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# ***DIRECTV, Inc. v. Imburgia* and the Continued Ascendance of Federal Common Law: Class-Action Waivers and Mandatory Arbitration Under the Federal Arbitration Act**

Michael J. Yelnosky\*

To insiders, the critique of the Supreme Court's Federal Arbitration Act (FAA)<sup>1</sup> jurisprudence is well known. It goes something like this: when Congress passed the FAA in 1925, it was intended to be a simple procedural statute requiring federal courts to enforce arbitration agreements.<sup>2</sup> However, in the last four decades, the Supreme Court has transformed the FAA into a source of substantive federal arbitration law requiring enforcement of virtually every arbitration agreement entered into in the United States.<sup>3</sup> And the critics abound.<sup>4</sup>

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1. 9 U.S.C.A. §§ 1–16 (Westlaw through Pub. L. No. 114–244).

2. See 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, 99 (2006); Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability: David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 58 BROOK. L. REV. 279, 328 (1992).

3. See Lawrence A. Cunningham, *Rhetoric versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 L. & CONTEMP. PROBS., no. 1, 2012, at 129, 131–32.

4. See Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 730–31 (2012) (citing David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 250 (2012) (“The Supreme Court is as irretrievably lost in its arbitration jurisprudence as it has ever been in any line of cases . . .”)); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV.

Now, even outsiders know about the impact of the FAA. Last fall, *The New York Times* ran a front-page three-part series<sup>5</sup> describing how companies, by inserting arbitration and class-action waiver provisions into consumer and employment contracts, can circumvent the courts and take away one of the few tools citizens have to seek remedies for certain illegal or deceitful business practices.<sup>6</sup> One of the articles quotes The Honorable William G. Young, a federal district court judge appointed by President Reagan, as saying, “This is among the most profound shifts in our legal history . . . . [B]usiness has a good chance of opting out of the legal system altogether and misbehaving without reproach.”<sup>7</sup> Another article emphasized the ubiquity of arbitration clauses in the United States: “From birth to death, the use of arbitration has crept into nearly every corner of Americans’ lives, encompassing moments like having a baby, going to school, getting a job, buying a car, building a house and placing a parent in a nursing home.”<sup>8</sup> Recently, there have been more robust calls for FAA reform than ever before,<sup>9</sup> but the body of FAA law

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1305, 1353 (1985) (The FAA “is now definitively established as a substantive federal law, preemptive and binding on the states, and articulating a federal policy extending to issues well beyond its literal terms.”).

5. Michael Corkery & Jessica Silver-Greenberg, *When Scripture Is the Rule of Law: Companies Can Compel Arbitrations Guided by Religion*, N.Y. TIMES, Nov. 3, 2015, at A1 [hereinafter Corkery & Silver-Greenberg, *Scripture*]; Jessica Silver-Greenberg & Michael Corkery, *A Privatization of the Justice System: In Arbitration, a Bias Toward Business*, N.Y. TIMES, Nov. 2, 2015, at A1 [hereinafter Silver-Greenberg & Corkery, *Privatization*]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice: Vast Trend Locks Americans Out of Court – Rulings Greatly Favor Business*, N.Y. TIMES, Nov. 1, 2015, at A1.

6. Silver-Greenberg & Gebeloff, *supra* note 5, at A1.

7. *Id.*

8. Silver-Greenberg & Corkery, *Privatization*, *supra* note 5, at B4.

9. For example, in May 2016, the Consumer Financial Protection Bureau (CFPB) published for comment proposed rules that would (1) prohibit providers of certain consumer financial products and services from using a pre-dispute arbitration agreement to block consumer class actions in court and (2) require providers that use pre-dispute arbitration agreements to submit records relating to arbitral proceedings to the Bureau so that it may determine whether further Bureau action is necessary. Arbitration Agreements, 81 Fed. Reg. 32830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040). When the comment period ended on August 22, 2016, the CFPB had received 51,799 comments. *Arbitration Agreements*, REGULATIONS.GOV, <https://www.regulations.gov/document?D=CFPB-2016-0020-0001> (last visited Oct. 13, 2016). Moreover, on August 25, 2016, the Department of Labor issued regulations, pursuant to President Obama’s

remains largely intact.

The cause of all this fuss is the operative provision of the FAA, § 2, which provides that:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>10</sup>

Moreover, the Supreme Court has held that: (1) the FAA creates federal substantive law favoring arbitration,<sup>11</sup> and as such that law applies in both federal and state courts;<sup>12</sup> (2) arbitration agreements are enforceable even where federal statutory claims are asserted by the plaintiff;<sup>13</sup> (3) most state laws that would render arbitration agreements unenforceable are preempted by the FAA;<sup>14</sup> and (4) a class-action waiver is enforceable even if the plaintiff's cost of individually arbitrating a federal statutory claim exceeds any potential recovery.<sup>15</sup>

Additionally, state law plays an extraordinarily odd role in FAA jurisprudence. Section 2 directs courts to enforce arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>16</sup> The Supreme Court has read that provision as a reference to state law, but only state law that “govern[s] issues concerning the validity, revocability, and enforceability of contracts *generally*. A state-law principle that

Executive Order 13673, that require employers with federal contracts in excess of \$1,000,000 to offer arbitration to any employee with a claim arising under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment only *after* such disputes arise. Arbitration of Contractor Employee Claims, 81 Fed. Reg. 58562, 58644 (Aug. 25, 2016) (to be codified at 48 C.F.R. pt. 22).

10. 9 U.S.C.A. § 2 (Westlaw through Pub. L. No. 114–244).

11. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“Congress declared a national policy favoring arbitration . . .”).

12. *Id.* at 16 (“Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”).

13. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (“[S]o 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.”).

14. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

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

16. 9 U.S.C.A. § 2 (Westlaw through Pub. L. No. 114–244).

takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.”<sup>17</sup>

As I have explained elsewhere, this regime forces courts to make fine distinctions between generally applicable state contract law and state contract law that singles out arbitration provisions for suspect status.<sup>18</sup> One commentator has labeled the distinction “fundamentally incoherent.”<sup>19</sup> And, to further complicate matters, in *AT&T Mobility LLC v. Concepcion*, a 2011 case, the Supreme Court held that California’s generally applicable contract doctrine of unconscionability could not be applied to render unenforceable a class-action waiver in an arbitration agreement.<sup>20</sup> However, the Court did so not because unconscionability is a state-law doctrine that applies uniquely to arbitration, but because the Court found that class-wide arbitration “interferes with fundamental attributes of arbitration.”<sup>21</sup>

As I have also explained elsewhere, the Court’s reading of § 2 as referring to state law is *dicta*, and a better reading is that, like the rest of § 2, it authorizes the federal courts to create federal common law to govern the enforcement of covered arbitration agreements.<sup>22</sup> The final strand of FAA jurisprudence that is important to the forthcoming discussion of *DIRECTV, Inc. v. Imburgia*<sup>23</sup> is the Court’s repeated insistence that the FAA’s “primary purpose” is to ensure that private agreements to arbitrate are enforced according to their terms.<sup>24</sup> As indicated by the Court, courts and arbitrators must “give effect to the contractual rights and expectations of the parties,” and the parties’ intentions control.<sup>25</sup> Pursuant to that mandate, the Court enforced a choice-of-law provision in an arbitration agreement

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17. *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) (emphasis added) (citations omitted).

18. See Yelnosky, *supra* note 4, at 743–44.

19. David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 559 (2004).

20. 563 U.S. 333, 343 (2011).

21. *Id.* at 344.

22. Yelnosky, *supra* note 4, at 736–42, 745–58.

23. 136 S. Ct. 463 (2015).

24. *Volt Info. Sciences, Inc. v. Bd. of Tr. of Legal Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

25. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt*, 489 U.S. at 479).

that permitted the arbitrator to award punitive damages<sup>26</sup> and a provision incorporating California's arbitration procedures.<sup>27</sup> Conversely, the Court reversed an arbitration panel's conclusion that an arbitration agreement authorized class arbitration because there was no evidence that was what the contracting parties intended.<sup>28</sup>

As is apparent, the Supreme Court has been accepting and deciding cases involving the FAA with some frequency. Some, such as *American Express Co. v. Italian Colors Restaurant* in 2013<sup>29</sup> and *Concepcion* in 2011,<sup>30</sup> had a high profile.<sup>31</sup> *DIRECTV, Inc. v. Imburgia* was not one of those cases.<sup>32</sup> The plaintiffs were customers of DIRECTV who brought a class action in California state court claiming that early termination fees charged to them violated California law.<sup>33</sup> In the trial court, DIRECTV moved to send the matter to arbitration pursuant to the parties' service agreement, which provided that "any Claim either [party] asserts

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26. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57–58 (1995).

27. *Volt*, 489 U.S. at 474–76.

28. *Stolt-Nielsen*, 559 U.S. at 673.

29. 133 S. Ct. 2304, 2310–12 (2013) (holding that a class-action waiver in an arbitration agreement was enforceable in an antitrust action even where the cost for any plaintiff proceeding individually would far exceed any possible remedy).

30. 563 U.S. 333, 344 (2011) (holding that California's doctrine of unconscionability could not be applied to render unenforceable a class-action waiver in an arbitration agreement).

31. Binyamin Appelbaum, *Justices Support Corporate Arbitration*, N.Y. TIMES, June 21, 2013, at B3 (covering *Italian Colors*); Adam Liptak, *Supreme Court Allows Contracts that Prohibit Class-Action Arbitration*, N.Y. TIMES, Apr. 28, 2011, at B3 (covering *Concepcion*).

32. 136 S. Ct. 463 (2015). While there was some press coverage of the Court's decision, see Adam Liptak, *Supreme Court Rules DirectTV Customers Must Use Arbitration, Not Class Action*, N.Y. TIMES, Dec. 15, 2015, at B3, knowledgeable reporters knew that the contract provision at its heart was unusual enough to limit its reach. *Id.* Prior to the argument in the case, one commentator wrote that the biggest surprise was that the Court had scheduled the case for argument instead of summarily reversing. Ronald Mann, *Argument Preview: Justices Face Off Again with California Court Refusing To Enforce Arbitration Agreement*, SCOTUS BLOG (Oct. 2, 2015, 11:41 AM), <http://www.scotusblog.com/2015/10/argument-preview-justices-face-off-again-with-california-court-refusing-to-enforce-arbitrationagreement>. When I was asked by the editors of this *Law Review* if I wanted to write something about a case from the Court's 2015 term, I had complete confidence that DIRECTV had not already been "claimed."

33. *Imburgia*, 136 S. Ct. at 466.

will be resolved only by binding arbitration.”<sup>34</sup> That contract also had a waiver of class arbitration: “Neither [party] shall be entitled to join or consolidate claims in arbitration.”<sup>35</sup> Finally, the contract also provided that “if the ‘law of your state’ makes the waiver of class arbitration unenforceable, then the entire arbitration provision ‘is unenforceable.’”<sup>36</sup>

The trial court denied DIRECTV’s request to send the case to arbitration, and the California Court of Appeal affirmed, finding that at the time the contract was executed, the class-action waiver was unconscionable under California law, and the entire arbitration agreement was therefore unenforceable.<sup>37</sup> Although the U.S. Supreme Court in *Concepcion* ruled that California’s unconscionability doctrine was preempted by the FAA, the California Court of Appeal determined that that decision did not change the result here because the parties had simply agreed on a choice of law provision pertaining to California law before the *Concepcion* decision.<sup>38</sup> It reasoned that the contract provision was very specifically directed at class-action waivers and any ambiguity about the meaning of the provision should be construed against DIRECTV, the drafter.<sup>39</sup> The California Supreme Court declined to review the case, and the U.S. Supreme Court granted *certiorari* and reversed.<sup>40</sup>

Justice Breyer, joined by the Chief Justice and Justices Scalia, Kennedy, Alito and Kagan, began his opinion, somewhat oddly, by reminding lower court judges (especially state court judges) that federal law is supreme and that they are bound to follow *Concepcion*.<sup>41</sup> I say it is odd because he immediately acknowledged that this “elementary” point of law did not resolve the issue in the case.<sup>42</sup> The issue was not whether *Concepcion* controlled; rather, the issue was whether the parties had exercised their right to choose the law that would govern their agreement.<sup>43</sup>

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 466-67 (quoting *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 194 (Cal. Ct. App. 2014)).

38. *Id.* at 467 (quoting *Imburgia*, 170 Cal. Rptr. 3d at 198).

39. *Id.* (quoting *Imburgia*, 170 Cal. Rptr. 3d at 195).

40. *Id.* at 467-68.

41. *Id.* at 468 (citing *Howlett v. Rose*, 496 U.S. 356, 371 (1990)).

42. *Id.*

43. *See id.* at 468 (“In principle, they might choose to have portions of

Justice Breyer also acknowledged that the Court was obliged to defer to the state courts' interpretation of the contract, so the question was whether that interpretation was consistent with the FAA.<sup>44</sup>

He concluded that the California Court of Appeal's interpretation of "the law of your state" to include "invalid California law" was inconsistent with the FAA because "California courts would not interpret contracts other than arbitration contracts the same way."<sup>45</sup> The conclusion was based on the parties' failure to provide any examples of a California court interpreting a "law of your state" provision to include California laws that had been invalidated.<sup>46</sup> That same reasoning supported the majority's conclusion that "the law of your state" was not ambiguous language and therefore would not ordinarily be interpreted against the interest of the drafter.<sup>47</sup> The Court thus reversed because California's interpretation of "law of your state" did not place arbitration contracts on equal footing with all other contracts.<sup>48</sup>

Justice Ginsburg wrote a dissent that Justice Sotomayor joined.<sup>49</sup> She emphasized that both at the time the service agreement was drafted by DIRECTV and at the time the plaintiffs commenced their lawsuit, class-action waivers were *per se* unconscionable under California law, and there was no reason for plaintiffs to think the Supreme Court would hold years later in *Concepcion* that this body of law was preempted by the FAA.<sup>50</sup>

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their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including [the unconscionability doctrine] and irrespective of that rule's invalidation in *Concepcion*.”).

44. *Id.* (citing *Volt Info. Scis., Inc. v. Bd. of Tr. of Legal Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)).

45. *Id.* at 469.

46. *Id.*

47. *See id.* at 470 (“But . . . were the phrase ‘law of your state’ ambiguous, surely some court would have construed that term to incorporate state laws invalidated by, for example, federal labor law, federal pension law, or federal civil rights law. Yet, we have found no such case.”).

48. *Id.* at 471 (quoting *Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440, 443 (2006)).

49. *Id.* (Ginsburg, J., dissenting). Justice Thomas wrote his own dissent based on his long-held position that the FAA does not apply in state court proceedings. *Id.* (Thomas, J., dissenting).

50. *Id.* at 472 (Ginsburg, J., dissenting) (quoting *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 196 (Cal. Ct. App. 2014)).

Thus, the California Court of Appeal's interpretation of the "law of your state" provision did not suggest discrimination against arbitration.<sup>51</sup> Moreover, she explained, a simple class-action waiver would have sufficed for DIRECTV's purposes.<sup>52</sup> Incorporating instead the "law of your state" provision was curious, which made the phrase ambiguous.<sup>53</sup> Finally, interpreting the ambiguous phrase against the drafter was completely appropriate here, she explained, because DIRECTV was by far the more powerful party in this transaction.<sup>54</sup> She concluded that the majority demeaned the California Court of Appeal's application of traditional tools of state contract law.<sup>55</sup>

So, why did I want to write about this case? The answer, I am afraid, is somewhat self-serving. I think *Imburgia* is an example of the Court coming even closer to adopting, *sub silentio*, the approach I argued for some years ago when I suggested that § 2's savings clause does not refer to state law, but to federal common law created by the courts when interpreting and determining the enforceability of arbitration agreements covered by the FAA.<sup>56</sup>

It is already the case, notwithstanding the Court's insistence, that § 2 refers to state law, and that most of that state law is preempted by "a federal common law of arbitration contract interpretation."<sup>57</sup> But in *Imburgia*, as Justice Ginsburg points out, the Court, for the first time, "reversed a state-court decision on the ground that the state court misapplied state contract law when it determined the meaning of a term in a particular arbitration agreement."<sup>58</sup> That would be an undeniable expansion of the Court's already capacious willingness to displace state law,

51. *Id.* at 473.

52. *Id.* at 474.

53. *See id.* at 474–75 ("DIRECTV chose a different formulation, one referring to the 'law of [its customer's] state.' I would not translate that term to be synonymous with 'federal law.' If DIRECTV meant to exclude the application of California legislation, it surely chose a bizarre way to accomplish that result.").

54. *Id.* at 475.

55. *Id.* at 478.

56. Yelnosky, *supra* note 4, at 753–54; *see also* Cunningham, *supra* note 3, at 150; Stephen K. Huber, *Confusion About Class Arbitration*, 7 J. TEX. CONSUMER L. 2, 6 (2003).

57. Huber, *supra* note 56, at 6.

58. 136 S. Ct. at 473 (Ginsburg, J., dissenting). In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court came close, but there it reversed an arbitration panel's interpretation of the parties' contract to authorize class arbitration. 559 U.S. 662, 672–75 (2010).

while at the same time paying lip service to its continuing role.<sup>59</sup> And Justice Ginsburg is undoubtedly correct that after this decision, consumers “lack even the benefit of the doubt when anomalous terms in [adhesion contracts requiring arbitration] reasonably could be construed to protect their rights.”<sup>60</sup> Imre Szalai has similarly noted that the Court in *Imburgia* expanded FAA preemption to include not only state laws but state court judges’ interpretations of the language of arbitration agreements.<sup>61</sup>

The last question I want to anticipate is why I would advocate for the expansion of federal authority in this area, where such federal authority (the Supreme Court) has been so willing to leave consumers, employees, and others with claims against businesses out in the cold. The short answer is that I am not advocating for the current content of FAA law. Instead, I am arguing that an expansive role for federal law in § 2 is more consistent with the interpretation of the rest of the statute, as well as the likely understanding of the 1925 Congress; uniform law makes sense in this area; and there is nothing about federal common law that is inherently pro-business.<sup>62</sup> Indeed, in the most analogous statutory regime—Section 301 of the Labor Management Relations Act of 1947, which authorizes federal common law regulation of union-employer arbitration in the private sector—the law is not skewed in favor of employers.<sup>63</sup> There is no reason, other than the current composition of the Court, that what would emerge from a fully federalized FAA would not be an improvement on the *status quo*.<sup>64</sup>

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59. See Yelnosky, *supra* note 4, at 757–58.

60. *Imburgia*, 136 S. Ct. at 476 (Ginsburg, J., dissenting).

61. Imre Szalai, *DIRECTV v. Imburgia Turns Arbitration Law on its Head*, INDISPUTABLY (Dec. 16, 2015), <http://www.indisputably.org/?p=7902>.

62. See Yelnosky, *supra* note 4, at 748–51.

63. See *id.* at 748.

64. *Id.* at 759.