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The Need for a Detailed Procedure of Judicial Review of Civil Rights Arbitration Awards after Rent-A-Center West, Inc. v. Jackson

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Introduction

The November 17, 2010 New York Times article "Justices Are Long on Words but Short on Guidance" blasted the Supreme Court of the United States for its issuance of sweeping and politically polarized decisions, and criticized the quality of the Court's "judicial craftsmanship" by positing that "[i]n decisions on questions great and small, the Court often provides only limited or ambiguous guidance to lower courts. And it increasingly does so at enormous length." [1] The article continued that critics of the Court's work "point to reasoning that fails to provide clear guidance to lower courts," and described the Court's recent rulings as "fuzzy" and "unwieldy."[2]

In the past, the Supreme Court has been notably divided over issues such as abortion and the death penalty. But the "fuzziness" in many recent rulings is owed to an obvious ideological divide in the area of arbitration. Over the past decades, a significant number of controversial decisions have arisen from the considerable attention (and contention) the Supreme Court has given arbitration as it endeavors to counterbalance pro-arbitration rulings and assurances that **arbitration** does not erode sufficient, constitutionally proscribed judicial control.[3] However, these decisions have been largely criticized as providing, at best, a fuzzy blueprint for lower courts to design more specific rules.

Rent-A-Center v. Jackson [4] is the most controversial, ideologically split arbitration decision of the Supreme Court's recent term. The central issue arose because Rent-A-Center requires employees to sign a two-part arbitration agreement as a condition of their employment, stipulating first that all disputes arising out of the employment relationship be settled by arbitration, and second, that an arbitrator must settle all challenges to the validity of the arbitration agreement.[5] When plaintiff Jackson, a Rent-A-Center account manager, brought a **42 USC § 1981(a) / 42 USC §§. 2000(e)(2) employment discrimination claim** against the company, Rent-A-Center insisted that the claim be resolved through arbitration.[6]

Jackson argued that the arbitration agreement was unconscionable because it denied him meaningful and appropriate access to court for a satisfactory remedy in the exact way prohibited by federal statute. Rent-A-Center argued that this threshold question of whether there was a valid and fair agreement to arbitrate Jackson's employment grievance was a matter for the arbitrator under

the **Federal Arbitration Act. J**ackson asserted that because the unconscionability challenge went to both parts of the arbitration agreement, arbitrability of the agreement was a question for the court.

By a vote of five to four, the Supreme Court ruled in Rent-A-Center's favor. Led by Justice Scalia, the Court held that if Jackson had solely questioned the second part of the contract – that the agreement must be arbitrated – then the challenge would have been proper before the court. But because the employee's grounds for unconscionability applied equally to the agreement to arbitrate all employment disputes, the general question of unconscionability was no longer a "gateway issue" before the court, and was a matter for the arbitrator.[7]

Though it generated very little media attention, the majority decision in *Rent-A-Center* incited much sideline animosity. Critics of *Rent-A-Center* argued that the case is incorrectly decided and the latest, deadliest blow to consumers and employees in a trajectory of pro-arbitration rulings that are supplanting the constitutional right to court access with compulsory arbitration. Lawmakers have admonished the Court's short-sightedness, and Senate Judiciary Committee Chairman Patrick Leahy referred to *Rent-A-Center* as "a blow to our nation's civil rights laws".[8] Throughout the blogosphere, commentators described *Rent-A-Center* as "audacious," and, as Justice Stephens described in his dissent, "fantastic".[9]

In addition to the political arguments arising from *Rent-A-Center*, critics also raised concerns about procedural challenges facing professional arbitrators in light of the Court's holding. The recent case law culminating in *Rent-A-Center* has drawn criticism for its lack of guidance instructing either the courts or arbitrators about their respective roles within civil rights arbitration. Broad principles of arbitration and specific doctrines of the Supreme Court encourage but do not demand that the federal protections of civil rights statutes must be enforced in private arbitration. Though the Supreme Court gives assurance that courts may reject arbitral awards for "manifest disregard," in regards to statutory protection, the courts do not agree as to whether a showing of manifest disregard is proper grounds for vacating an arbitration award.[10]

This conundrum is disturbing, and the doctrine culminating in *Rent-A-Center* creates, at best, a blueprint for potential interpretations of arbitration agreements and judicial remedies for arbitrable disputes. The question left before the legal community is, then, whether the Supreme Court's next step will be to clarify a specific process for civil rights arbitration. Until then, the courts will likely remain divided over the issue of whether, and under what circumstances, statute-created court access can be circumvented with compulsory arbitration agreements, without violating due process of law.

This paper will explore several components underlying the *Rent-A-Center* decision and the subsequent need for clearer guidance per civil rights arbitration. First, this paper will prepare the background and context of civil rights arbitration by exploring the legislative history and statutory framework of the **Federal Arbitration Act ("FAA") and the Civil Rights Acts, particularly focusing on 42 USC §1981(a) right to recovery under Title VII of the Civil Rights Act of 1964 ("Title VII")**. Second, this paper will introduce problems of separability stemming from the Supreme Court's efforts to increase the preemptive reach of the FAA under a broad definition of interstate commerce. Finally, this paper will assert potential remedies towards ameliorating the ambiguities that culminate in the *Rent-A-Center* decision, in light of this judicial and legislative history.

I. Background and Context of Civil Rights Arbitration

A. Statutory History of 42 USC § 1981

The civil right at issue in Rent-A-Center was Jackson's right to protection against racial discrimination under 42 USC § 1981. During the Reconstruction Era, restrictive employment covenants were an acknowledged social evil used by former slave owners to deny freedmen any opportunity to exercise their rights to property and employment.[11] Recognizing the elements that impaired the emancipated slaves' ability to obtain a fair trial in former Confederate states, Congress observed that, "To say that a man is a freeman and yet is not able to assert and maintain his right in a court of justice is a negation of terms."[12]

The framers of the Civil Rights Acts had a specific legislative goal of rooting out discrimination. The Reconstruction Congress determined that the Civil Rights Acts would only have force if the statutes also created a clear mechanism of judicial enforcement, and delineated a remedy at law that would ensure all Americans the right to a fair tribunal.[13] Accordingly, this Congress created statutes providing a federal right to action as protecting against discrimination.[14]

The legislative history behind the Reconstruction Era Civil Rights Acts is not antiquated, and the Supreme Court has recognized that, "ameliorating the effects of past racial discrimination [is] a national policy objective of the highest priority.?[15]A predominant effect of the Civil Rights Acts, particularly 42 USC § 1981(a), is that federal law prohibits discrimination in employment based on race, gender, disability, and sexual orientation. In 1991, the 102nd Congress expanded the provisions of 42 USC § 1981(a) and subsequent law to provide statutory basis for arbitration and alternative dispute resolution to "the extent available by law."[16]

B. Statutory History of the Federal Arbitration Act

Formal arbitration practices can be dated to the Middle Ages, and many primary themes continue in modern arbitration: greater confidentiality, group amelioration, arbitrators with particularized commercial expertise, less formality than court proceedings, greater expedition, compromise, judgments that are final in merit, and the idea that, optimally, resolution of the dispute allows the parties to maintain favorable business relationships.

Despite this equitable premise, many difficulties hindered arbitration until the 20th century, such as difficulty in enforcing awards and judicial concern over jurisdictional ouster. In 1920, the New York State legislature enacted the first modern arbitration statute, which was followed in 1925 by enactment of the FAA and, subsequently, the advent of arbitrable statutes in most of the states.[17]Core principles of the New York statute were cloned in the FAA, particularly the idea that a pre-dispute agreement compelling arbitration is contractual, and therefore a litigant must assert a valid contract defense such as fraud, duress or unconscionability to prove the agreement is unenforceable.[18]Where a counter party to a pre-dispute agreement brings a case, a party can move to stay the court case by showing the agreement was arbitrable or, if there is general recalcitrance, move to compel arbitration.[19]

C. Common Criticisms of Modern Arbitration

These attributes of modern arbitration have been greatly criticized in the context of statutory arbitration, particularly in respect to Title VII claims.[20] In the legal discussions surrounding *Rent-A-Center*, Jackson's supporters argued that he, and similarly situated employees, did not have a choice about whether to sign the Rent-A-Center mandatory pre-dispute arbitration agreement; Jackson had no opportunity to negotiate its terms, and the failure to sign would have precluded employment.[21] Additionally, supporters argued that Jackson should not have been expected to

understand that his acceptance of the employment agreement was a waiver of his statutory right to court access.[22] Finally, supporters believed that, even in favorable arbitration circumstances, acceptance of all arbitration terms was likely to favor the employer with respect to fees, discovery, and procedures.[23] However, the Supreme Court has noted many times that these criticisms are not unique to civil rights arbitration but instead are inherent to the very nature of dispute resolution.[24]

The Court of Appeals has noted the issue of enforceability in employment contracts mandating employees' waiver of court access with respect to all employment disputes relating to discrimination.[25] The court described an arbitrator who resolves statutory claims as a "private judge," but noted that, unlike a judge, an arbitrator is not publicly accountable and the lack of public accountability may favor companies over individuals.[26] The court also acknowledged that confidentiality is won at the cost of binding precedent, which presents both a potential barrier to future plaintiffs' ability to locate necessary information as well as reduced effectiveness of binding precedence.[27] The Court of Appeals also noted that the competence of an arbitrator to analyze and decide purely legal issues in connection with statutory claims might be questioned because arbitrators do not have to be legal professionals.[28] Nonetheless, the Court of Appeals dismissed all of these criticisms by stating that the Supreme Court has decided that, as a general rule, employment discrimination claims are fully subject to binding arbitration.[29]

The Supreme Court and Court of Appeals' dismissal of these critical issues does little to assuage the valid concerns raised regarding civil rights' arbitration.[30] Particularly in light of the legislative history substantiating 42 USC § 1981, the Court of Appeals' deference, without meaningful underlying analysis behind its decision, is demonstrative of the enormous lack of guidance criticized by the New York Times.

II. The Preemptive Reach of the Federal Arbitration Act

A. Basic Principles of Federal Preemption in Arbitration

The FAA is something of an anomaly in the field of federal-court jurisdiction.[31] The FAA does not vest exclusive subject matter jurisdiction in the federal courts though it creates the body of federal substantive law establishing and regulating arbitration.[32] Unless there is either a federal question or complete diversity, it is up to the state courts to apply the FAA and the federal case law standards for its implementation in any cases involving interstate commerce.[33]

Some, including some Supreme Court Justices, take this to mean that the congressional intent was that the FAA should only apply in federal court as a federal remedy.[34] The disagreement between jurists of the correct application of the FAA is, at least, indicative of the lack of clarity in the congressional intention behind the Act. The FAA says that it applies to all matters involving "interstate commerce."[35] However, interstate commerce of 1925 was a restricted concept, to the point that a business' involvement in interstate activity did not create sufficient minimum contact to assert jurisdiction over it.[36] Therefore, it is questionable whether this statutory language should be imposed upon by a modern definition of interstate commerce.

B. Federal Preemption of the FAA and Substantive Law Under Erie

Additionally, the Supreme Court did not distinguish substantive diversity of state versus federal law until *Erie v. Tompkins* in 1938.[37] Under *Erie*, state contract law is applied to interpret the substantive meaning of the arbitration agreement.[38] Within the context of preemption – under which

interstate commerce is broadly sweeping, without regard to its substantial impact – the Court has construed the FAA as broadly as the constitutional limit.[39] Under the constitutional provisions of the Supremacy Clause, the Supreme Court has held that state courts and legislatures cannot enact statutes restricting arbitration.[40] Likewise, states cannot ease the federal presumption of arbitrability.[41]

C. Restrictions to Separability

This imposition of preemption may be the most problematic because of its restrictions to common law contract defenses. In his dissent to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, Justice Black described the Court's holding that the preemptive reach of the FAA compels a counter party to carry out his agreement to arbitrate even though the a court might find the agreement void because of fraud as "fantastic."[42] Justice Black continued in his dissent that he was unconvinced that a broad preemptive application of the FAA is not a denial of a person's rights to due process of law.[43]

Under contract law,undue influence, fraud, and unconscionability are remedies available to parties attempting to rescind a contractual clauses. Contract defenses may be ruled on separately or prior to arbitration. This makes sense because, as Justice Stevens suggested, there is no need to arbitrate an unenforceable agreement.[44] In *Rent-A-Center*, plaintiff Jackson presented a well-pleaded case of unconscionability, relying on the separability of contract and arbitration.[45] However, the Supreme Court's decision in *Rent-A-Center*, that a defense of unconscionability should be heard by the arbitrator, entirely undermines the presumed separability of the arbitrable matter and the arbitration agreement.[46]

This ruling is unwieldy, at best. It does not make sense to compel arbitration of the validity of an arbitration agreement when a party claims to have contractual defenses to that arbitration agreement.[47] Nevertheless, the *Rent-A-Center* decision approves this conceptual change to separability. In light of the legislative intent of the FAA and Title VII, any denial of court access resulting from this faulty logic must be considered a lack of due process.[48]

III. Judicial Review of Arbitration Awards Post-*Rent-A-Center*

A. Lack of Guidance on Judicial Review of Civil Rights Arbitration

Jackson's argument in *Rent-A-Center* was that the making of the arbitration agreement was unconscionable, and therefore required the court to make a determination of the agreement's legality before compelling any arbitrable review of the dispute.[49] However, as illustrated in the previous sections, even those legal minds most versed in the FAA are unable to agree whether compulsory arbitration of employment discrimination suits can be forced on employees. The Court's ruling in *Rent-A-Center* dramatically affects the ability of employees to challenge the enforceability of arbitration agreements, because it sends valid challenges to arbitration to the arbitrator.[50]

However, the *Rent-A-Center* decision provides little guidance on judicial review of contractual defenses to arbitration. The decision does not consider the obvious question that arises from its holding: in light of this decision, has the scope of review of arbitration awards changed such that the arbitrator's determination of whether to arbitrate is a valid ground for judicial review?

The *Rent-A-Center* decision is premised on the assumption that an arbitrator's ruling on unconscionability is still subject to post-award review under the FAA.[51] In fact, Justice Scalia was

insistent that an arbitrator would not be able to disregard the law when determining whether an arbitration agreement is unconscionable.[52] However, the *Rent-A-Center* decision does not provide any guidance on the procedure of this scope of review.

B. The Doctrine of Manifest Disregard

Justice Scalia's insistence that an arbitrator may not disregard the law hints at the doctrine of manifest disregard, and the validity of its application to the scope of review. The Supreme Court has ruled that, so long as the litigant may vindicate his or her statutory claim in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.[53] However, actual judicial review of arbitration awards is strictly limited under section 10 of the FAA.[54] The award may be vacated only if the proceeding was tainted with corruption, misconduct or bias; if the arbitrator exceeded his or her authority; or if the arbitrator acted in "manifest disregard of the law."[55]

Generally, manifest disregard means that the arbitrator knew the applicable law but purposefully chose to ignore it or refused to apply it.[56] Since the inception of the doctrine, there has been a great expansion of the arbitrator's authority over disputes.[57] This expansion of power has been so broad that, under applicable arbitration rules, the arbitrator himself may not correct his award after release for substantive deficiencies.[58] Because judicial review of arbitration awards is rare, it seems a convincing argument that manifest disregard applies in circumstances where arbitrators have exceeded their powers.[59] However, the doctrine is also contested because the language of section 10 does not specifically refer to manifest disregard as an independent ground for vacating arbitration awards.[60]

A good deal of confusion around the extent of the arbitrator's power and the applicability of manifest disregard is owed to the lack of guidance provided by recent Supreme Court decisions. Prior to *Rent-A-Center*, the Supreme Court held in *Hall Street Assocs., LLC v. Mattel, Inc.* that the statutory grounds for judicial review under section 10 are exclusive. This ruling indicated that manifest disregard was not valid grounds for review.[61] Shortly after the *Hall Street* decision, the court concluded, in dictum, that if an arbitration panel exceeds its powers, the courts are authorized by section 10(b) of the FAA to either direct a rehearing or review the question *de novo*.[62] The federal circuit courts have been diametrically opposed in their rulings, as they struggle to interpret the meaning of these conflicting Supreme Court writings.[63]

C. Post-Award Judicial Review after Rent-A-Center

Historically, courts have been reluctant to even review arbitration awards, let alone vacate or demand rehearing. However, *Rent-A-Center* may be an opportunity for a new post-award standard of review.

Consider the following: An arbitration panel is selected to hear an employment discrimination dispute. Though the panel members are all industry experts and well versed in employment discrimination issues, they are not lawyers. The employee asserts that not only have her Title VII rights been violated, but also that the arbitration agreement is invalid because it was fraudulently induced. In its misunderstanding of applicable contract law, the panel misinterprets the employee's claim and decides that the arbitration agreement is enforceable. The panel proceeds with arbitration.

This example illustrates a potential conflict arising from the Supreme Court's *Rent-A-Center* and *Hall Street* decisions. Does the arbitrators' incorrect determination manifest purposeful disregard of the law? Although section 10 of the FAA does not allow a court to set aside an award for an error of law per se, an argument could be made that, in such a case as the previous scenario, the arbitrator

exceeded his or her powers under section 10(a)(4) by acting on an unfamiliar area of law. However, there is no precedent on how the court should proceed to review such a situation. As the Supreme Court continues to expand the scope of post-award judicial review, more guidance and clearer judicial intent will be required to direct both arbitrators and the courts.

Professional mediator and former Columbia University Negotiation and Conflict Resolution faculty member, Bathabile Mthombeni, vehemently agrees that the Supreme Court must put forth specific rules relating to civil rights arbitration claims. Professor Mthombeni is an enthusiastic supporter of mediation, including employment and statutory mediation. However, her wariness of compulsory arbitration has increased over the years in tandem with Supreme Court pro-arbitration rulings.

> “I am very concerned about the way that *Rent-A-Center* was decided because of the impact this has on access to the courts - especially by people who are likely the most vulnerable,” Professor Mthombeni stated. “Do potential employees really have a choice? [In the future, will] this mean that an employee cannot file with the EEOC? And, as the dissent in *Rent-A-Center* points out, how are the lawyers arguing these cases supposed to anticipate how thinly they must slice their arguments as to the seperability of various portions of the agreement to arbitrate?”

Professor Mthombeni’s concern about the *Rent-A-Center* case’s impact on employees and consumers is based in her extensive knowledge of both dispute resolution and civil rights statutes. She suggests that arbitrators should be held to the same standards of evidential and procedural rules that would pertain in court. “The framers of [42 U.S.C. § 1981(a)] did not anticipate those claims being investigated or decided in arbitration. My recollection of 1981 legislation is that it is especially articulated in order to allow individuals to act as attorneys general, recognizing the particular interest that society has in rooting out civil rights violations.

> “It does not seem that arbitration is a forum that champions this end. I am at least concerned about the lack of protections afforded to litigants in arbitration – in particular... the rules of evidence and civil procedure not being strictly adhered to.”

Professor Mthombeni suggests that not only should post-judicial review standards be more defined but also that the Supreme Court should parallel its rulings with evidential and procedural rules of arbitration. “Some might argue that the rules of evidence and civil procedure are themselves flawed. But at least they are part of a commonly understood scheme that has evolved and been tested over several hundred years that puts everyone on level ground - so long as they all understand the rules.”

Conclusion

In their best light, the Supreme Court’s pro-arbitration rulings can be dense and confusing. The Court has upheld the validity of mandatory compulsory arbitration agreements that waive an employee’s right to court access as predicated by Title VII. The Court has held that this negation of the legislative intent of Title VII is still fair, so long as arbitration provides the same statutory remedy as the court system. The Supreme Court has previously held that, because arbitration agreements are separable

contractually, a party may seek judicial review of defenses to the arbitration agreement.

However, the Supreme Court has now ruled in *Rent-A-Center* that the entire arbitration agreement, even the contractual defenses, may be removed to the arbitrator, for a determination of whether the agreement to arbitrate is valid. This ruling is not only a confusing departure, but also requires the Supreme Court to go further with an explanation of the scope of review for civil rights arbitration.

The *Rent-A-Center* opinion holds that judicial review of challenges to civil rights arbitration agreements is still available under the FAA, but does not address how this review should happen. Without guidance and procedure for post-award review, and without guidance of whether manifest disregard is applicable under the FAA, the criticism of the Supreme Court's pro-arbitration rulings as "sweeping", "politically polarized," and "fuzzy" will likely continue.

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[1]Liptak, Adam. "Justices Are Long on Words but Short on Guidance." *The New York Times Online*. 17 November 2010, *available at* http://www.nytimes.com/2010/11/18/us/18rulings.html?pagewanted=1&_r=1.

[2]*Id.*

[3]*See Halligan v. Piper Jaffray, Inc.,* 148 F.3d 197, 200-01 (2d. Cir. 1998).

[4]*Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010).

[5]*Id.*

[6]*Id.*

[7]*See id*.

[8]Marks, Clifford M. “Supreme Court’s Arbitration Ruling Draws Liberal’s Ire.” *The Wall Street Journal Blogs*. 21 June 2010, *available at* http://blogs.wsj.com/law/2010/06/21/supreme-courts-arbitration-ruling-draws-liberals-ire/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+wsj/law/feed+%28WSJ.com:+Law+Blog%29.

[9]Lithwick, Dahlia. “Justice by the Hour.” *Slate.com*. 26 April 2010. Accessed 10 November 2010. http://www.slate.com/id/2252001/pagenum/all/#p2.

[10]*See Coffee Beanery, Ltd. v. WW, L.L.C.,* 300 F.3d 415 (6th. Cir. 2008) (holding that manifest disregard is an applicable standard of review). *But see Citigroup Global Markets, Inc. v. Bacon,* 562 F.3d 349(5th Cir. 2009) (holding that manifest disregard is not an applicable standard of review.)

[11]A common antebellum holding, reflecting Justice Taney’s decision in *Dred Scott*,was that freedmen did not have the right to exercise the same civil rights as white men. *See e.g., Howard v. Howard,* 51 N.C. 235 (1858).

[12]Cong. Globe, 39th Cong., 1st Sess. 41 (1866). *See generally* Report of the Joint Committee on Reconstruction Pt. II, 240 (1866).

[13]*See, e.g.,* Cong. Globe, 39th Cong., 1st Sess.1758 (1866) (statement of Sen. Trumbull).

[14]42 U.S.C. § 1981(a).

[15]*Franks v. Bowman Transp. Co*., 424 U.S. 747, 779 (1976).

[16]Pub. L. 102-166, Title I §118. There has been consistent disagreement between the circuit courts whether this statutory language refers to the extent defined by *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (holding that an agreement to arbitrate employment claims could be binding even under the ADEA), versus *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (holding that an employee's suit under Title VII of the Civil Rights Act of 1964 is not foreclosed by the prior submission of his claim to arbitration).

[17]N.Y. C.P.L.R. § 7501.

[18]9 U.S.C. § 1-16.

[19]9 U.S.C. § 4.

[20]*Halligan v. Piper Jaffray, Inc.,* 148 F.3d 197, 203 (2d. Cir. 1998).

[21]Brief of Amicus Curiae Service Employees International Union, Legal Aid Society, Employment

Law Center, National Employment Lawyers Association, National Employment Law Project, Women's Employment Rights Clinic, and The Employee Rights Advocacy Institute for Law & Policy in Support of Respondent. Part I, p. 6.

[22]*Id.*

[23]*Id.*

[24]*Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 481 (1989).

[25]*Cole v. Burns Int'l Sec. Servs*., 105 F.3d 1465, 1476 (D.C. Cir. 1997).

[26]*Id.* at 1477.

[27]*Id.*

[28]*Id.*

[29]*Id.* at 1478, *see also Gilmer*, 500 U.S. 26, 34-35.

[30]*Id.*

[31]*Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 26.

[32]*Id*.

[33]*Id*.

[34]*Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (J. Stevens dissenting).

[35]*The Citizens Bank v. Alafabco, Inc.,* 539 US 52, 53 (2003).

[36]*Gilmer*,500 U.S. at 39-40 (J. Stevens dissenting).

[37]*See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)

[38]*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271 (1995). “The Act’s provisions (about contract remedies) are important and often outcome determinative, and thus amount to “substantive”, not “procedural” provisions of law.”

[39]*Id.*

[40]*Id.*

[41]*Prima Paint Corp. v. Flood & Conklin Mfg. Co.,*388 U.S. 395, 400.

[42]*Id.*at 407 (J. Black dissenting).

[43]*Id*.

[44]*Id.*

[45]*Id*. As a matter of substantive federal law, a claim of fraud in the inducement of a contract containing an arbitration clause is for the arbitrator, but the issue of fraud in the inducement for the

arbitration clause itself is a question for the court. *Id.*

[46]*Id.*

[47]130 S. Ct. at 2782 (J. Stevens dissenting).

[48]*Gilmer*,500 U.S. at 39-40 (J. Stevens dissenting).

[49]Brief of Amicus Curiae The American Federation of Labor and Congress of Industrial Organizations in Support of Respondent. Part I, p. 5-9.

[50]130 S. Ct. at 2782 (J. Stevens dissenting).

[51]9 U.S.C. § 10.

[52]130 S. Ct. at 2781.

[53]*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985).

[54]*Halligan v. Piper Jaffray, Inc.,* 148 F.3d 197, 202 (2d. Cir. 1998).

[55]Merrill Lynch v. Jaros, 70 F.3d 418, 421 (6th. Cir. 1995).

[56]*Halligan*, 148 F.3d at 202.

[57]The concept of manifest disregard was first used by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427 (1953).

[58]A.A.A., Rule R-46.

[59]*Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.,* 548 F.3d 85, 95 (2d. Cir.

2008), *rev'd on other grounds,* 130 S. Ct. 1758 (2010).

[60]9 U.S.C. § 10.

[61]*Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 579, 589 (2008). "[T]he statutory text gives us

no business to expand the statutory grounds [of judicial review under the FAA].” *Id.*

[62]*Stolt-Nielsen, S.A.*,130 S. Ct. at 1772.

[63]*Supra* note 10.

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