distinguish among the many different types of arbitration practiced today—commercial, labor, securities, consumer, international, and construction—nor do they distinguish among the forums administering arbitrations under different rules, including AAA, JAMS, CPR,¹⁴⁸ FINRA, ICC, and National Arbitration and Mediation (NAM).¹⁴⁹ Each of these arbitration types and forums vary in procedure from one another,¹⁵⁰ yet the Court's descriptions of them make it seem as if all modern arbitration is the same process.¹⁵¹ Below, I focus on specific aspects of arbitration procedure as described by the Supreme Court.

A. *Why Do Parties Enter into Arbitration Agreements?*

First, consistent with its twentieth-century opinions,¹⁵² the Court's recent cases declare, without any factual basis, that parties enter into arbitration agreements to save time and money. Thus, the Court in 2008—quoting directly from a 1985 case—stated the main purpose of an arbitration agreement is to “achieve ‘streamlined proceedings and expeditious results.’”¹⁵³ In 2010, the Court repeated its interpretation of parties' intent when entering into arbitration clauses: “In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower

¹⁴⁷ Professor Brunet noted this trend in late twentieth-century arbitration court opinions and commentary. See Brunet, *supra* note 26, at 40 (“Courts and commentators emphasize these traits when they generalize about the term arbitration.”).

¹⁴⁸ CPR: INT'L INST. FOR CONFLICT PREVENTION AND RESOL., <http://www.cpradr.org> [<http://perma.cc/M78Q-4BD9>] (last visited Dec. 6, 2015).

¹⁴⁹ NAT'L ARB. & MEDIATION, <http://www.namadr.com> [<http://perma.cc/F23D-HYGQ>] (last visited Dec. 6, 2015).

¹⁵⁰ See *supra* notes 60-62 and accompanying text.

¹⁵¹ See Brunet, *supra* note 26, at 40 (critiquing the view of arbitration as “a monolithic, one-dimensional concept with settled features that resemble a type of folklore”).

¹⁵² See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (“[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes.”).

¹⁵³ *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008) (quoting *Mitsubishi Motors*, 473 U.S. at 633).

costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”¹⁵⁴

This unilateral, inaccurate supposition that all parties to all arbitration agreements have a singular purpose in agreeing to arbitrate seems like a sweeping overgeneralization at best. Parties enter into arbitration agreements for many reasons.¹⁵⁵ Reasons can be procedural (e.g., parties perceive arbitration to be cheaper and faster; parties want arbitrators, not juries, as decision makers; parties want a neutral jurisdiction)¹⁵⁶ or substantive (parties prefer the dispute to be resolved under particular rules; parties prefer decision makers who do not follow legal rules; parties have a desire to preserve their relationships).¹⁵⁷ One empirical study identified at least 14 different reasons why parties stated they choose to arbitrate.¹⁵⁸ Finally, parties might arbitrate because they have no choice.¹⁵⁹ The Court has ignored the reality of the parties’ wildly varying intentions when entering into PDAAs and built an edifice of arbitrability law based on that fiction.

B. *Is Arbitration Less Expensive Than Litigation?*

Second, without any supporting empirical evidence, the Court has clung to the premise that arbitration is cheaper than litigation. Thus, in *Circuit City Stores, Inc. v. Adams*, the Court proclaimed “[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation.”¹⁶⁰ In *14 Penn Plaza LLC v. Pyett*, the

¹⁵⁴ *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010).

¹⁵⁵ See Christopher R. Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 AM. REV. INT’L ARB. 163, 186 (2011) (“Parties use arbitration clauses in their contracts for a variety of reasons—some that might be characterized as procedural and others that might be characterized as substantive.”); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 451-52 (2010) (summarizing empirical studies and cataloguing at least 10 different reasons why parties might agree to arbitrate).

¹⁵⁶ See Drahozal, *Why Arbitrate?*, *supra* note 155, at 172-75.

¹⁵⁷ *Id.* at 175-77.

¹⁵⁸ Stipanowich & Lamare, *Living with ADR*, *supra* note 41, at 36-37 (identifying reasons, such as arbitration: is “required by contract,” is “court mandated,” is “desired by senior management,” “saves time,” “saves money,” “allows parties to resolve disputes themselves,” “provides a more satisfactory process,” “has limited discovery,” preserves “privacy and confidentiality,” “avoids establishing legal precedents,” “gives more satisfactory settlements,” “provides . . . more durable resolution[s],” “preserves good relationships,” and “uses expertise of third party neutral”).

¹⁵⁹ For example, a recent study demonstrates that when consumers read a consumer contract, many had no idea they had agreed to arbitrate disputes and that they could not bring claims in court. See *Whimsy Little Contracts*, *supra* note 64, at 47-50.

¹⁶⁰ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

Court repeated, “[p]arties generally favor arbitration precisely because of the economics of dispute resolution.”¹⁶¹

Yet many scholars question the cost savings of modern arbitration.¹⁶² Litigation-like arbitration procedures—including extensive document and e-discovery, motion practice, and pre- and post-hearing briefs—have become far more common, driving up arbitration costs dramatically.¹⁶³ Businesses that are less likely to use arbitration in the future cite high costs as one of the reasons.¹⁶⁴ At best, the empirical evidence gathered to date is inconclusive as to whether arbitration is still less expensive than litigation.¹⁶⁵

Additionally, the cost savings vary greatly depending on the amount of money at stake. Arbitration forums generally charge a sliding scale of filing fees that grow in proportion to the amount of damages claimed. The larger the claim, the more the parties invoke extended discovery and motion practice. Arbitration may be far more costly than litigation for a small claim that could proceed in small claims court.¹⁶⁶ Cost advantages may exist only for very complex claims or for disputes over large sums of money. Yet the Court has expanded its arbitrability holdings based in part on the unsupported premise that all commercial and consumer arbitration is less expensive than litigation.

C. *Is Arbitration Faster Than Litigation?*

Third, as with costs, the Court has assumed, without evidence, that arbitration is faster than litigation. In *Italian Colors*, the Court stated that “speedy resolution” is what “arbitration in general and bilateral arbitration in particular was meant to secure.”¹⁶⁷ It cited no evidence regarding the relative speed of a particular type of arbitration compared to a comparable litigation. It failed to distinguish among different

¹⁶¹ 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009).

¹⁶² See, e.g., Stipanowich & Lamare, *Living with ADR*, *supra* note 41, at 1, 51-54, 64-65 (describing the modern commercial arbitration process as a costlier, more litigation-like process); Kovach & Love, *supra* note 5, at 91.

¹⁶³ Stipanowich, *Arbitration: The “New Litigation,”* *supra* note 46, at 11-16; see also Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT’L ARB. 297, 341-43 (2014) (describing the challenges associated with the increased cost of modern arbitration).

¹⁶⁴ Stipanowich & Lamare, *Living with ADR*, *supra* note 41, at 53.

¹⁶⁵ See Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813 (2008) (concluding that arbitration may be as costly or more costly than litigation for certain types of disputes and less costly for other types).

¹⁶⁶ See Gross, *Small Claims Arbitration*, *supra* note 1, at 66.

¹⁶⁷ Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013).

arbitration proceedings based on the size of claims, the forum in which they take place, the subject matter of the disputes, or the governing procedural rules.

In one case, the Court did consider evidence regarding the relative speed of two different types of arbitration, but it did so merely for the purpose of showing that class arbitration is slower than bilateral arbitration. In *Concepcion*, the Court rejected class arbitration as “inconsistent with the FAA” because it “makes the process slower,” whereas speed is one of the “benefits” of arbitration.¹⁶⁸ To support its proposition, the Court then cited statistics from the AAA reporting the mean time from filing to disposition for the AAA’s “average consumer” arbitration (180 days) as compared to AAA class arbitrations (630 days).¹⁶⁹ In fact, the 630 days that the Court implied was too slow for AAA class arbitration is close to the median turnaround time of many other types of arbitration, including FINRA arbitration.¹⁷⁰ The Court characterized class arbitration as slow, when the process does not appear to last much longer than many bilateral arbitrations. Without empirical evidence demonstrating that all FAA-governed (nonclass) arbitration is faster than litigation of the same type of dispute, the Court’s construction of arbitrability law based on that premise is nothing more than a house of cards.

D. *Do Parties Choose Their Arbitrators?*

Fourth, the Court holds on to the now-faulty premise that parties choose their arbitrators.¹⁷¹ This general statement is true for some arbitrations in some forums, but it is not true for all types of arbitration. Arbitrator selection occurs through several different methods: list selection,¹⁷² tripartite,¹⁷³ party agreement

¹⁶⁸ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011).

¹⁶⁹ *Id.*

¹⁷⁰ See *Dispute Resolution Statistics*, FINRA, <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics> [<http://perma.cc/4LUY-9V6R>] (showing overall turnaround time of all arbitration cases in 2014 as 14.9 months, or roughly 449 days) (last visited Dec. 6, 2015).

¹⁷¹ *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010) (citing the parties’ “ability to choose expert adjudicators to resolve specialized disputes” as a benefit of arbitration).

¹⁷² In the list-selection method, the forum provides parties with a limited list of qualified arbitrators for a particular dispute; the parties then rank listed arbitrators in their order of preference and strike those who are objectionable. The forum consolidates the rankings, strikes all objectionable parties, and appoints the highest-ranking remaining arbitrator. Parties usually have a limited number of strikes. See, e.g., FINRA CUSTOMER CODE r. 12402(d), 12403(c) (2015).

¹⁷³ In the tripartite method, each party picks one arbitrator, and those two arbitrators then pick a third arbitrator to serve as chair of the panel. AAA COMMERCIAL ARBITRATION RULES, *supra* note 48, r. R-13, R-14 (2015).

pre- or post-dispute,¹⁷⁴ or appointment by forum,¹⁷⁵ to name a few more commonly used methods. The amount of “choice” parties have varies greatly among these methods, ranging from complete choice to none at all.¹⁷⁶ The “choice” can be limited to ranking and striking ten names from a randomly provided list; it can be limited to selecting one of three arbitrators but having little say in the other two; it can be a name selected at random by a forum and unilaterally placed on the panel.

The amount in dispute can impact the degree of choice a party has in selecting arbitrators. That choice can be quite limited in small claims cases where a consumer or employee is suing a wealthy corporation.¹⁷⁷ For example, in AAA arbitrations involving \$500,000 or more, parties can freely select any arbitrators they want.¹⁷⁸ In contrast, in AAA arbitrations involving \$75,000 or less, the forum supplies five names to the parties, and the parties select an arbitrator from this list.¹⁷⁹ Other arbitration forums, including FINRA,¹⁸⁰ replicate this sliding scale of arbitrator choice and amount. Thus, the less the claim is worth, the less input parties tend to have. In its twenty-first-century arbitration cases, the Court states as a fact that parties can choose their arbitrators; this statement is simply not true for many arbitrations.

E. Can Parties Tailor the Arbitration Process to Suit Their Needs?

Fifth, the Court believes parties can tailor the arbitration process to suit their individual needs.¹⁸¹ In *Concepcion*, the Court noted that parties are afforded “discretion in designing

¹⁷⁴ AM. ARBITRATION ASS'N, CONSTRUCTION ARBITRATION RULES, r. R-15(a) (2015) (“If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed.”).

¹⁷⁵ *Id.* r. R-14(c) (specifying that if parties fail to select an arbitrator, the forum can appoint one).

¹⁷⁶ My experience as both an arbitrator and an arbitration advocate buttresses my view that this “choice” is somewhat illusory. I have chosen and been chosen as a FINRA arbitrator, and I know how little input the parties can have in the selection process.

¹⁷⁷ See Gross, *Small Claims Arbitration*, *supra* note 1, at 60.

¹⁷⁸ AAA COMMERCIAL ARBITRATION RULES, *supra* note 48, r. R-1(c), L-2 (2013).

¹⁷⁹ *Id.* r. E-2, E-4.

¹⁸⁰ See *Arbitrator Selection*, FINRA, <http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/ArbitratorSelection/index.htm> [<http://perma.cc/6B6X-8CJB>] (last visited Dec. 6, 2015) (“The number of arbitrators appointed to a case depends on the amount and type of relief requested in the Statement of Claim.”).

¹⁸¹ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (parties can “tailor some, even many features of arbitration by contract, including the way arbitrators are chosen”).

arbitration processes . . . to allow for efficient, streamlined procedures tailored to the type of dispute.”¹⁸²

In fact, a party’s lack of control is one of the main reasons that businesses are using arbitration less.¹⁸³ Many of the FINRA arbitration rules under the Customer Code are mandatory and not subject to parties’ modifications.¹⁸⁴ Some forums permit the parties to change the rules, but only when all parties agree to the change.¹⁸⁵ Agreement among parties in an adversarial process is rare;¹⁸⁶ such agreement is more likely when there is a balance of power among the parties. Many of the arbitrations that led to the very Supreme Court cases that generated this characterization, however, involved parties with vastly unequal bargaining power.¹⁸⁷

F. *Are Arbitrators Experts in the Subject Matter of the Dispute?*

Sixth, the Court describes twenty-first-century arbitrators as experts in the subject matter of disputes, as well as in the arbitration forums’ procedures. In *Green Tree Financial Corp. v. Bazzle*, the Court noted that arbitrators are “well situated to answer” questions about “contract interpretation and arbitration procedures.”¹⁸⁸ The Court in *Howsam v. Dean Witter Reynolds, Inc.* expressed the view that NASD arbitrators are “comparatively more expert [than judges] about the meaning of their own rule.”¹⁸⁹ In *Concepcion*, the Court listed “the ability to choose expert adjudicators to resolve specialized disputes” as one of the benefits

¹⁸² AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011).

¹⁸³ Stipanowich & Lamare, *Living with ADR*, *supra* note 41, at 63 (“Why, then, do fully half of the survey respondents think it unlikely that their company will use arbitration in the future? . . . [I]t often comes down to perceptions of control.”).

¹⁸⁴ FINRA, CUSTOMER CODE, *supra* note 47, r. 12105(a) (stating that “if the Code provides that the parties may agree to modify a provision of the Code, or a decision of the Director or the panel, the written agreement of all named parties is required,” and implying that parties cannot modify all rules (emphasis added)).

¹⁸⁵ See, e.g., AAA COMMERCIAL ARBITRATION RULES, *supra* note 48, r. R-1 (“The parties, by written agreement, may vary the procedures set forth in these rules.”); JAMS, ARBITRATION RULES, *supra* note 49, r. 2 (“The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies . . .”).

¹⁸⁶ See Gross, *The End of Mandatory Securities Arbitration?*, *supra* note 1, at 1175-76.

¹⁸⁷ Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (merchant restaurants against large consumer credit card company); CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012) (credit card holders against credit repair organization and credit card issuer); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1740 (2011) (cellular phone purchasers against large, nationwide cellular service company).

¹⁸⁸ Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453 (2003).

¹⁸⁹ Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002).

of arbitration for disputants.¹⁹⁰ And in *Pyett*, it announced that “arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims.”¹⁹¹ Moreover, “[a]n arbitrator’s capacity to resolve complex questions of fact and law extends with equal force to discrimination claims.”¹⁹²

These statements were largely true 50 years ago, although the extent of that truth depended even then on the type of arbitration. Authoritative histories of arbitration in the United States describe late nineteenth and twentieth-century arbitrators as “drawn from the trade association’s [that offered arbitration of trade disputes] membership” who “appl[ie]d their knowledge of the trade to bring about an equitable resolution to the dispute.”¹⁹³ In fact, in this time period, the “selection of a trusted and expert decision maker dominated the arbitration process.”¹⁹⁴

The Court’s twenty-first-century statements on this subject seem to rely heavily on twentieth-century FAA opinions rather than on current empirical evidence, but without recognizing any change in the relative expertise of arbitration panels. The Court also relies on statements about one type of arbitration to generalize about all arbitration. For example, the first statement cited above from *Pyett*—a case about labor arbitration—quotes verbatim from *McMahon*, a 1987 case involving securities arbitration, which in turn cites to *Mitsubishi*, a 1985 case about international arbitration.¹⁹⁵ The Court in *Mitsubishi*, however, cited arbitration rules of three different international arbitration forums to support its contention that parties can select experts to arbitrate their disputes.¹⁹⁶ In *Pyett*, in contrast, it did not cite arbitrator selection rules from the forums that handle most labor disputes.

Today, in many forums, arbitrators are not so expert.¹⁹⁷ I am trained as an arbitrator for the AAA, FINRA, and the National Futures Association. All three forums offered abundant

¹⁹⁰ *Concepcion*, 131 S. Ct. at 1751.

¹⁹¹ 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 268 (2009) (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 232 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985)).

¹⁹² 14 Penn Plaza, 556 U.S. at 269.

¹⁹³ Stone, *Rustic Justice*, *supra* note 26, at 972. Most of these histories, however, focus on specific subject matter rather than on general, domestic commercial arbitration.

¹⁹⁴ Brunet, *supra* note 26, at 43.

¹⁹⁵ 14 Penn Plaza, 556 U.S. at 268 (quoting *McMahon*, 482 U.S. at 232).

¹⁹⁶ *Mitsubishi Motors*, 473 U.S. at 633, n.17.

¹⁹⁷ See Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1242 (2000) (“Today, arbitrators often are not considered experts in the subject matter of the dispute they arbitrate because many disputes involve statutory and legal claims rather than claims that can be resolved by examining industry customs.”).

training on process but no training on any substantive law.¹⁹⁸ And only if the parties have sophisticated counsel and spend money on pre- and post-hearing briefs do the parties educate the arbitrators about applicable law and procedure. Furthermore, for some arbitrations, the more expert arbitrators are, the less likely they will be conflict-free, as their expertise necessarily entails professional connections and relationships in the very industry that is the subject of the dispute.¹⁹⁹ “Expert” arbitrators are more likely to know the parties and/or their counsel, thus conflicting themselves out of serving as a neutral on a panel.²⁰⁰

The Court is also inconsistent on the notion that arbitrators are experts. While most Supreme Court opinions in this area tout arbitrators as subject matter experts capable of interpreting complex statutory schemes, according to the Court, arbitrators are not experts in class action procedures: “[A]rbitrators are not generally knowledgeable in the often-dominant procedural aspects of [class] certification”²⁰¹ The Court continued, “And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied.”²⁰² Without any basis for the distinction, the Court minimized arbitrators’ expertise on class action procedures while simultaneously proclaiming arbitrators as experts on statutory discrimination claims.

The Court’s premise that arbitrators are subject matter experts is simply no longer true. As for process expertise, it very much depends on the type of arbitration.

¹⁹⁸ To be fair, to be eligible as an arbitrator for specific subject matter rosters at the AAA, an arbitrator must have significant experience in that particular subject matter. See, e.g., *Qualification Criteria for Admittance to the AAA Labor Panel*, AM. ARB. ASS’N, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003879 [http://perma.cc/TBL4-FFU2] (last visited Dec. 6, 2015).

¹⁹⁹ See *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984) (acknowledging that “to disqualify any arbitrator who had professional dealings with one of the parties [to say nothing of a social acquaintanceship] would make it impossible, in some circumstances, to find a qualified arbitrator at all”); cf. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 148-49 (1968) (recognizing that “arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases”).

²⁰⁰ See Lindsay Melworm, Note, *Biased? Prove It: Addressing Arbitrator Bias and the Merits of Implementing Broad Disclosure Standards*, 22 CARDOZO J. INT’L & COMP. L. 431, 464 (2014) (explaining that “too much knowledge or exposure in any particular area can lend itself to generating conflicts of interest or may necessarily involve prior relationships that compromise the independence and impartiality of the arbitrator”).

²⁰¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

²⁰² *Id.* at 1751-52.

G. *Is There Meaningful Review of Arbitration Awards?*

Finally, the Court believes lower courts engage in limited though meaningful review of arbitration awards: FAA sections 9–11 “substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway” (as compared to a “time-consuming judicial review process”).²⁰³ But the Court itself recently acknowledged that the grounds for review are very limited.²⁰⁴ There are no grounds for review of any errors of law,²⁰⁵ and parties who want it cannot even add it to their arbitration agreements.²⁰⁶ Indeed, in *Concepcion*, the Court noted that the lack of appellate review of arbitration was a reason a company could not possibly have wanted class arbitration—a “bet the company” type proceeding in which the stakes are very high.²⁰⁷ Ironically, when it benefits corporations to do so, the Court acknowledges reality and concedes that the available means of review are insufficient.

CONCLUSION

As demonstrated in Part III, the Court’s view of arbitration in its opinions since the 1980s is not based on reality. Rather, it rests on an outdated description of the arbitration process, recognizes no developments in the process since the early twentieth century, and fails to distinguish among the various types of arbitration. The discrepancy between the Court’s description of arbitration and the actual process is greatest for arbitrations of small claims involving consumers, individual investors, lower-level employees, and franchisees. Many

²⁰³ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

²⁰⁴ See *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (“Under the FAA, courts may vacate an arbitrator’s decision ‘only in very unusual circumstances.’” (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995))).

²⁰⁵ After *Hall Street*, the Courts of Appeals are divided on whether “manifest disregard of the law” remains a viable ground to challenge an award. See Jill Gross, *Arbitration Case Law Update 2014*, in SECURITIES ARBITRATION 2014, at 300-01 (Practising Law Institute) (discussing current status of circuit split); see also Jill Gross, *Hall Street Blues: The Uncertain Future of Manifest Disregard*, 37 SEC. REG. L. J. 232 (2009) (predicting the post-*Hall Street* future of the manifest-disregard standard). Even for those courts that recognize the standard, it is difficult for parties to meet. See, e.g., *Abu Dhabi Inv. Auth. v. Citigroup, Inc.*, 557 F. App’x 66, 67 (2d Cir. 2014) (restating the oft-cited principle that “[a]wards are vacated for manifest disregard only in ‘those exceedingly rare instances where some egregious impropriety on the part of the arbitrator[] is apparent’” (citation omitted)).

²⁰⁶ *Hall Street*, 556 U.S. at 585-86.

²⁰⁷ *Concepcion*, 131 S. Ct. at 1752.

arbitration participants are bound by a legal framework that has no bearing on the process it purports to regulate.

Let us imagine what might have happened if the Court had considered the reality of twenty-first-century arbitration. It might have concluded that parties are not always able to choose their arbitrators, that many arbitrators are not experts in the subject matter of the dispute, that some arbitration proceedings are as (or more) costly and time consuming as court cases, and that some disputants do not have the ability to design the process to suit their needs. Under these conditions, Justice Scalia might have had more difficulty justifying the Court's holdings that all federal statutory claims are arbitrable absent a contrary congressional command, that claimants can vindicate their statutory rights even in the face of a class action waiver, and that the FAA preempts state laws that invalidate class action waivers. In contrast, the actual holdings of the *Hat Trick* cases, evolved from twentieth-century arbitration jurisprudence, shut off any safety valve remaining for parties subject to unfair and adhesive arbitration agreements.

By ignoring the actual varied and complex twenty-first-century practice of arbitration, the Court is able to not only promote arbitration, but also unclog court congestion,²⁰⁸ appease corporate interests by enforcing their arbitration clauses,²⁰⁹ and suppress claims of individual consumers and employees.²¹⁰ The Court's arbitration jurisprudence ensures the enforceability of most PDAs with class action waivers and other provisions—provisions that make it very difficult for parties with unequal bargaining power to enforce their rights, rendering those rights illusory. The Court in its legal doctrine thus ignores the economic realities of dispute resolution.²¹¹

The disconnect between the Court's understanding of arbitration and the reality of the current process has sparked a shift away from arbitration as a preferred method of dispute

²⁰⁸ See Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 188 (2012) (arguing that “the Supreme Court’s enthusiastic embrace of mandatory predispute arbitration should be understood primarily as institutional self-help, as an opportunistic search for the funding and personnel that courts need to conduct fact-finding and decision-making in cases that the courts perceive as routine”).

²⁰⁹ Cf. Barbara Black, *Arbitration of Investors’ Claims Against Issuers: An Idea Whose Time Has Come?*, 75 L. & CONTEMP. PROBS. 107, 115 (2012) (describing the current Court as “pro-business”).

²¹⁰ See *supra* notes 22-23 and accompanying text.

²¹¹ Cf. Welsh, *supra* note 208, at 228 (“If the Supreme Court is indeed incentivizing the creation of a national, private small claims court, it also must assume responsibility for assuring the sufficiency of the justice—procedural and substantive—provided by such a court.”).

resolution.²¹² Many parties prefer litigation or mediation to arbitration in nonadhesive situations.²¹³ Recent studies show that in-house counsel are shifting away from arbitration.²¹⁴ The AAA now mandates mediation before arbitration, suggesting that the premier arbitration forum in the world no longer views arbitration as a first choice alternative to litigation.²¹⁵

The Court's mistakes about arbitration, particularly those used to justify the outcomes in the Hat Trick cases, have correlated with a decline in arbitration as a method of alternative dispute resolution. The correlation is suggestive. Increased enforcement of arbitration clauses led to the rise of arbitration. With an increase in mandatory arbitration came harsher criticism of the fairness of the process. Forums tried to meet fairness concerns by adopting legalistic processes. As arbitration became more litigation-like, disputants with a choice moved away from arbitration; those without a choice were forced into a process not tailored to their disputes.²¹⁶ The Court then rejected challenges to forced arbitration on the grounds that arbitration has protective and other features that it actually no longer possesses.

In the end, the declining use of arbitration hurts process pluralism. Scholars explain the strength of the ADR movement as stemming from the value disputants place on the availability of a range of dispute resolution mechanisms. Disputants can select the most appropriate mechanism for a particular dispute and be confident that the mechanism will deliver procedural and

²¹² Stipanowich, *Arbitration: The "New Litigation,"* *supra* note 46, at 5 ("[I]t appears that discontent with commercial arbitration has never been more palpable if not more widespread.").

²¹³ Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871(2008) (reporting on results of study of arbitration clauses in consumer and nonconsumer contexts within the same company and concluding that "absence of arbitration provisions in the vast majority of material [nonconsumer] contracts suggests that, ex ante, many firms value, even prefer, litigation over arbitration to resolve disputes with peers"); Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 122 (2002) (describing parties' flight from arbitration towards evaluative mediation).

²¹⁴ Stipanowich & Lamare, *Living with ADR,* *supra* note 41, at 45.

²¹⁵ See AAA COMMERCIAL ARBITRATION RULES, *supra* note 48, r. R-9 (2013) ("In all cases where a claim or counterclaim exceeds \$75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties.").

²¹⁶ Eisenberg et al., *Arbitration's Summer Soldiers,* *supra* note 213, at 888-89 (positing that empirical evidence suggests that companies do not prefer arbitration in business-to-business disputes, but prefer it in consumer disputes in which an adhesive arbitration clause can preclude aggregate dispute resolution).

substantive justice.²¹⁷ In a process-pluralistic world, disputants can also tailor and customize a particular mechanism to an individualized dispute.²¹⁸ Yet studies show increased dissatisfaction with arbitration and the loss of arbitration's core value—choice.²¹⁹ If disputants lose faith in a mechanism as promoting justice, fewer options remain.

Arbitration plays a useful role in the ADR spectrum, and eliminating it as an option reduces the appeal of ADR.²²⁰ Paradoxically, the Court's most recent FAA cases remove arbitration as a dispute resolution tool in the toolbox for those with a choice and mandate it as a tool for those without a choice. Given the need for ADR mechanisms in our legal system today, reducing the appeal of arbitration is bad for justice.

²¹⁷ In their seminal piece, Professors Sander and Goldberg set up a framework for lawyers to evaluate and advise clients on which ADR process is best suited for a particular dispute. See Frank E.A. Sander and Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994).

²¹⁸ Lande, *Getting the Faith*, *supra* note 5, at 148-49 ("The essence of this ideology is that many different features of disputing processes can be manipulated and customized for each dispute.").

²¹⁹ Stipanowich, *Arbitration: The "New Litigation," supra* note 46, at 51-52 (concluding that parties generally do not but should design arbitration clauses more deliberately to specify characteristics of the process that would best suit the type of dispute being arbitrated, in order to "fulfill the promise" of arbitration's virtues).

²²⁰ Cole, *On Babies and Bathwater*, *supra* note 89, at 506 ("Arbitration fairness should not mean the elimination of arbitration as a dispute resolution mechanism."); Stipanowich, *Arbitration: The "New Litigation," supra* note 46, at 8 (arguing that, to maximize the benefits of arbitration, disputants must "embrace a more nuanced view of arbitration processes and . . . mak[e] or promot[e] more appropriate process choices").