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THE BOLD AMBITION OF JUSTICE SCALIA'S ARBITRATION JURISPRUDENCE: KEEP WORKERS AND CONSUMERS OUT OF COURT

BY

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BY
KATHERINE V.W. STONE*

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I. INTRODUCTION

Arbitration clauses have become a pervasive feature of modern life. Arbitration terms are ubiquitous in agreements between consumers and their banks, credit card companies, internet service providers, cell phone companies, health clubs, hospitals, doctors, and other medical service providers.[1] They are also widely used in leases, home-owners association by-laws, airline and other travel contracts, on-line purchases, and consumer goods transactions. Moreover, arbitration clauses are so widely used in both at-will and fixed term

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1. *See* Theodore Eisenburg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 886 (2008).

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employment agreements that today, more employees are covered by arbitration clauses than by collective bargaining agreements.[2] Estimates suggest that, as of 2003, nearly one quarter of private sector nonunion workers were subject to arbitration systems that their employer designed and imposed as a condition of employment.[3] And due largely to Supreme Court's decisions, arbitration clauses are virtually impossible to challenge and nearly always enforced.

The expanding scope of arbitration has become a cause for alarm amongst consumer and worker advocates, who see it as a judicial roll back of hard-won consumer and worker rights. The rise of arbitration has also been heavily criticized by legal scholars, who see it as an assault on the civil justice system itself. The overall impact, they claim, is to severely curtail access to the courts.[4]

II. THE SUPREME COURT'S ARBITRATION LAW BEFORE SCALIA

Justice Antonin Scalia played a key role in the trend by which arbitration has displaced the civil justice system. He joined the Supreme Court in 1986, just as the modern law of arbitration was beginning to take shape. In the preceding three years, the Court had transformed the Federal Arbitration Act (FAA), a narrow and little-known statute dating from 1925, into a central pillar of national policy.[5] Before 1983, the FAA had been interpreted narrowly as applying only to contractual disputes between businesses that were brought in federal courts and involved issues of federal law.[6] However, in the early 1980s, a trilogy of Supreme Court decisions changed all that.

The first case of the pivotal FAA Trilogy was *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, decided in 1983.[7]

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2. Katherine V.W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 27, 27 (Andrienne E. Eaton & Jeffrey H. Keefe eds., 1999) (adding that "[i]f current trends continue, soon more workers will have their workplace rights determined by employer-created arbitration than by collective bargaining agreements").

3. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 410-11 (2007).

4. *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2809, 2838 (2015); *see also* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER L. REV. 1017 (1996).

5. Kathering Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 953-54 (1999).

6. Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 201 (1956).

7. 460 U.S. 1 (1983).

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There the Supreme Court adopted a presumption in favor of arbitration to use when deciding cases involving the FAA. It ruled that when deciding whether a particular dispute comes within an arbitration clause, courts should resolve all doubts in favor of arbitration. It said that such a presumption furthered the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[8] This declaration of federal policy has served as a fixture of arbitration law and provided a rationale for the extraordinary expansion of the FAA that followed. The second case, decided in 1984, was *Southland Corp. v Keating*.[9] There the Court held that the FAA applied in state courts as well as federal courts, preempting any state law with which it even arguably conflicted.[10] And in 1985, in the third case, the Court held in *Mitsubishi v. Soler Chrysler-Plymouth* that under the FAA, arbitration applied to statutory as well as contractual claims.[11]

Justice Scalia joined the Supreme Court the year after these three FAA decisions were issued. In their aftermath, both conservative and liberal Supreme Court justices built upon them to expand the scope of the FAA.[12] In general, the liberal justices pushed to expand the preemptive scope of the Act, contending that it displaced state laws that attempted to protect consumers from unfair arbitration agreements.[13] At the same time, conservative justices expanded the types of issues that fell within its ambit, holding that the FAA applied to disputes over employment discrimination and other important statutory rights.[14] With one exception, Scalia decided with the majority in both camps.[15] But beginning in 2006, Scalia went

8. *Id.* at 24.

9. 465 U.S. 1 (1984).

10. *Id.* at 12.

11. 473 U.S. 614, 628 (1985).

12. See Katherine V.W. Stone, *Will Workers and Consumers Get Their Day in Court*?, AM. PROSPECT (May 5, 2016), <http://prospect.org/article/will-workers-and-consumers-get-their-day-court-0>.

13. Doctor's Assocs. v Casarroto, 517 U.S. 681, 683 (1996) (eight to one decision authored by Justice Ginsberg).

14. Circuit City Stores v. Adams, 532 U.S. 105, 119 (2001) (Justice White opinion to which Justices Stevens, Ginsburg, Breyer, and Souter dissented); Gilmer v. Johnson/Interstate Lane Corp., 500 U.S. 20, 26-27 (1991) (Justice White opinion to which Justices Stevens and Marshall dissented).

15. Scalia's only dissent in an FAA case was in Allied-Bruce Terminex v. Dobson, 513 U.S. 265, 284 (1995) (Scalia, J., dissenting) and *id.* at 285 (Thomas, J., dissenting), where he joined with Justice Thomas to argue that *Southland* was wrongly decided and the FAA does not apply in state courts. He later abandoned this position. *See 'Casarotto*, 517 U.S. at 681 (joining the majority opinion that applied the FAA and reversed a decision of the Supreme Court of Montana despite a dissent by Justice Thomas arguing that the FAA does not apply in state

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further than any of the others in propounding an interpretation of the FAA and an approach to arbitration that would make arbitration agreements unescapable and arbitration decisions nearly impermeable to challenge, even in the face of overwhelming evidence of egregious unfairness, over-reaching, or bias.

III. JUSTICE SCALIA'S IMPRINT ON ARBITRATION LAW

Antonin Scalia joined the Supreme Court in 1986. In his first two decades on the Court, he sided with the majority in all but one of the Court's decisions involving the FAA, but did not write the majority opinion any of them.[16] However, after 2006, Scalia became the Court's leading voice on the issue of arbitration. Between 2006 and his death in 2016, Justice Scalia authored six majority opinions in cases involving interpretation of the FAA. No other justice came close to authoring as many FAA opinions as Scalia.[17] And, as will be explained below, his majority opinions in *Buckeye Check Cashing, Inc. v. Cardegna*,[18] *Arthur Andersen LLP v. Carlisle*,[19] *Rent-A-Center, West, Inc. v. Jackson*,[20] *AT&T Mobility LLC v. Concepcion*,[21] *CompuCredit Corp. v. Greenwood*,[22] and *American Express Co. v. Italian Colors Restaurant*[23] have expanded the law of arbitration in new and dangerous ways. Scalia's decisions and his reasoning have built an edifice of arbitration law that effectively walls off the federal courts from most lawsuits brought by ordinary individuals. The net effect of these decisions is to make arbitration the exclusive forum for most claims brought against corporations and financial institutions by workers and consumers. As a result, efforts by consumers and workers to assert their hard-won rights have been relegated to the privatized, invisible, and unaccountable forum of arbitration.

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courts).

16. Of the cases decided by the Supreme Court in the late 1980s and early 1990s, Justice Scalia joined the majority opinion in *Perry v. Thomas*, 482 U.S. 483 (1987); *Shearson/ American Express v. McMahon*, 482 U.S. 220 (1987); *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468 (1989); and *Gilmer*, 500 U.S. at 20.

17. The closest was Breyer, who as of March 2017 has authored four majority opinions in cases involving the FAA, most of which were narrowly drawn opinions on relatively technical issues. Ginsburg has authored three, and the other justices have authored either one or two in their time on the Court.

18. 546 U.S. 440 (2006).

19. 556 U.S. 624 (2009).

20. 561 U.S. 63 (2010).

21. 563 U.S. 333 (2011).

22. 565 U.S. 95 (2012).

23. 133 S. Ct. 2304 (2013).

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All but one of Scalia's arbitration decisions grew out of cases in which consumers, workers, or small businessmen challenged arbitration agreements because, they claimed, they were unfair.[24] In these cases, Scalia rejected the challenges. In addition, Justice Scalia provided a crucial vote in a number of other important decisions that were decided by a five to four majority. These include *Circuit City v. Adams*, holding that the FAA applied to employment contracts, despite the express exemption in section 1 of the statute for "contracts of employment";"[25] *Green Tree Financial Corp. v. Randolph*, making an arbitration agreement enforceable despite the plaintiff-borrower's claim that she could not afford to pay the large costs that the arbitration procedure would entail;[26] and *Stolt-Nielson S.A. v. AnimalFeeds International Corp.*, holding that when an arbitration clause is silent on the subject of class arbitration, the court should presume that the clause prohibits class arbitration and requires parties proceed on an individual basis because "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[27]

Scalia's outsized impact on arbitration law spans several important areas. First, he has made it nearly impossible to challenge an arbitration clause on the ground that it is contained in an unenforceable or void arbitration agreement. Secondly, he has made arbitration clauses that are combined with a class action waiver enforceable despite state law that would render class action waivers unconscionable. Third, he has called into question a fundamental principle of arbitration law – that arbitration should not be required when to do so would prevent litigants from effectively vindicating their statutory rights. And fourth, he has given the FAA such preeminence that it is held to supersede all other federal laws with which it conflicts.

Below I discuss Scalia's contributions in each of these areas. I then discuss some of the implications of the edifice he has created by these decisions.

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24. The only exception is *Arthur Andersen LLP v. Carlisle*, which involved a dispute between businesses. 556 U.S. 624 (2009). The issue before the Supreme Court concerned the appealability of a refusal of a stay order by the lower court and whether a non-signatory to an arbitration agreement can request a stay under section 3 of the FAA. *Id.* at 625-26.

25. 532 U.S. 105, 112 (2001).

26. 531 U.S. 79, 92 (2000).

27. 559 U.S. 662, 685 (2010).

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A. Restricting Challenges to Unfair, Unenforceable, or Void Arbitration Agreements

Arbitration clauses are found in contracts, and as is well known, contracts are governed by state law. If a contract is found to be unconscionable or to have been procured by fraud or duress under the applicable state law, a state court will deny enforcement. The FAA recognizes the role of state law in contract enforcement and provides, in section 2, that a written agreement to arbitrate in a contract shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[28] This provision is known as the savings clause, and it is designed to preserve the role of state contract law in determining which arbitration clauses should be enforced.

Under the FAA, as it has been interpreted, the ability of parties to challenge an arbitration clause on the grounds that the contract itself is invalid under state law, say for unconscionability, is governed by the doctrine of separability,[29] a doctrine in arbitration law that has been particularly restrictive of consumer and workers' rights. The separability doctrine operates to prevent challenges to arbitration decisions based on the claim that a contract containing an arbitration clause is invalid. And it is an area in which Scalia has had a large impact.

The separability doctrine first arose in one of the earliest cases involving the FAA to come to a federal court of appeals. In 1942, in *Kulukundis Shipping Co. v. Amtorg Trading Corp.,* the Second Circuit was faced with a dispute over alleged nonperformance of a shipping charter.[30] In that case, the respondent claimed that it had not violated the charter contract because the contract had never been signed, so no valid contract ever existed.[31] The trial court held for the libellant (the moving party, or plaintiff). Because the charter contained an arbitration provision, the defendant-respondent claimed on appeal that the issue should have been decided by an arbitrator,

28. 9 U.S.C. § 2 (2012).

29. Some courts and commentators refer to the separability doctrine as the severability doctrine. However, the term "severability" also refers to situations in which a court will sever a clause of a contract or a provision of a statute on a variety of grounds that have nothing to do with the FAA. In order to avoid ambiguity and confusion, I refer to the specific FAA doctrine discussed herein as '"separability."'

30. 126 F.2d 978 (2d Cir. 1942).

31. *Id.* at 980.

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and thus, under the FAA, the judgment must be set aside.[32] The Second Circuit was confronted with the question, who should decide whether the contract was signed and hence valid? Given that the alleged contract contained an arbitration clause, should the court or an arbitrator decide whether the contract was valid and enforceable? The issue posed a conundrum. If the court were to hold that a court should rule on the enforceability of the contract, then the court would decide the merits of the dispute, because the issue in the dispute was whether there was a valid contract. However the court decided that issue, it would displace the arbitrator on the merits of the case and thus undermine the arbitration clause, which provided that any dispute between the parties should be decided by the arbitrator. If, on the other hand, the court should hold that the arbitrator should decide whether the contract was valid, then it was possible that an arbitrator would decide a case over which it had no authority. That is, if the contract were truly invalid, then the arbitrator had no authority to decide any aspect of the case and hence could not conduct an arbitration hearing at all.

After considering the possibilities, the *Kulukundis* court ruled that "[t]he Arbitration Act does not cover an arbitration agreement sufficiently broad to include a controversy as to the existence of the very contract which embodies the arbitration agreement."[33] Thus it held that "it would be improper to submit to the arbitrators the issue of the making of the charter party."[34]

The *Kulukundis* decision addressed but did not settle the issue of who decides issues of contract validity. Over the next several years, courts grappled with the question of who decides the enforceability of an arbitration clause when one party claims a contract that contains an arbitration clause is invalid. In 1959, in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, the Second Circuit ruled that when there is an arbitration clause, the arbitrator rather than a court should decide questions of the contract's validity.[35] In that case, one party was challenging a contract, claiming that there had been fraud in the inducement. The court reasoned that an arbitration clause is at least partially separable from the contract in which it is contained, and

32. *Id.* at 981.

33. *Id.* at 986.

34. *Id.* The court ultimately held that the arbitration clause did cover the issue of damages, so it ordered arbitration on that issue should the court should decide that the respondent was in breach. *Id.* at 986-89.

35. 271 F.2d 402, 410 (2d Cir. 1959).

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hence an arbitrator can decide on the validity of an arbitration clause even if the contract containing the arbitration clause is unenforceable. Thus it held that an arbitration clause was valid and enforceable for the purpose of enabling an arbitrator to decide whether the overall contract, in which it is embedded, is valid.[36] That is, even if an entire contract is invalid, the promise to arbitrate is enforceable because it is separable from the rest of the contract.

The Supreme Court adopted the Second Circuit approach in 1967 in *Prima Paint Corp. v. Flood & Conklin Manufactering Co.*[37] The case was a commercial dispute growing out a contract in which Prima Paint purchased Flood & Conklin's (F & C) business, and promised to pay F & C a percentage of receipts for former F & C customers. In return, F & C promised to provide Prima Paint with consulting services and not to compete for six years.[38] The contract had an arbitration clause. One week after the contract was signed, F & C filed for bankruptcy. Prima Paint stopped making payments to F & C and brought suit to rescind the contract, alleging it had been induced by F & C's fraudulent representations about its solvency.[39] In response, F & C argued that an arbitrator should decide its rights under the contract, including the issue of fraud in the inducement. The lower courts agreed with the defendant on the authority of the *Robert Lawrence Co.* case.[40] On certiorari, the Supreme Court affirmed the lower courts and adopted the reasoning of the Second Circuit. In an opinion written by Justice Fortas, it stated that except where parties otherwise intend, "arbitration clauses as a matter of federal law are 'separable' from the contacts in which they are embedded," unless the claim of fraud was "directed to the arbitration clause itself."[41] Therefore in that case it held that the issue of the enforceability of the agreement must be decided by an arbitrator.

After *Prima Paint*, the separability doctrine makes a promise to arbitrate separable from the rest of the contract unless there is a claim of fraud or other contract defense that is directed toward the arbitration clause itself. The result is that the separability doctrine relegates many contract defenses to arbitration.

Prima Paint provided a powerful dissent by Justices Black,

36. *Id.*
37. 388 U.S. 395 (1967).
38. *Id.* at 397.
39. *Id.* at 398.
40. *Id.* at 399-400.
41. *Id.* at 402.

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Douglas, and Stewart. They wrote:

> "The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the court holds are to adjudicate the legal validity of the contract need not even be lawyers, . . . and even if qualified to apply the law, not bound to do so. I am by no means sure that thus forcing a person to forgo his opportunity to try his legal issues in the courts where . . . he may have a jury trial and right to appeal, is not a denial of due process of law."[42]

They added that the decision flew in the face of congressional intent. The section 2 savings clause showed that congress intended that issues of contract validity be decided by a court. As they said, "If there has never been any valid contract, then there is not now and never has been anything to arbitrate."[43]

The separability doctrine was widely criticized by legal scholars and some courts. Some judges took the position that a case should be sent to an arbitrator when the challenge to an arbitration clause was based on allegations that a contract was voidable, but not when the challenged contract was alleged to be void.[44] For example, Judge Easterbrook ruled in *Sphere Drake Insurance v. All American Insurance* that if a contract is entirely void such that no contract ever came into being, then to force a party to arbitrate under its terms "would disregard the principle that arbitration is contractual."[45] He distinguished *Prima Paint* from cases in which it was alleged there was no agreement in the first place. "Fraud in the inducement," i.e., the allegation in *Prima Paint*," he explained,

> "does not negate the fact that the parties actually reached an agreement. But whether there was any agreement is a distinct question . . . A person whose signature was forged has never agreed to anything. Likewise with a person whose name was written on a contract by a faithless agent who lacked authority to make that commitment. . . [A]s arbitration depends on a valid contract an argument that the contract does not exist can't logically be resolved

42. *Id.* at 407 (Black, J., dissenting).

43. *Id.* at 425.

44. *See, e.g.*, Sphere Drake Ins. v. All Am. Ins. Co., 256 F.3d 587, 590-91 (7th Cir. 2001) (holding that a claim that a signature on a contract was forged must be resolved by a court because if true, no contract ever came into being, and hence there was never consent to the contract, or the arbitration clause contained therein); Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 863 (Fla. 2005) (distinguishing the case at hand from *Prima Paint*, because "if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well").

45. 256 F.3d at 590.

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by the arbitrator."[46]

Justice Scalia weighed in on the issue of separability in 2006 in his first authored Supreme Court majority decision interpreting the FAA. In *Buckeye Check Cashing, Inc. v. Cardegna*,[47] he ruled that the separability doctrine applied to a contract that was altogether void under state law. In *Buckeye*, the plaintiffs had obtained a payday loan from the defendant, and later challenged it on the grounds that the terms violated Florida's usury and consumer protection laws. The defendant-lender moved to compel arbitration on the basis of an arbitration clause in the loan agreement.[48] The Florida Supreme Court ruled that the contract was in fact void because it violated a state usury law that was criminal in nature.[49] Accordingly, the state high court refused to enforce the arbitration clause, holding that separability did not apply to contracts that were "illegal and void under Florida law."[50]

On defendant's appeal to the U.S. Supreme Court, Justice Scalia reversed. Scalia ruled that the separability doctrine of *Prima Paint* applied to all challenges to a contract's validity, even those that allege a contract is illegal or otherwise void.[51] He said "we cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contact law.'"[52]

Since *Buckeye*, the Supreme Court has applied its reasoning to require arbitration in disputes involving contracts that are void or unenforceable on other grounds. For example, it held that an arbitrator must decide former employees' challenge to a covenant not to compete, even though such covenants are void under Oklahoma law.[53] It also held that a dispute over alleged negligence by a nursing home that caused the death of a patient must go to arbitration despite a West Virginia state law providing that wrongful death actions against nursing homes shall not be decided in arbitration.[54]

Despite the breadth of his ruling in *Buckeye*, though, Scalia

46. *Id.* at 590-91.
47. 546 U.S. 440 (2006).
48. *See id.* at 442-43.
49. Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 862 (Fla. 2005).
50. *Id.* at 864.
51. *Buckeye Check Cashing*, 546 U.S. at 448.
52. *Id.* at 446.
53. Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 504 (2012).
54. Marmet Health Care Center v. Brown, 565 U.S. 530, 533 (2012).

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reiterated the exception to separability that the Court had established when it first adopted the separability doctrine in *Prima Paint.* In *Buckeye*, Scalia stated that when a party claimed that there was illegality, fraud, or some other recognized contractual defect in the arbitration clause itself, the defense would be heard by a court.[55] That is, a party could get a judicial hearing when it alleged that an arbitration clause itself, as distinct from the contract as a whole, was invalid. But, as Scalia wrote, "[u]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."[56]

After *Buckeye*, the *Prima Paint* exception enabled consumers and workers to challenge unfair and one-sided arbitration agreements when a particular arbitration clause was alleged to be unconscionable under the applicable state law. However, in June 2010, in *Rent-A-Center West v. Jackson*, Scalia again wrote for the majority on separability, and there he drastically narrowed the exception.[57] By so doing, he practically eliminated the ability of consumers or workers to challenge unconscionable arbitration procedures.

The facts of *Rent-A-Center* are straightforward. Antonio Jackson worked at Rent-A-Center in Nevada, where he repeatedly sought a promotion and was repeatedly turned down. After one rebuff, he complained to his store manager. He was subsequently promoted, but then fired two months later. He sued, alleging he had been denied a promotion because of his race and had been fired in retaliation for complaining about it.[58] Jackson had signed an arbitration agreement as a condition of obtaining employment, so Rent-A-Center sought to dismiss and compel arbitration of Jackson's discrimination claim. Jackson opposed arbitration on the ground that the arbitration clause was unconscionable under existing state law.[59] He claimed it imposed excessive cost on him and it did not permit him to conduct the discovery he would need to establish his claim of discrimination – both issues that the Nevada Supreme Court had previously held rendered an arbitration clause unconscionable and unenforceable.[60]

55. *Buckeye Check Cashing*, 546 U.S. at 445-46.

56. *Id.*

57. 561 U.S. 63 (2010).

58. The facts are found in the District Court opinion in the case, Jackson v. Rent-A-Ctr. W., Inc., No. 03:07-CV-0050, 2007 WL 7030394 at *1 (D. Nev. June 7, 2007).

59. *Id.* at *2.

60. *See* Burch v. Second Judicial Dist. Ct., 49 P.3d 647, 650-51 (Nev. 2002) (holding that where an arbitration clause is both procedurally and substantively unconscionable, it will not be enforced).

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Thus, by claiming that the arbitration clause itself was unconscionable, Jackson seemingly came within the exception to the separability doctrine that Scalia had reiterated in *Buckeye*.

The Ninth Circuit agreed that the issue of the contract's validity should be decided by a court,[61] but the Supreme Court reversed. Writing for the majority, Scalia ruled that under the separability doctrine, Jackson's claim must go to arbitration.[62] He explained that the arbitration clause had delegated authority to the arbitrator to decide issues of arbitrability. Because Jackson's objection was to the entire arbitration clause and not the specific aspect of the arbitration clause that delegated authority to resolve disputes to the arbitrator, Scalia ruled that his claim of unconscionability did not come under the *Prima Paint* exception and must be decided by an arbitrator.[63] That is, Scalia ruled that the delegation clause of the arbitration agreement was separable from the rest of the contract, including the arbitration clause itself.

The decision drew a strong dissent by Justice Stevens who was joined by Justices Ginsburg, Breyer, and Sotomayor. Stevens declaimed that:

> [The Separability Doctrine] allow[s] a court to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement.* Today the Court adds a new layer of severability – something akin to Russian nesting dolls – into the mix: Courts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator.[64]

As a result of *Rent-A-Center*, it has become easy for employers or corporations to avoid unconscionability challenges to arbitration. All they need to do is include a provision in their arbitration clauses that delegate to the arbitrator the authority to decide all disputes, including disputes over arbitrability. Because employers are the ones who draft the arbitration clause and insert them into contracts of adhesion with their workers and consumers, *Rent-a-Center* means that it is now nearly impossible for a party to challenge a one-sided arbitration clause on unconscionability grounds, no matter how unfair it is. Rather, a party who claims that the arbitration clause in his or her employment contract is unconscionable under state law has to

61. Jackson v. Rent-A-Ctr. W., Inc., 581 F.3d 912, 917 (9th Cir. 2009).
62. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70-71 (2010).
63. *Id.* at 71-72.
64. *Id.* at 85 (Stevens, J., dissenting) (emphasis in original).

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bring *that* claim to arbitration.

B. Class Action Waivers and Arbitration: The Role of Preemption

The most controversial issue in arbitration law today grows out of the interaction between arbitration and class actions. Composite arbitration/class-action waiver clauses have become common in contracts offered by credit card companies, banks, cell phone providers, and providers of other common services.[65] They are also used with increasing frequency in employment contracts.[66] By their terms, composite clauses require a party to take any claim or dispute that might arise with their contracting counter party to arbitration on an individual basis. They are usually used by corporations to prevent small claims – high stakes lawsuits against them, i.e., suits in which large numbers of plaintiffs have claims so small that no individual can afford to sue by themselves but which can cost a corporation a lot of money if brought as a class action. When a composite class action waiver/arbitration clause is enforced, plaintiffs are forced to arbitrate claims on an individual basis, even if it is prohibitively expensive for any one of them to do so. These also tend to be cases in which any individual claimant's potential award is so small that it is impossible for them to secure legal representation.

Long before composite class action-arbitration clauses became commonplace, many states confronted the phenomenon of class action waivers inserted into consumer contracts. Some state courts ruled that a contract that includes a waiver of a right to bring a class action is unenforceable when contract is one of adhesion and is designed to prevent consumers with small value claims from banding together to sue corporations for wrongdoing.[67] Subsequently, corporations began to combine class action waivers with arbitration clauses, and thanks to Justice Scalia, they have managed to make the waivers enforceable.

Consumers and employees have challenged composite

65. *See* Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights*, 61 UCLA L. REV. DISCOURSE 164, 167-68 (2013).

66. *See, e.g.*, O'Connor v. Uber Techs., Inc., 150 F. Supp. 3d 1095, 1101 (N.D. Cal. 2015); Mohamed v. Uber Techs., Inc., 109 F. Supp. 3d 1185, 1197 (N.D. Cal. 2015).

67. *See, e.g.*, Discover Bank v. Super. Ct.,113 P.3d 1100, 1110 (Cal. 2005); Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) (finding arbitration clause embedded in monthly telelphone bill to be unconscionable because "it is an adhesion contract which not only provides for a method of dispute resolution but also dictates a one-sided waiver of important substantive rights.").

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arbitration/class-action waiver clauses on two grounds. They allege that (1) composite clauses are unconscionable under state law; and (2) they make it impossible to vindicate statutory rights. The Supreme Court has rejected both of these claims in recent years, with Justice Scalia writing the majority opinions.

In 2011, in *AT&T Mobility LLC v. Concepcion*,[68] the Supreme Court overturned a Ninth Circuit decision that held that a class-action waiver in a consumer case was unconscionable. In that case, an AT&T customer brought a class action alleging that the company had engaged in fraudulent practices by charging sales taxes – approximately fifteen dollars per phone – to customers to whom it promised free cell phones in exchange for a two-year service contract.[69] AT&T's customer agreement included an arbitration clause that also banned class actions and class-wide arbitration. The plaintiffs brought a class action, and AT&T moved to compel arbitration on an individual basis.[70] The District Court and the Ninth Circuit Court of Appeals applied a three-pronged test derived from a 2005 California Supreme Court decision called *Discover Bank v. Superior Court* to determine whether the waiver was unconscionable.[71] The test, called the Discover Bank rule, provides that:

> [W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . 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."[72]

Pursuant to the Discover Bank Rule, the court considers three factors to determine whether a class action waiver in a consumer contract was unconscionable: (1) whether the agreement was a contract of adhesion, (2) whether the dispute was likely to involve small amounts

68. 563 U.S. 333, 352 (2011).

69. *Id.* at 337.

70. *Id.* at 336-37.

71. Laster v. T-Mobile USA, Inc., No. 05cv1167, 2008 WL 5216255 at *11-12 (S.D. Cal. Aug. 11, 2008) (citing *Discover Bank*, 113 P.3d at 1100), *aff'd*, Laster v. AT&T Mobility LLC, 584 F.3d 849, 855-58 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility v. Concepcion, 563 U.S. at 333.

72. *Discover Bank*, 113 P.3d at 1110.

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of damages, and (3) whether the party with superior bargaining power carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. The Ninth Circuit found all three prongs of the test satisfied, and thereby denied AT&T's motion to compel arbitration.[73]

On certiorari, the Supreme Court reversed. Justice Scalia, writing for the majority, held that the California rule was preempted by the FAA.[74] He did so despite the provision in section 2 of the FAA that preserves a role for state law in the interpretation of the federal law.

The savings clause in section 2 of the FAA provides that, despite the language of the statute that makes written agreements to arbitrate "valid, irrevocable, and enforceable," arbitration clauses are not enforceable if there exists a ground "at law or in equity for the revocation of any contract."[75] In numerous cases, the Supreme Court has interpreted that savings clause to preserve a role for state law in the application of the FAA.[76] Nonetheless, the Supreme Court has also narrowed the savings clause, ruling that it only applies to generally applicable rules of state law, not rules that are specifically aimed at arbitration.[77] As the Court said in *Perry v. Thomas*, a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state law holding that enforcement [of an arbitration agreement] would be unconscionable."[78]

In the *AT&T Mobility* case, the state rule that the Ninth Circuit found to preclude enforcement of the class action waiver was a general rule of California law, one that applies to all waivers of class actions in consumer contracts. As it said "'*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.'"[79] Scalia disagreed. Rather, he determined that the California Discover Bank rule, although couched in general terms, was actually an impediment to arbitration and therefore was preempted.[80]

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73. *Laster*, 584 F.3d at 855, *rev'd sub nom.* AT&T Mobility v. Concepcion, 563 U.S. at 333.
74. *AT&T Mobility*, 563 U.S. at 352.
75. 9 U.S.C. § 2 (2012).
76. *See, e.g.*, Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 472-73 (1989).
77. Perry v. Thomas, 482 U.S. 483 (1987).
78. *Id.* at 492 n.9.
79. *AT&T Mobility*, 563 U.S. at 338 (quoting Laster v. AT&T Mobility LLC, 584 F.3d 849, 858 (9th Cir. 2009)).
80. *Id.* at 352.

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This aspect of the holding is broader than it appears. In his reasoning, Scalia gave examples of other state laws that would be preempted, even though couched in general terms. One example he gave is a hypothetical state law that required all arbitration agreements to have judicially monitored discovery. Another is a state law that required all arbitration agreements to abide by the Federal Rules of Evidence. Both of these, he argues, would have a disproportionate impact on arbitration and would therefore be preempted.[81] What is telling, however, is that the hypothetical laws he discussed are ones that are specifically targeted at arbitration agreements. Thus they are straw men. Both of his hypothetical laws would fall squarely within the prior law, as enunciated by *Perry v. Thomas*, that arbitration-specific laws that are intended to impede arbitration are preempted. But in *AT&T Mobility*, the state law was not arbitration-specific. Thus by applying preemption to the Discover Bank Rule, Scalia not only precluded states from adopting rules to protect consumers against composite class action/arbitration agreements, he also made it clear that other general rules a state might enact to ensure fair treatment of consumers or workers would also come under the FAA's broad preemptive scope. For example, based on his reasoning, if a state enacted a law that provided that "all waivers of legal rights that are made a condition of employment must be knowing and voluntary and in writing," that law would likely be preempted as operating as an impediment to arbitration.[82]

In his *AT&T Mobility* opinion, Scalia added dicta that implicated other types of challenges to class action waivers in arbitration agreements. The clause at issue barred the signatories not only from bringing claims as a class action in a court, it also barred them from participating in a class or representative proceeding in any tribunal.[83] That is, it barred not only class actions but also class arbitration. Although the plaintiffs had not sought class arbitration and although the lower courts had not considered that issue, Scalia devoted a considerable portion of the opinion to recounting the many ways in which class arbitration was an unsatisfactory procedure. He stated that class arbitration would undermine the informality, efficiency, and

81. *Id.* at 341-43.

82. California did pass such a statute in 2015 – 2015 Cal. AB 465 – but it was vetoed by the governor, so there was no challenge brought in court. *See* Bryan L. Hawkins, *Yet Another Attack on Arbitration: Calif.'s AB 465*, LAW 360 (Sept. 17, 2015), <https://www.law360.com/articles/701781/yet-another-attack-on-arbitration-calif-s-ab-465>.

83. *AT&T Mobility*, 563 U.S. at 336.

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speed that are the raison d'être for arbitration in the first place.[84] He also stated that in class arbitration, an arbitrator would have to devise a method to afford absent class members notice, an opportunity to be heard, and a right to opt out.[85] He then stated that class arbitration could impose great risks on defendants, who could receive a devastating judgment when numerous small claims were aggregated and yet would lose their right to interlocutory appeals or judicial review.[86] For these reasons, he concluded that "[a]rbitration is poorly suited to the higher stakes of class litigation."[87]

AT&T Mobility was not the first time the Supreme Court suggested that class or collective arbitration was inconsistent with the FAA. A year earlier, the Court ruled in *Stolt-Nielson S.A. v. AnimalFeeds International Corp.* that when an arbitration clause is silent on the subject of class arbitration, a party cannot be compelled to submit to class arbitration.[88] In that case, which involved a commercial dispute between two shipping companies, the parties stipulated that they had agreed to arbitrate their disputes but they had not agreed to permit class arbitration. Justice Alito, writing for the majority, found that "[t]his stipulation left no room for an inquiry regarding the parties' intent [on the subject of class arbitration]."[89] And in dicta, he noted that "the fundamental changes" that follow from a shift from bilateral to class arbitration could potentially undermine many of the benefits offered by arbitration.[90] Although Scalia did not write the *Stolt-Nielsen* opinion, he echoed and underscored its reasoning in the dicta in *AT & T Mobility*. And shortly after *AT & T Mobility*, Scalia expanded further on the issue in *American Express v. Italian Colors Restaurant*.[91]

Since the *AT&T Mobility* decision, which upheld class action waivers combined with arbitration mandates in consumer contracts, lower courts have been divided about its impact in employment cases.[92] Although *AT&T Mobility* effectively shut the door on

84. *Id.* at 348.

85. "We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator." *Id.* at 349.

86. *Id.* at 350-51.

87. *Id.* at 363.

88. 559 U.S. 662, 687 (2010).

89. *Id.* at 676.

90. *Id.* at 686.

91. 133 S. Ct. 2304 (2013).

92. *See* Iliza Bershad, *Employing Arbitration: FLSA Collective Actions Post-*Concepcion, 34 CARDOZO L. REV. 359, 362-63 (2012) (reporting that courts have "struggled mightily to

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unconscionability challenges to class action waivers in consumer arbitration agreements, a minority of courts have refused to extend it to the employment setting.[93] Most courts, however, have held that class action waivers of employment rights are enforceable.[94]

C. Class Action Waivers and the Effective Vindication Doctrine

The other line of attack on composite class action waivers/arbitration clauses that Justice Scalia has quashed is that, without the ability to bring a class action, a party cannot vindicate his or her substantive rights. This argument is based on a long-standing pillar of arbitration law, first announced by Justice Blackmun in *Mitsubishi Motors v. Soler Chrysler-Plymouth,* that arbitration is only appropriate when it entails no loss of substantive statutory rights.[95] There the Court justified sending an antitrust case to arbitration by stating that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[96] It further elaborated by stating, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."[97] This principle, known as the effective vindication doctrine, has been invoked *frequently* thereafter both by the Supreme Court and by the lower federal courts.[98]

The effective vindication doctrine is essential if courts are to justify closing the courthouse door to otherwise qualified litigants. And it is not a new idea. In the nineteenth century, Judge Story refused to order parties to arbitrate out of a concern that moving

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determine the enforcement of arbitration agreements [in] employment [contracts]" after *AT&T Mobility*).

93. *See* Tory v. First Premier Bank, No. 10-C-7326, 2011 WL 4478437 (N.D. Ill. Sept. 26, 2011); Sanchez v. Valencia Holding Co., 132 Cal. Rptr. 3d 517 (Ct. App. 2011); *see also* Jerett Yan, Recent Case, *A Lunatic's Guide to Suing for $30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After* AT&T v. Concepcion, 32 BERKELEY J. EMP. & LAB. L. 551, 559-61 (citing cases).

94. *See, e.g.*, Owen v. Bristol Care, Inc., 702 F.3d 1051 (8th Cir. 2013); Vilches v. Travelers Cos., 413 F. App'x 487, 494 n.4 (3d Cir. 2011); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005); Carter v. Countrywide Credit Indus. Inc., 362 F.3d 294, 298 (5th Cir. 2004); Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002); Horenstein v. Mortg. Mkt., Inc., 9 F. App'x 618, 619 (9th Cir. 2001); Chen-Oster v. Goldman, Sachs & Co., 785 F. Supp. 2d 3947 (S.D.N.Y. 2011).

95. 473 U.S. 614, 628 (1985).

96. *Id.* at 637.

97. *Id.* at 628.

98. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

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from a judicial to an arbitral forum could prejudice the rights of a party and lead to unjust results.[99] *Mitsubishi Motors*'s effective-vindication-of-substantive-rights principle addressed this concern by making it clear that if a litigant would be required to forfeit his or her substantive rights in arbitration, then the arbitration clause should not be enforced.

In a number of consumer and employment cases, plaintiffs have asserted that the enforcement of class-action waivers would force litigants to forgo their substantive rights and, hence, that arbitration should not be required. One setting in which this argument has been raised is where numerous workers allege they have been denied overtime pay or otherwise cheated out of small sums of money by their employer in violation of the Fair Labor Standards Act.[100] There litigants argue that it would be prohibitively expensive for any individual to bring a lawsuit for their small stake. The issue has also been raised in cases in which numerous individuals claim overcharges against a credit card company or financial institution, but no individual has the resources to bring a lawsuit on their own.[101]

The issue was addressed in 2013 by Justice Scalia, writing for the Supreme Court, in *American Express Co. v. Italian Colors Restaurant.*[102] A group of merchants brought a class action against American Express (AmEx), claiming that they had been overcharged in violation of the federal antitrust law. Each of the merchant's contracts with AmEx contained a clause that prohibited them from bringing any dispute to a forum other than arbitration, and required that all disputes be arbitrated on an individual basis.[103] It also prohibited them from sharing resources to produce a common expert report.[104] When AmEx moved to compel arbitration on an individual

99. *See* Tobey v. Cty. of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (expressing doubt that "the real legal or equitable rights of the parties can be fully ascertained or perfectly protected" in arbitral proceedings). *See generally* Stone, *supra* note 5, at 973-76 (recounting rationale for the refusal of nineteenth century common law courts to order specific performance of a promise to arbitrate).

100. *See, e.g.*, Walthour v. Chipio Windshield Repair, 745 F.3d 1326 (11th Cir. 2014); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1051 (8th Cir. 2013); Banus v. Citigroup Global Mkts., Inc., 757 F. Supp. 2d 394 (S.D.N.Y. 2010).

101. *E.g.* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000).

102. 133 S. Ct. 2304 (2013).

103. *Id.* at 2308.

104. *Id.* at 2316 (Kagan, J., dissenting) (explaining that the confidentiality provision in the agreement prevented merchants from informally working together to produce a common expert report).

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basis, the merchants objected because, they contended, to arbitrate the antitrust claim on an individual basis would cost an individual several hundred thousand dollars, whereas the average recovery would be only about $13,000, or $29,000 when trebled under the antitrust acts.[105] Hence, they claimed, without the ability to bring a class or collective action, they would lose their substantive rights. The plaintiffs prevailed in the Second Circuit, but on appeal to the Supreme Court, they lost.[106]

In *American Express v. Italian Colors,* the Supreme Court upheld the class-action waiver despite unrefuted evidence that the cost of bringing an antitrust case was so high that without the ability to proceed as a class action, the case could not be brought.[107] Moreover, in his majority opinion, Scalia went out of his way to cast doubt on the viability of the effective vindication principle. He called it mere "dicta," and interpreted it with mutilating narrowness, stating that, it would cover "a provision in an arbitration agreement forbidding the assertion of certain statutory rights."[108] He added that it "would *perhaps* cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[109] Beyond those circumstances, he stated, "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."[110]

Justice Kagan delivered a powerful dissent that was joined by Justices Ginsburg and Breyer.[111] She gave particular attention to Scalia's dismissive treatment of the effective vindication principle. She explained that the effective-vindication rule was essential to prevent stronger parties from using these and other kinds of means to eviscerate statutory protections.[112] As she wrote:

> "[The FAA] reflects a federal policy favoring actual arbitration – that is, arbitration as a streamlined "method of resolving disputes," not as a foolproof way of killing off valid claims. . . . The effective-vindication rule furthers the statute's goals by ensuring that arbitration remains a real, not faux, method of dispute

105. *Id.* at 2308 (majority opinion). Plaintiffs are awarded treble damages in antitrust cases, so the actual average damages were only one third of those figures. *Id.*

106. *Id.* at 2308, 2312.

107. *Id.* at 2308, 2311.

108. *Id.* at 2310.

109. *Id.* at 2310-11 (emphasis added).

110. *Id.* at 2311 (emphasis in original).

111. *Id.* at 2313 (Kagan, J., dissenting). *Italian Colors* was decided by a four to three majority, with Thomas concurring in the result and Sotomayor recusing herself.

112. *Id.* at 2314.

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> resolution. . . . Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights. . . . . ."[113]

Justice Kagan's dissent went on to delineate other procedural mechanisms that would operate as de facto exculpatory clauses in arbitration agreements were it not for the effective vindication rule. She argued that the rule

> "covers the world of other provisions a clever drafter might devise to scuttle even the most meritorious federal claims. Those provisions might deny entry to the forum in the first instance. Or they might deprive the claimant of any remedy. Or they might prevent the claimant from offering the necessary proof to prevail . . . . The variations matter not at all. Whatever the precise mechanism, each "operate[s] as a prospective waiver of a party's [federal] right[s]" – and so confers immunity on a wrongdoer."[114]

The overall effect of the *Italian Colors* opinion, Kagan claimed, is that "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[115]

Although the *Italian Colors* case itself involved a dispute brought by merchants, the majority's decision has important consequences for employment and consumer cases. By narrowing the effective vindication doctrine, the Court has potentially undermined challenges to class-action waivers in arbitration clauses. Moreover, Scalia's reasoning makes it likely that courts will uphold other procedural devices an employer or corporation might insert into an arbitration clause to prevent individuals from vindicating their federal statutory rights.

D. The Relationship Between the FAA and Other Federal Laws

Justice Scalia's decisions in the area of preemption involved the interaction between the FAA and state law. His decision in *Italian Colors* involved the interaction between the FAA and one particular federal law, the Sherman Antitrust Act. Scalia also addressed more generally the question of what happens when there is a conflict between the FAA and another federal law, and declared, in *CompuCredit Corp. v. Greenwood*, that the FAA must be given preeminent weight.[116]

113. *Id.* at 2315 (citation omitted).
114. *Id.* at 2317-18 (alterations in original) (citation omitted).
115. *Id.* at 2313.
116. 565 U.S. 95, 98 (2012).

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CompuCredit Corporation is a financial service company that, *inter alia*, issues subprime credit cards to individuals who cannot qualify for other credit cards.[117] In 2008, the Federal Trade Commission found that it had misled customers by failing to disclose upfront fees, adding on additional fees once customers agreed to purchase its services, and falsely stating that the credit card could be used to rebuild the holder's credit.[118] For the same reasons, some customers brought a class action against CompuCredit in 2008, alleging that the company had sold them cards in violation of the federal Credit Repair Organizations Act (CROA). When the customers initially applied for cards, each had been required to fill out a credit card application that included a clause obligating them to submit all disputes relating to their accounts to binding arbitration.[119]

CompuCredit moved to dismiss the class action and compel arbitration of the customers' claims. Both the federal district court and the Court of Appeals for the Ninth Circuit denied the motion because, the district court found, that "Congress intended claims under the CROA to be non-arbitrable."[120] It based its conclusion on two provisions in the CROA statute: one provision gives consumers a private cause of action for violations thereof,[121] and another provision states that any waiver of the rights in the statute are unenforceable and void.[122] The CROA also requires credit repair organizations to send to its customers the following sentence: "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act."[123]

Compucredit appealed to the Supreme Court, and Justice Scalia reversed.[124] Despite the explicit statutory language preserving consumers' right to sue, the Supreme Court ordered the case to arbitration. Justice Scalia, writing for the majority, bent the statutory

117. *See* Patrick Lunsford, *CompuCredit and Its Collection Agency Settle FTC-FDIC Case for $114 Million*, insideARM (Dec. 22, 2008, 2:36 AM ET), <https://www.insidearm.com/news/00016836-compucredit-and-its-collection-agency-set/>.

118. Press Release, Fed. Trade Comm'n, FTC Sues Subprime Credit Card Marketing Company and Debt Collector for Deceptive Credit Card Marketing (June 10, 2008), <https://www.ftc.gov/news-events/press-releases/2008/06/ftc-sues-subprime-credit-card-marketing-company-debt-collector>.

119. *CompuCredit Corp.*, 565 U.S. at 96-97.

120. Greenwood v. Compucredit Corp., 617 F. Supp. 2d 980, 988 (N.D. Cal. 2009), *aff'd*, 615 F.3d 1204 (2010), *rev'd*, *CompuCredit Corp.*, 565 U.S. at 95.

121. 15 U.S.C. § 1679g (2012).

122. *Id.* § 1679f(a).

123. *Id.* § 1679c(a).

124. *CompuCredit Corp.*, 565 U.S. at 104-05.

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language into a pretzel. He announced that the CROA's language giving consumers a "right to sue a credit repair organization" and its explicit non-waiver clause did not ensure a right to bring an action in court; rather, he held, the statute could also be satisfied by a right to an arbitration.[125] In his reasoning, Scalia departed from his usual strict, literal method of reading statutes to explain that

> "The disclosure provision is meant to describe the law to consumers in a manner that is concise and comprehensible to the layman – which necessarily means it will be imprecise . . . [including] with respect to the statement's description of a "'right to sue."' This is a colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA. We think most consumers would understand it this way, without regard to whether the suit in court has to be preceded by an arbitration proceeding."[126]

Thus, he concluded, "Because the CROA is silent on whether claims under the Act can proceed in an arbitral forum, the FAA requires the arbitration agreement be enforced according to its terms."[127] And to underscore and broaden the holding, Scalia added that arbitration agreements must be enforced "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" [128] Thus, Scalia's opinion in *CompuCredit* put a heavy thumb on the scale in favor of arbitration when the FAA is in conflict with another federal statute.

Justice Ginsburg dissented. She began by noting that the Credit Repair Organization Act was designed to protect consumers who have had difficulty obtaining credit, particularly consumers of limited means.[129] The statute mandates that credit repair organizations make certain specific disclosures to inform customers about the credit products they were purchasing. One of the mandated disclosures is that any credit agreement must state that, "You have a right to sue a credit repair organization that violates the CROA."[130] The statute also has a civil liability provision that specifies that consumers can bring an action on an individual or class action basis and obtain damages, actual and punitive, and attorney fees. It also provides that any provision that purports to waive any of the rights granted by the

125. *Id.* at 99-100.
126. *Id.* at 102-03.
127. *Id.* at 104.
128. *Id.* at 98.
129. *Id.* at 110 (Ginsburg, J., dissenting).
130. *Id.* (citing 15 U.S.C. § 1679c(a)).

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statute is void.[131]

In her *CompuCredit* dissent, Justice Ginsburg argued that "Congress enacted the CROA with vulnerable consumers in mind – consumers likely to read the words 'right to sue' to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration.'"[132]

> The "right to sue" may well be "a colloquial method of communicating to consumers." But is surely not colloquially *understood* by recipients of the required disclosures as the right, not to adjudicate in court, but only to seek, or defend against, court enforcement of an award rendered by the arbitrator chosen by the credit repair organization. Few, if any, credit repair customers would equate the "'right to sue'" with the extremely limited judicial review given to an arbitrator's award."[133]

Scalia's decision treated the FAA as a super-statute to which not only competing state laws, but also competing federal laws, must yield. One example of the wide reach of CompuCredit is in the cases arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a federal statute that prohibits employment discrimination against, and to establish reemployment rights on behalf of, those who serve in the military and then reenter civilian life.[134] The statute sets out an enforcement mechanism by which an aggrieved individual can either file a complaint with the Secretary of Labor or pursue an action in a federal court.[135] USERRA also contains a provision that states:

> This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[136]

Moreover, there is a long-standing principle, announced in 1946 by the Supreme Court and affirmed repeatedly since then, that statutes concerning federal reemployment rights for military members are "to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."[137] Nonetheless, in the

131. *Id.*
132. *Id.*
133. *Id.* at 114 (emphasis in original) (citations omitted).
134. 38 U.S.C. §§ 4301-35 (2012).
135. *Id.* §§ 4322, 4323(a)(3).
136. *Id.* § 4302(b).
137. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946).

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face of this principle, despite explicit statutory language precluding contractual provisions or agreements that waive, limit, or diminish rights granted by the statute, and despite the statute's enforcement scheme that creates a private individual right of action in a federal court, the Courts of Appeals have uniformly relied on *CompuCredit* to hold that claims arising under USERRA must be brought to arbitration where an employer imposed an arbitration clause on an employee.[138] As the Ninth Circuit explained in one USERRA case, neither the text nor legislative history of USERRA evinces a congressional intent "to preclude the compelled arbitration of claims arising under its provisions."[139]

IV. WORKERS' RIGHTS UNDER THE FEDERAL ARBITRATION ACT AND THE LONG SHADOW OF JUSTICE SCALIA

Scalia's opinions in *CompuCredit*, *Rent-A-Center*, *Buck-Eye*, *Italian Colors*, and *AT&T Mobility* are all implicated in an important group of cases coming before the Supreme Court next term, when it will hear three consolidated cases that pose the question of the impact of the FAA on workers' rights to engage in collective activity. The cases pose the question of whether a combined arbitration/class action waiver clause violates the National Labor Relations Act (NLRA).[140]

The NLRA, enacted in 1935, makes protection for worker collective action a central pillar of our national labor policy. Section 7 of the statute creates a right for workers to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[141] The right attaches when two or more employees act together to attempt to form a union, take political action, or engage in litigation to improve their wages, hours, and conditions. Section 7 has long been considered the core of the labor law statute.[142] Indeed, it is

138. Ziober v. BLB Resources, Inc., 839 F.3d 815, 819 (9th Cir. 2016); Landis v. Pinnacle Eye Care, LLC, 537 F.3d 559, 563 (6th Cir. 2008); Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 677-78 (5th Cir. 2006); *see also* Bodine v. Cook's Pest Control Inc., 830 F.3d 1320, 1327 (11th Cir. 2016) (holding that a USERRA claim was arbitrable even where the underlying arbitration agreement contained terms that violated the statute because those terms could be severed from the remainder of the agreement).

139. *Ziebor*, 819 F3d at 817.

140. 29 U.S.C. §§ 151-69 (2012).

141. *Id.* § 157.

142. *See, e.g.*, NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 835 (1984) (observing that section 7 was the primary means by which Congress implemented its purpose of equalizing the bargaining power of employees and employers); Sears, Roebuck & Co. v. San Diego Cty. Dist. of Carpenters, 436 U.S. 180, 206 n.42 (1978) ("[T]he right to organize is at the very core of the

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fair to call it the central provision which the remainder of the statute is designed to implement.[143]

From the early days of the statute, the Supreme Court has interpreted section 7 to apply not only to collective action directed toward one's immediate employer to improve conditions in the workplace, but also to collective activity seeking to improve working conditions by means of actions directed toward the judicial and legislative arenas.[144] Thus, federal courts have established that the right of collective action protected by section 7 includes the right to bring lawsuits on a collective basis.[145] Now, though, the application of section 7 to workers' efforts to secure their rights through group or collective litigation is in jeopardy. This issue is of crucial importance because, over the past two decades, more and more workers have turned to the courts to enforce their rights under federal and state employment laws, and have frequently done so on a collective basis.[146]

Since Scalia's decision in *AT&T Mobility*, employers frequently insert composite arbitration/class action waiver clauses in their employment contracts. Then, if employees attempt to bring a class action for violations of state or federal employment laws, such as for failing to pay required overtime premiums, the employer raises the arbitration clause to defeat them. In 2012, *In re D.R. Horton, Inc* , the agency that administers the NLRA – the National Labor Relations Board (the Labor Board, or the NLRB) – considered the issue of how these composite arbitration/class action waiver clauses interact with

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purpose for which the NLRA was enacted"); Div. 1287, Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Missouri, 374 U.S. 74, 82 (1963) ("Collective bargaining, with the right to strike at its core, is the essence of the federal scheme."); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945) ("[T]he right of employees to organize for mutual aid . . . is the principle of labor relations which the Board is to foster."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33-34 (1937) (holding that employees have a fundamental right to organize and section 7 of the National Labor Relations Act (NLRA) is meant to safeguard this right).

143. *See In re* D.R. Horton, Inc., 357 N.L.R.B. 2277, 2286 (2012) ("The right to engage in collective action – including collective *legal* action – is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.").

144. *See* Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66 (1978).

145. *See, e.g.*, Brady v. Nat'l Football League, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the National Labor Relations Act."); Leviton Mfg. Co. v. NLRB, 486 F.2d 686, 689 (1st Cir.1973) ("[T]he filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith.").

146. *See* Katherine V.W. Stone, *A Labor Law for the Digital Era: The Future of Labor and Employment Law in the United States*, *in* LABOR AND EMPLOYMENT LAW AND ECONOMICS 689 (Kenneth G. Dau-Schmidt et al. eds., 2d ed. 2009).

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section 7 rights.[147]

The case involved an employee of a major homebuilder, Michael Cuda, who claimed he had been misclassified as a supervisor and thus deprived of overtime and other protections of the FLSA. When Cuda began working, he was given a contract with a provision that required arbitration of all disputes relating to his employment. The arbitration clause also provided that the arbitrator "may only hear the Employee's individual claims" and "does not have authority to fashion a proceeding as a class or collective action or award relief to a group or class of employees."[148] Cuda requested to arbitrate his complaint of misclassification on a class basis, as part of a national class of current and former supervisors who alleged they had been similarly misclassified. The company refused to arbitrate on a class-wide basis. Cuda then filed an unfair labor practice charge with the NLRB alleging that the arbitration provision, which forced him to waive his right to engage in a class arbitration, was a violation of his right to engage in collective action for mutual support and protection under Section 7 of the NLRA.[149] The Labor Board agreed.

In its decision, the Labor Board held that "employees who join together to bring employment-related claims on a class-wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA."[150] It invoked the principle from *Mitsubishi* that arbitration could not be used to force parties to "forgo substantive rights afforded by a statute."[151] And it presented a detailed history of the statutory language and subsequent interpretative history to demonstrate that employees' rights to engage in collective action embodied in section 7 are substantive rights. The Labor Board concluded that in Cuda's case, "the class action waiver interfered with the workers' substantive rights under the NLRA."[152]

The NLRB's *D.R. Horton* decision was overturned by the Fifth Circuit in December, 2013.[153]

147. 357 N.L.R.B. 2277 (2012).
148. *Id.* at 2277.
149. *Id.* at 2277-78.
150. *Id.* at 2279.
151. *Id.* at 2285 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991)).
152. *Id.* at 2280.
153. D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 357-62 (5th Cir. 2013). For a thorough analysis of *D.R. Horton, Inc.*, see Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013 (2013).

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The court of appeals heavily relied on *CompuCredit* to find that there is

> "no basis on which to find that the text of the NLRA supports a congressional command to override the FAA. . . . [A]nd because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms."[154]

In its opinion, the court gave only cursory treatment of the Labor Board's no-loss-of-substantive-rights argument, stating categorically and without analysis that the use of class action procedures is not a substantive right.[155] The court concluded that the NLRB should have accommodated the NLRA to the policies of and rights created by the FAA, and it admonished the NLRB for not giving adequate weight to the policies of the FAA.[156]

In recent years, the courts of appeals have divided on the question of whether a composite arbitration/class action waiver clause in an employment contract violates the National Labor Relations Act by depriving workers of their right to engage in collective action. The Second, Fifth and Eighth Circuits have held that class waivers are enforceable and adopted the reasoning of the Fifth Circuit in its decision overturning the Board's *D.R. Horton* decision.[157] On the other side, the Seventh and Ninth Circuits have agreed with the Board and held such clauses to be in violation of section 7 of the NLRA and hence unenforceable.[158]

The Supreme Court has accepted certiorari in three cases to consider whether arbitration agreements with individual employees that ban them from pursuing work-related claims on a collective basis violate the NLRA.[159] The cases were originally scheduled for argument in the 2016-2017 term but have been deferred to the 2017-

154. *D.R. Horton, Inc.*, 737 F.3d at 360-62.

155. *Id.* at 357.

156. *Id.* at 358-62.

157. Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton, Inc.*, 737 F.3d at 344; Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc. 702 F.3d 1050 (8th Cir. 2013).

158. Morris v. Ernst & Young, Inc., 834 F.3d 975 (9th Cir. 2016); Epic Sys. Corp. v Lewis, 823 F.3d 1147 (7th Cir. 2016).

159. Epic Sys. Corp. v. Lewis, 137 S. Ct. 809 (2017). The three cases that have been consolidated for argument are: *Epic Sys.*, 823 F.3d at 1147 (holding that arbitration agreement with class action waiver is a violation of section 7 of the NLRA); *Morris*, 834 F.3d at 975 (same); and *Murphy Oil USA, Inc.*, 808 F.3d. at 1013 (holding that an employer does not violate the NLRA by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration).

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2018 term and will be argued in October, 2017.[160] Some have speculated that the delay was designed to bring the case before the Court after the ninth Justice is confirmed.[161]

In considering the three cases, the Court will have to contend with arguments that bear on the viability of the effective vindication doctrine after *Italian Colors*, the scope of separability after *Rent-A-Center*, the predominance of the FAA over another federal statute in light of *CompuCredit*, and the application of *AT&T Mobility* to the employment context. That is, all of Scalia's major contributions will be implicated. And the outcome will determine whether and the extent to which Scalia's efforts to wall off the federal courts from workers who want to assert their rights has succeeded. A closer look at one of the three cases to be argued will illustrate the long shadow that Scalia's arbitration jurisprudence will cast on the issue.

One of the three cases coming before the Court is *Epic Systems v. Lewis*.[162] In that case, Epic Systems, a health care software company, sent its employees an email in 2014 stating that if they continued to work at Epic, they would be subject to an arbitration agreement that required them take any wage-and-hour claims they might have to arbitration on an individual basis. It also provided that the employees waived "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding."[163] Subsequently one employee, a technical writer named Jacob Lewis, brought a suit alleging that he and other technical writers had been misclassified as supervisors and hence had been deprived of overtime pay to which they were entitled to under the Fair Labor Standards Act. Epic moved to dismiss on the basis of the arbitration clause, and Lewis responded that the arbitration clause violated the NLRA because it interfered with employees' right to engage in concerted activities for mutual aid and protection and was therefore unenforceable.[164] The District Court agreed with Lewis that the arbitration clause was unenforceable,[165] and the Seventh Circuit Court of Appeals, in a unanimous decision, affirmed.

160. *United States Supreme Court Delays Argument in Class Action Waiver Cases*, NAT'L L. REV. (Feb. 10, 2017), <http://www.natlawreview.com/article/united-states-supreme-court-delays-oral-argument-class-action-waiver-cases>.

161. Ross Runkel, *Delayed Arguments in Class Action Waiver Case*, ROSS RUNKEL REP. (Feb. 8, 2017), <https://www.rossrunkelreport.com/blog/delay>.

162. 823 F.3d at 1147.

163. *Id.* at 1151.

164. *Id.*

165. *Id.*

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In refusing to enforce an arbitration agreement that banned collective, class or representative actions of employees' wage and hour disputes, the Seventh Circuit in *Epic Systems* first found that the arbitration clause impinged on employees' section 7 rights.[166] Judge Wood, writing for the court, then turned to the question of whether the FAA overrides rights created by the NLRA, as might follow from the Supreme Court's decision in *CompuCredit*.[167] In considering that question, she found there to be no conflict between the FAA and the NLRA and hence no need to determine the extent to which the FAA trumps the NLRA. Rather, as Judge Wood explained:

> [T]here is no conflict between the NLRA and the FAA, let alone an irreconcilable one. As a general matter, there is "no doubt that illegal promises will not be enforced in cases controlled by the federal law." . . .The FAA incorporates that principle through its saving clause: it confirms that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Illegality is one of those grounds. . . .The NLRA prohibits the enforcement of contract provisions like Epic's, which strip away employees' rights to engage in "concerted activities." Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement. Here, the NLRA and FAA work hand in glove.[168]

Judge Wood also responded to the reasoning in the Fifth Circuit decision in *D.R. Horton* where it relied on *AT&T Mobility* and *Italian Colors* to conclude that;

> because class arbitration sacrifices arbitration's "principal advantage" of informality, "makes the process slower, more costly, and more likely to generate procedural morass than final judgment," "greatly increases risks to defendants," and "is poorly suited to the higher stakes of class litigation," the "effect of requiring class arbitration procedures is to disfavor arbitration."[169]

From that proposition, the Fifth Circuit had concluded that "any law that even incidentally burdens arbitration – here, section 7 of the NLRA – necessarily conflicts with the FAA."[170]

> Judge Wood responded to the Fifth Circuit, stating:
>
> Neither *Concepcion* nor *Italian Colors* goes so far as to say that *anything* that conceivably makes arbitration less attractive automatically conflicts with the FAA, nor does either case hold that

166. *Id.* at 1154-56.
167. *Id.* at 1156-61.
168. *Id.* at 1157 (citations omitted).
169. *Id.* (citations omitted).
170. *Id.* at 1158 (quoting D.R. Horton v. NLRB, 737 F.3d 344, 357 (5th Cir. 2013)).

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> an arbitration clause automatically precludes collective action even if it is silent on that point. . . . The FAA does not "pursue its purposes at all costs" – that is why it contains a saving clause. If these statutes are to be harmonized – and according to all the traditional rules of statutory construction, they must be – it is through the FAA's saving clause, which provides for the very situation at hand. Because the NLRA renders Epic's arbitration provision illegal, the FAA does not mandate its enforcement.[171]

Lastly, the Seventh Circuit addressed Epic Systems' argument that the right to engage in collective action in a court is a procedural right does not fall within the effective vindication doctrine. Judge Wood contended that the right to collective action in the NLRA is substantive, not procedural, so that to require arbitration would prevent the plaintiffs from vindicating their statutory rights. As she stated:

> The right to collective action in section [sic] 7 of the NLRA is not, however, merely a procedural one. It instead lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute. . . That Section 7's rights are "substantive" is plain from the structure of the NLRA: Section 7 is the NLRA's only substantive provision. Every other provision of the statute serves to enforce the rights Section 7 protects.[172]

For these reasons, the Seventh Circuit concluded that "[b]ecause it precludes employees from seeking any class, collective, or representative remedies to wage-and-hour disputes, Epic's arbitration provision violates Sections 7 and 8 of the NLRA."[173]

V. CONCLUSION

Justice Scalia's arbitration jurisprudence will converge in the Supreme Court's treatment of the consolidated cases concerning the FAA and the NLRA coming before the Supreme Court next term. The lower court cases implicate the holdings and reasoning of *CompuCredit*, *AT&T,* and *Italian Colors*. Moreover, although the cases do not directly discuss *Buck-Eye* and *Rent-a-Center*, those cases too could be in play. That is because, in applying the effective vindication doctrine as one ground for denying enforcement of an arbitration clause, the issue of separability arises. The Seventh Circuit did not address the separability doctrine in *Epic Systems*, presumably because the plaintiff was challenging the arbitration clause itself by

171. *Id*. at 1158-59.
172. *Id.* at 1160 (citations omitted).
173. *Id*. at 1161.

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claiming the clause was violative of his substantive rights under the NLRA. However, it could be possible for a court to use Scalia's reasoning in *Rent-A-Center* to find that the arbitration clause was an agreement unto itself and not a portion of a larger agreement, so that any challenge on *that* agreement would have to be determined by an arbitrator.

Thus the upcoming cases could shed light on the potential limits or potential breadth of Justice Scalia's arbitration rulings. The upcoming cases will determine whether Scalia's decisions have left some room for workers to assert their rights collectively. If the result is no, then we can conclude that Justice Scalia has successfully built a wall to keep workers and consumers out of the federal courts.

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