

Error Correction and the Supreme Court's Arbitration Docket

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Supreme Court Justices from William Taft to Stephen Breyer have repeated the maxim that the “Supreme Court is not a court of error correction.” When it comes to arbitration law, however, a number of the Court’s cases do little more than correct errors by lower courts. So why has error correction played such a significant role in the Court’s arbitration docket? One important factor is ongoing resistance to the Court’s arbitration decisions in the lower courts, to which a number of the Court’s error correcting decisions are a direct response. Another is that cases involving standards rather than rules necessarily require fact-based determinations, and the nature of the Court’s case selection process can result in the Court reviewing cases with one-sided facts that make little law. But, in addition, the generalist legal background of Supreme Court Justices (and their law clerks) leads them to overlook important nuances in the facts of arbitration cases before the Court on certiorari. These nuances give rise to several simple steps the Court could take to avoid some of its more limited decisions, including: (1) reviewing state court cases only when the issue presented does not also arise in cases in federal courts; (2) avoiding cases arising out of post-dispute arbitration agreements; and (3) choosing cases with typical arbitration clauses, not atypical ones.

Supreme Court Justices from William Taft through Stephen Breyer have repeated the maxim that “[t]he United States Supreme Court is not a court of error correction.”¹ What they mean is that “[t]he function of the Supreme Court is conceived to be, not the remedying of a particular litigant’s wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest.”² Indeed, a common basis for arguing against the Court’s grant of certiorari is that the

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¹ Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006); see William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925).

² Taft, *supra* note 1, at 2.

case should not be reviewed because it is “factbound”—i.e., dependent on the application of settled law to the particular facts of the case and not likely to result in a decision of widespread importance.³

When it comes to arbitration law,⁴ however, a number of the Court’s cases turn out to be narrow decisions that do little more than correct errors by lower courts.⁵ The relatively large number of summary reversals in arbitration cases is the clearest illustration.⁶ In addition, however, a number of other Supreme Court arbitration cases in recent years have involved highly fact-specific decisions that either might have had, or in fact did have, little effect beyond the case itself. And some decisions that did have broader effect were actually—according to subsequent Supreme Court decisions—based on unusual facts and should not have been applied so broadly. Of course, not all arbitration cases have such limited reach. Some, such as *AT&T Mobility LLC v. Concepcion*, have been applied widely by the lower courts.⁷ But even *Concepcion* could have been limited to its facts—and some courts (albeit only a very small minority) in fact did so.⁸

So why has error correction played such a significant role in the Court’s arbitration docket? Certainly an important factor is ongoing resistance to the

³ See *infra* text accompanying notes 28–31.

⁴ This article focuses on cases decided under the Federal Arbitration Act rather than cases involving arbitration between labor unions and management.

⁵ For one definition of error correction, see Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 278–79 (2006) (“Error correction implies reversing lower court judgments simply because they are wrong. It implies supervising the outcomes of individual cases to ensure that the lower courts are always stating and applying the law correctly.”).

⁶ See *infra* text accompanying notes 39–48.

⁷ PUBLIC CITIZEN & NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, JUSTICE DENIED: ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT’S CONCEPCION DECISION ARE PLAINLY EVIDENT 4 (2012), available at <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf> (“identif[y]ing] Seventy-six potential class action cases where judges cited *Concepcion* and held that class action bans within arbitration clauses were enforceable.”).

⁸ E.g., *Feeney v. Dell Inc.*, 28 Mass. L. Rptr. 652, at *10 (Mass. Super. Oct. 4, 2011) (distinguishing *Concepcion* on ground that unlike the AT&T Mobility clause, “[t]he Dell Arbitration Clause provides no incentives and simply requires arbitration of all disputes, even those that could not possibly justify the expense in light of the amount in controversy”), *rev’d on other grounds*, 993 N.E.2d 329 (Mass. 2013); *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528, 536 & n.4 (S.D.N.Y. 2012) (distinguishing *Concepcion* on the ground the Court there “emphasized in detail the provisions in that arbitration agreement that benefitted plaintiffs and that ensured that the *Concepcions* would be able to find redress for their claims”), *rev’d*, 726 F.3d 290 (2d Cir. 2013).

Court's arbitration decisions in the lower courts. In the face of such resistance, the Court may give greater weight to correcting lower courts that refuse to follow its decisions. In addition, cases involving standards rather than rules necessarily require fact-based determinations, and the nature of the Court's case selection process can result in the Court reviewing cases with one-sided facts that end up making little law.

But in addition, another factor is the generalist legal background of Supreme Court Justices (and their law clerks), which leads them to overlook important nuances in the facts of arbitration cases on certiorari. These nuances give rise to several suggestions that might avoid some of the Court's more limited or problematic decisions, including: (1) reviewing state court cases only when the issue presented does not also arise in cases in federal courts; (2) avoiding cases arising out of post-dispute arbitration agreements; and (3) choosing cases with typical arbitration clauses, not atypical ones.

I want to emphasize several caveats to my argument: first, I am not suggesting that all or even most Supreme Court arbitration cases involve only error correction. Instead, my argument is simply that a surprising—to me, at least—number of its arbitration cases can be so viewed. Second, the sample of Supreme Court arbitration cases is a small one, such that the cases I am considering may be random anomalies rather than reflecting systematic patterns. Third, the Court takes cases as presented to it by the parties,⁹ so some of what I observe results from case selection by parties rather than the Court. Finally, arbitration law is by no means the only field in which commentators have noted a significant degree of error correction in the Court's cases.¹⁰ To be clear, I am not suggesting that arbitration law is unique in this regard.¹¹

⁹ See Maxwell Mak et al., *Is Certiorari Contingent on Litigant Behavior? Petitioners' Role in Strategic Auditing*, 10 J. EMP. LEGAL STUD. 54, 55 (2013) (“[W]e show that the decision to grant [certiorari] . . . is conditional on the choices litigants make in deciding to petition for review.”).

¹⁰ E.g., Douglas A. Berman, *Initial Reflections on an Error-Correction SCOTUS Term*, SENTENCING LAW & POL'Y BLOG (June 30, 2006), http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/initial_reflect.html (citing “the reality that the Roberts Court assumed an ‘error-correction’ role in its approach to criminal justice matters. Notably, this term the Court had a large number of *per curiam* reversals in criminal cases, and even many decisions rendered after full argument were often focused principally on making sure lower courts understood what they did wrong.”).

¹¹ Indeed, to do so I would need to compare arbitration cases to other types of cases decided by the Court, which I do not do in this article.

My argument here is related to, but distinct from, the theory of “oddball” or “atypical” cases proposed by Suja Thomas.¹² Thomas argues that the Supreme Court “should not make legal change motivated by atypical or oddball facts when the change will affect typical cases.”¹³ Rick Bales and Mark Gerano have applied the concept to arbitration cases, citing *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant* as examples of “oddball” cases.¹⁴ Like Thomas and Bales, I highlight the atypical, unusual facts of some recent Supreme Court cases. And I readily recognize that not all cases with atypical facts are applied narrowly (although I question whether decisions like *Concepcion* are “motivated” by the atypical facts of the case as Bales and Gerano suggest). But my emphasis here differs from theirs because I focus on atypical cases that tend to be “easy” rather than “hard,” and thus have little impact beyond their facts.

My approach also differs from theirs in that it is largely a positive one rather than a normative one. I am not evaluating whether the Court’s approach to selecting arbitration cases is the proper one, or whether the outcomes of the cases that result are good or bad. Instead, the question I address here is whether the Court is doing what it says it is doing, and if not, why not (although I do offer some suggestions for how the Court might correct some of the occasional mistakes I think it has made in selecting cases).

Part I of this article provides an overview of the Supreme Court and error correction. Part II analyzes error correction in the Supreme Court’s arbitration cases. Part III then identifies possible explanations for the frequency of error correction in the Supreme Court’s arbitration docket.

¹² Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law* (See, e.g., *The Lack of Judicial Restraint in Twombly, Wal-Mart, and Ricci*), 48 WAKE FOREST L. REV. (forthcoming 2013). My argument here is also distinct from Cass Sunstein’s theory of judicial minimalism, although not necessarily inconsistent with it. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10 (1999) (explaining that “the practice of minimalism involves two principle features, narrowness and shallowness”). A decision that only corrects lower court errors would likely be a “narrow” decision—it decides the case rather than establishing a broad rule—and a “shallow” one—it “avoid[s] issues of basic principal”—as Sunstein uses the terms. *Id.* at 17–18.

¹³ Thomas, *supra* note 12 (manuscript at 5).

¹⁴ Richard A. Bales & Mark B. Gerano, *Oddball Arbitration*, 30 HOFSTRA LAB. & EMP. L.J. (forthcoming 2013) (manuscript at 18–32) (citing *14 Penn Plaza v. Pyett*, a labor arbitration case, as another example).

I. ERROR CORRECTION BY THE SUPREME COURT

At the urging of Chief Justice Taft, and to reduce a large backlog of cases in the Supreme Court, Congress in 1925 enacted the so-called “Judges’ Bill,”¹⁵ which gave the Court substantial control over its docket.¹⁶ The United States Courts of Appeals had been created thirty some years previously,¹⁷ and so an important argument in favor of the Judges’ Bill was that the Supreme Court was no longer needed for error correction. The Courts of Appeals played that role, permitting the Supreme Court to focus on issues of concern beyond the parties to the case. As Chief Justice Taft explained in his testimony in support of the bill:

No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court’s function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.¹⁸

In law review commentary on the bill once passed, Taft wrote: “[t]he function of the Supreme Court is conceived to be, not the remedying of a particular litigant’s wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest.”¹⁹ In other words, after enactment of the Judges’ Bill, error correction was no longer a central function of the Supreme Court.

¹⁵ Act of Feb. 13, 1925, ch. 229, 43 Stat. 936. The bill was called the “Judges’ Bill” because it had been drafted by Supreme Court Justices McReynolds, Van Devanter, and Sutherland. See Justice William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 8 (1986).

¹⁶ For a detailed discussion of the history of the Judges’ Bill, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1660–704 (2000).

¹⁷ *Id.* at 1650.

¹⁸ Hearings on H.R. 10479 before the House Comm. on the Judiciary, 67th Cong., 2d Sess. 2 (Mar. 30, 1922) (statement of Chief Justice Taft).

¹⁹ Taft, *supra* note 1, at 2; see also *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Taft, C.J.) (“The jurisdiction [to review decisions of the Courts of Appeals] was

Since Chief Justice Taft, numerous other Justices have reiterated the same point: that the Court is not in the business of error correction.²⁰ Rather, the Court seeks to decide legal issues of broad public importance:

- Chief Justice Vinson: “The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.”²¹

- Justice Harlan: “The fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari. Nor, for that matter, is the fact that a case may have been rightly decided in itself enough to preclude certiorari.”²²

- Chief Justice Rehnquist: “Rather than serving as an appellate court that simply attempts to correct errors in cases involving no generally important principle of law, the Court instead tries to pick those cases involving unsettled questions of federal constitutional or statutory law of general interest.”²³

- Justice Breyer: “The United States Supreme Court is not a court of error correction.”²⁴

- Justice Scalia: “[I]t’s not the job of the Supreme Court of the United States to correct the states . . . Error correction—unless it’s a capital case—is not what we do.”²⁵

not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.”).

²⁰ *But see* Justice Sonia Sotomayor, *Justice John Paul Stevens: Teaching by Example*, 44 LOYOLA L.A. L. REV. 819 (2011) (“It is often said that the U.S. Supreme Court is not a court of error correction. But that is not entirely true, and Justice Stevens had a particular instinct for identifying those errors that warranted further review even absent a circuit split, a large amount in controversy, or the involvement of a public figure.”).

²¹ Chief Justice Frederick M. Vinson, *Work of the Federal Courts*, Address Before the American Bar Association (Sept. 7, 1949), in 69 S. Ct. v, vi (1949).

²² JOHN M. HARLAN, MANNING THE DIKES: SOME COMMENTS ON THE STATUTORY CERTIORARI JURISDICTION AND JURISDICTIONAL STATEMENT PRACTICE OF THE SUPREME COURT OF THE UNITED STATES 18 (1958).

²³ Chief Justice William H. Rehnquist, Lecture at the Faculty of Law of the University of Guanajuato, Mexico (Sept. 27, 2001) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/sp_09-27-01.html).

²⁴ Breyer, *supra* note 1, at 92.

²⁵ *U.S. Supreme Court Justice Antonin Scalia Addresses ABA Midyear Meeting in New Orleans*, ABANow (Feb. 4, 2012) (quoting Supreme Court Justice Antonin Scalia), available at http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/u_s_supreme_courtj.html/.

The principle is also reflected in the Supreme Court’s Rules of Procedure. Rule 10 describes a number of “compelling reasons” for granting certiorari; error correction is not among them.²⁶ To the contrary, the rule expressly states that “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”²⁷

As such, a common ground for arguing against the grant of certiorari is that the case is “factbound”—i.e., that it involves the application of settled law to the (possibly unusual) facts of the case.²⁸ One recent (and ultimately unsuccessful) example of such an argument is the Solicitor General’s brief in *BG Group PLC v. Republic of Argentina*.²⁹ The issue in *BG Group* is whether a court or the arbitrator decides if a pre-condition to arbitration—in that case, whether a litigation requirement imposed by the applicable bilateral investment treaty—has been met. The SG recommended against cert, arguing that the decision turned on application of settled law to the unusual factual setting of the case:

The court’s case-specific conclusions do not conflict with any decision of this Court or another court of appeals. The decision is unlikely to have any significant impact beyond this case because the Treaty’s litigation requirement does not have analogues in any modern treaties or other investment agreements to which the United States is a party, and it appears to be uncommon in international treaty practice. For similar reasons, this case would also be an unsuitable vehicle for establishing general principles governing the interpretation of more typical international or domestic arbitration agreements. Further review is not warranted.³⁰

²⁶ Sup. Ct. R. 10; see EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 351 (9th ed. 2007).

²⁷ Sup. Ct. R. 10.

²⁸ Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 *ARIZ. L. REV.* 933, 941 (2009) (“Cases in which a party is asking the Court to review a lower court’s application of specific facts to a settled legal principle are ‘factbound.’”); see *Cavazos v. Smith*, 132 S. Ct. 2, 12 (2011) (Ginsburg, J., dissenting) (quoting *Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting)) (“In sum, this is a notably fact-bound case in which the Court of Appeals unquestionably stated the correct rule of law. It is thus ‘the type of case in which we are most inclined to deny certiorari.’”).

²⁹ Brief for the United States as Amicus Curiae at 10, *BG Group PLC v. Republic of Argentina*, 133 S. Ct. 2795 (2013) (No. 12-138).

³⁰ *Id.* at 8–9.

The Court ultimately granted certiorari in the case, declining to follow the Solicitor General's recommendation.³¹ My point here is not that the Court should have followed the SG's recommendation, but rather to illustrate how parties oppose review by the Court on the ground that any decision by the Court will not establish a general principle of law—that is, will be no more than error correction. Of course, in those cases in which the Supreme Court reverses the judgment under review it necessarily is correcting an error by the lower court. And the fact that the Court reverses in the substantial majority of cases it decides (reversing in 68.2% of cases decided after argument during the last three terms³²) suggests that error correction does in fact play a role in the Court's decision making: when resolving legal issues of broad importance it also corrects errors.³³ In such cases, error correction is a by-product of resolving the legal issues (perhaps even a by-product sought by the Justices). But it is not the purpose for the Court's review of the case. As the leading Supreme Court commentary states: “[e]rror correction . . . is outside the mainstream of the Court's functions.”³⁴

II. ERROR CORRECTION IN SUPREME COURT ARBITRATION CASES

Despite the Justices' repeated statements that the Court is not in the business of correcting lower court errors, its arbitration docket nonetheless reflects a significant degree of error correction. A recent rash of summary

³¹ BG Group PLC v. Republic of Argentina, 133 S. Ct. 2795 (2013).

³² From O.T. 2010 through O.T. 2012, the Court reversed in 161 of 236 cases, or 68.2% of the time. See *Stat Pack for October Term 2012*, SCOTUSBLOG.COM (June 27, 2013), http://www.scotusblog.com/wp-content/uploads/2013/06/SCOTUSblog_Stat_Pack_OT12.pdf (reversing in 56 of 78 cases); *Stat Pack for October Term 2011*, SCOTUSBLOG.COM (Sept. 25, 2012), http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/SCOTUSblog_Stat_Pack_OT11_Updated1.pdf (reversing in 48 of 76 cases); *Stat Pack for October Term 2010*, SCOTUSBLOG.COM (June 28, 2011), http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf (reversing in 57 of 82 cases).

³³ GRESSMAN ET AL., *supra* note 26, at 239 (“In the context of such a nationally important case, perceived ‘error’ in the lower court’s resolution of an important issue does indeed become relevant for certiorari purposes.”). Indeed, if error correction were irrelevant to the Court, one might expect that it would affirm and reverse in roughly equal proportions (subject to selection bias issues). See Nancy C. Staudt, *Agenda Setting in Supreme Court Tax Cases: Lessons from the Blackmun Papers*, 52 BUFF. L. REV. 889, 905 (2004) (“[T]he fact that a statistically significant correlation exists between the Justices’ decision to grant certiorari and their decision to reverse on the merits, suggests the Court is far more result oriented than many scholars seem to believe.”).

³⁴ GRESSMAN ET AL., *supra* note 26, at 351.

reversals in arbitration cases provides a clear illustration. In addition, several of its arbitration cases have been largely limited to their facts or else were initially applied broadly only to be reined in by later decisions of the Court. And even some of the more controversial recent arbitration decisions might have been limited to their facts, although only few courts have done so.

I do not claim that all or even most of the Supreme Court's arbitration docket amounts only to error correction. Such a claim would be overbroad. Nor do I contend that the Supreme Court is more likely to engage in error correction in arbitration cases than in the rest of its docket. To make such a claim would require comparing the frequency of error correction in arbitration cases to the frequency of error correction in other cases, which I have not sought to do. Indeed, commentators have noticed a significant degree of error correction in the Court's habeas and criminal docket, suggesting arbitration cases are not unique.³⁵ Instead, my point is narrower: that a number of Supreme Court arbitration cases either have been or might have been limited to their relatively unusual facts. In many of those cases, the Court, despite its protestations to the contrary, seems to be doing little more than correcting errors in lower court decisions.

A. *Summary Reversals*

The clearest evidence of error correction in Supreme Court arbitration cases (or any Supreme Court cases, for that matter) is summary reversals.³⁶ Summary reversal "is a rare and exceptional disposition, usually reserved by th[e] Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error."³⁷ Given these

³⁵ Jonathan M. Kirshbaum, *Accelerating Pace of Supreme Court's Summary Reversals of Habeas Relief Suggests Impatience with Circuit Court's Failure to Defer to State Tribunals*, CRIM. L. REP. (BNA) 1, 4 (Jun. 27, 2012) ("Indeed, during the Roberts era, the number of summary reversals based on this issue [federal court deference to state courts in habeas cases] far outstrips those issued on any other ground. It's not even close.").

³⁶ Rule 16.1 of the Supreme Court Rules provides that after considering the petition for certiorari and other filings, "the Court will enter an appropriate order," which "may be a summary disposition on the merits." Sup. Ct. R. 16.1. When the Court summarily reverses the judgment below, it does so without full briefing and argument on the merits, usually by issuing a short, per curiam opinion.

³⁷ *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) (quoting GRESSMAN ET AL., *supra* note 26, at 350) (internal quotations omitted); see SCOTT L. NELSON, *OPPOSING CERT: A PRACTITIONER'S GUIDE 5* (2009), available at <http://www.citizen.org/documents/OpposingCertGuide.pdf> ("Summary reversal is the dispositional equivalent of the atom bomb. It occurs when at least five members of the

circumstances in which the Court will reverse summarily, “[e]rror correction . . . appears to be the only legitimate function of summary reversals.”³⁸

Table 1 summarizes the number of opinions in argued cases and summary reversals by term (in column two), and then identifies the Court’s arbitration cases by term (in column three). The data show some increase in summary reversals under Chief Justice Roberts (from 5.4 per term for the five terms immediately prior to his confirmation to 7 per term for the eight terms since).³⁹ More notable for my purposes, however, although concededly a small sample, is that almost one-fifth of the Court’s summary reversals in O.T. 2011 and O.T. 2012 (3 of 16) involved arbitration matters. Indeed, since O.T. 2000, the proportion of summary reversals that addressed arbitration issues (4 of 83, or 4.8%) is more than double the proportion of argued cases (18 of 948, or 1.9%) that addressed arbitration issues.

Term	Total Opinions Argued/Per Curiam ⁴⁰	Federal Arbitration Act Cases ⁴¹
OT 2012	73/5	<i>American Express Co. v. Italian Colors Rest.</i> <i>Oxford Health Plans LLC v. Sutter</i> <i>Nitro-Lift Techs., LLC v. Howard</i>
OT 2011	65/11	<i>CompuCredit Corp. v. Greenwood</i> <i>Marmet Health Care Ctr., Inc. v. Brown</i> <i>KPMG LLP v. Cocchi</i>
OT 2010	77/5	<i>AT&T Mobility LLC. v. Concepcion</i>

Court believe, based solely on the petition, the response, and the reply in support of the petition (together with any amicus briefs that may have been filed at the certiorari stage), that the decision below is so obviously incorrect that the case does not require briefing and oral argument.”)

³⁸ GRESSMAN ET AL., *supra* note 26, at 351.

³⁹ The number of summary reversals has declined substantially from 1971-1976, when the Court issued an average of 25 summary reversals per term, and even from 1977-1979, when the average was 18 per term. *Id.* at 350 n.106.

⁴⁰ *Stat Pack for October Term 2012*, SCOTUSBLOG 10 (June 27, 2013), http://www.scotusblog.com/wpcontent/uploads/2013/06/SCOTUSblog_Stat_Pack_OT12.pdf. In Table 1, summary reversals are in italics.

⁴¹ For a mostly complete list of the Supreme Court’s arbitration cases, including labor arbitration cases, see Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 684 app. B (2012) (complete list except for omission of *KPMG LLP v. Cocchi*).

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OT 2009	72/14	<i>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.</i> <i>Rent-A-Ctr. W., Inc. v. Jackson</i>
OT 2008	75/4	<i>Vaden v. Discover Bank</i> <i>Arthur Andersen LLP v. Carlisle</i>
OT 2007	69/2	<i>Hall Street Assocs., LLC v. Mattel, Inc.</i> <i>Preston v. Ferrer</i>
OT 2006	68/4	
OT 2005	71/11	<i>Buckeye Check Cashing, Inc. v. Cardegna</i>
OT 2004	76/4	
OT 2003	74/5	
OT 2002	73/7	<i>Green Tree Fin. Corp. v. Bazzle</i> <i>Howsam v. Dean Witter Reynolds</i> <i>PacifiCare Health Sys. v. Book</i> <i>Citizens Bank v. Alafabco, Inc.</i>
OT 2001	76/5	<i>EEOC v. Waffle House, Inc.</i>
OT 2000	79/6	<i>C&L Enters. v. Citizen Band Potawatomi Indian Tribe</i> <i>Green Tree Fin. Corp.-Ala. v. Randolph</i> <i>Circuit City Stores v. Adams</i>
Total	948/83	18 opinions in argued cases 4 per curiam summary reversals

In all of the summary reversals, the lower court decisions clearly misapplied the FAA. The Oklahoma decision in *Nitro-Lift Technologies, LLC v. Howard* was flatly contrary to *Buckeye Check Cashing, Inc. v. Cardegna*, in which the Supreme Court held that the arbitrator, rather than a court, is to decide whether the main contract (i.e., the contract that includes the arbitration clause) is illegal. The cases differed only in the type of illegal provision involved—a covenant not to compete in *Nitro-Lift* as compared to an allegedly usurious interest rate in *Buckeye*. The West Virginia Supreme Court of Appeals in *Marmet Health Care Center, Inc. v. Brown* had created an exception to the FAA that was nowhere in the text of the statute and that wholly lacked support in any prior Supreme Court precedent. The Alabama Supreme Court’s holding in *Citizens Bank v. Alafabco*—that the FAA did not apply to an interstate loan refinancing transaction—essentially was a holding that Congress lacked the power to regulate such a transaction, which clearly was incorrect. The weakest case for summary reversal was *KPMG LLP v. Cocchi*. The Supreme Court has long held that a court must compel arbitration of claims within the scope of an arbitration agreement even if the case also includes nonarbitrable claims, which the Florida court failed to do.

The Florida decision was certainly wrong, but from the opinions it seems more like inadvertence on the part of the court than anything else.

The summary reversals were all in cases that originated in state rather than federal courts, and often included some suggestion that the state court disagreed with Supreme Court decisions interpreting the FAA. The West Virginia court in *Marmet Health* was the most blatant, observing that:

It is apparent that Congress intended for the FAA to serve only as a procedural statute for disputes brought in the federal courts. Congress also intended the Act to govern only contracts between merchants with relatively equal bargaining power who voluntarily entered arbitration agreements. . . .

. . . With tendentious reasoning, the United States Supreme Court has stretched the application of the FAA from being a procedural statutory scheme effective only in the federal courts, to being a substantive law that preempts state law in both the federal and state courts.

Further, the Supreme Court has created from whole cloth the doctrine of “severability,” found in a line of cases under the FAA bearing on who decides the validity of an arbitration agreement. . . .⁴²

All of these statements are direct attacks on the reasoning of Supreme Court arbitration decisions, some of which, such as the separability doctrine, had nothing to do with the case itself.

Alafabco and *Nitro-Lift* contained similar, albeit more subtle, indications of resistance to the Supreme Court’s arbitration rulings. *Alafabco* was one of a series of decisions in which the Alabama Supreme Court sought to avoid application of the FAA by construing its scope narrowly. The Court reversed one such decision in *Allied–Bruce Terminix Cos., Inc. v. Dobson*.⁴³ But even after *Allied–Bruce*, the Alabama court continued to construe the scope of the FAA narrowly,⁴⁴ eventually resulting in the summary reversal in *Alafabco*.⁴⁵ In *Nitro-Lift*, by comparison, the Oklahoma Supreme Court relied on a prior

⁴² *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 278–79 (W. Va. 2011), *rev’d sub nom. Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (*per curiam*).

⁴³ 513 U.S. 265 (1995).

⁴⁴ *See, e.g., Southern United Fire Ins. Co. v. Knight*, 736 So. 2d 582, 586–87 (Ala. 1999); *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759, 765–67 (Ala. 2000); *American Gen. Fin., Inc. v. Morton*, 812 So. 2d 282, 288–90 (Ala. 2001); *F.A. Dobbs & Sons, Inc. v. Northcutt*, 819 So. 2d 607, 611 (Ala. 2001).

⁴⁵ *Citizens Bank v. Alafabco*, 539 U.S. 194 (2003).

decision in which it construed the scope of the FAA narrowly,⁴⁶ and concluded that a specific state statute (here making covenants not to compete invalid) “must govern over the more general statute favoring arbitration”⁴⁷—either misconstruing or ignoring FAA preemption. Again, *Cocchi* is the exception. Although at least one commentator subsequently suggested that the Florida Court was expressing disagreement with Supreme Court precedent,⁴⁸ the case lacks the same direct or indirect evidence of resistance.

In all three of the summary reversals from O.T. 2011 and O.T. 2012, the respondent suggested in its cert petition that the Court summarily reverse the decision below,⁴⁹ and in two of the cases, the petitioner was represented by experienced Supreme Court counsel,⁵⁰ which might have given the Court

⁴⁶ *Howard v. Nitro-Lift Techs., LLC*, 273 P.3d 20, 26 (Okla. 2011) (relying on *Bruner v. Timberlane Manor Ltd. P’ship*, 155 P.3d 16, 31–32 (Okla. 2006) (which held that the FAA does not apply to arbitration clauses in nursing home contracts), in which “[t]he Supreme Court decisions discussed therein, and relied upon by Nitro-Lift here, were found not to inhibit our review of the underlying contract’s validity”), *rev’d*, 133 S. Ct. 500 (2012).

⁴⁷ *Id.* at 26 n.21.

⁴⁸ Michael J. Hassen, *Class Action Defense Cases—KPMG v. Cocchi: Supreme Court Reiterates Requirement that State Courts Follow Concepcion and Enforce Arbitration Agreements Under The Federal Arbitration Act (FAA)*, CLASS ACTION DEFENSE BLOG (2011), http://classactiondefense.jmbm.com/2011/11/class_action_defense_caseskpmg.html (“Despite its April 27, 2011 decision in *AT&T Mobility LLC v. Concepcion*, some state courts have continued to find ‘creative’ ways to avoid its mandate. The Florida state courts, however, failed to follow these rules.”).

⁴⁹ Pet. for Writ of Cert. at 23, *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (No. 10-1521) (“Although summary reversal is strong medicine, it is appropriate where, as here, the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.”) (internal quotation marks omitted); Pet. for Writ of Cert. at 21, *Clarksburg Nursing Home & Rehab. Center, LLC v. Marchio*, 132 S. Ct. 1619 (2011) (No. 11-394) (“The Court may wish to consider summary reversal on account of the West Virginia court’s ‘obvious’ error in failing to follow the ‘straightforward’ analysis directed by this Court’s precedents.”); Pet. for Writ of Cert. at 4, *Nitro-Lift Techs. LLC v. Howard*, 133 S. Ct. 500 (2012) (No. 11-1377) (“Because the Oklahoma court’s decision is irreconcilable with this Court’s decisions in *Prima Paint*, *Buckeye Check Cashing*, and *Preston*, Nitro-Lift respectfully requests that the Court . . . summarily reverse the decision below . . .”).

⁵⁰ Pet. for Writ of Cert. at 27, *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (No. 10-1521) (Carter Phillips and Sidley Austin LLP as counsel of record); Pet. for Writ of Cert. at 31, *Clarksburg Nursing Home & Rehab. Center, LLC v. Marchio*, 132 S. Ct. 1619 (2011) (No. 11-394) (Andrew Pincus and Mayer Brown LLP as counsel of record).

more comfort in issuing a summary reversal.⁵¹ The petitioners in two of the recent cases were supported by one or more amici,⁵² which also appears to increase the likelihood that the Court will grant review in a case.⁵³

Whatever the reason for the summary reversals (which I discuss more in Part III), all of the lower court decisions involved nothing more than the erroneous application of settled legal principles. In each of the cases, the Court was engaged simply in error correction.

B. *Argued Cases*

With a handful of exceptions, the arbitration cases decided by the Supreme Court after full briefing and oral argument have raised important issues. One exception is *Preston v. Ferrer*.⁵⁴ The issue in *Preston* was whether the arbitrator or an administrative agency (initially anyway) must decide whether a contract that included an arbitration clause was illegal.⁵⁵ The Court, with only Justice Thomas dissenting (on the ground that the FAA does not apply in state court), held that *Buckeye Check Cashing, Inc. v. Cardegna* “largely, if not entirely, resolves the dispute before us.”⁵⁶ It rejected respondent’s attempts to distinguish *Buckeye*, finding no reason to

⁵¹ KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 182 (1993) (“[E]ven when a host of variables that might also exercise some effect on certiorari are taken into account, experienced Supreme Court representation stands out as an important predictor. Presumably, the Court places greater trust in those judgments they know to be reliable.”).

⁵² See Brief for Alabama Bankers Ass’n as Amicus Curiae Supporting Petitioner, *Citizens Bank v. Alafabco, Inc.* 539 U.S. 52 (2003) (No. 02-1295); Brief for Alabama Pest Control Ass’n as Amicus Curiae Supporting Petitioner, *Citizens Bank v. Alafabco, Inc.* 539 U.S. 52 (2003) (No. 02-1295) 2003 WL 21261778; Motion for Leave to File Brief Amicus Curiae and Brief for Seventeenth Street Associates LLC as Amicus Curiae Supporting Petitioners, *Clarksburg Nursing Home & Rehab. Center, LLC v. Marchio*, 132 S. Ct. 1619 (2011) (No. 11-394); Motion for Leave to File a Brief as Amici Curiae and Brief of Beverly Enterprises–West Virginia, Inc. et al. as Amici Curiae Supporting Petitioners, *Clarksburg Nursing Home & Rehab. Center, LLC v. Marchio*, 132 S. Ct. 1619 (2011) (No. 11-394); Motion for Leave to File a Brief as Amicus Curiae and Brief for American Health Care Ass’n as Amicus Curiae Supporting Petitioners, *Clarksburg Nursing Home & Rehab. Center, LLC v. Marchio*, 132 S. Ct. 1619 (2011) (No. 11-394).

⁵³ MCGUIRE, *supra* note 51, at 182 table 8.1.

⁵⁴ *Preston v. Ferrer*, 552 U.S. 346 (2008).

⁵⁵ *Id.* at 353.

⁵⁶ *Id.* at 354.

treat state agencies differently from state courts as in *Buckeye*.⁵⁷ The Court's ruling on this issue is a very narrow one. Indeed, the Petition for Certiorari in *Preston* did not cite any asserted conflict among the lower courts, instead arguing principally that "[t]he reasoning of the Court of Appeal . . . sets a precedent which can negate *Buckeye* and invalidate arbitration agreements under state law merely by inserting an administrative proceeding ahead of a decision by the Courts."⁵⁸ The decision has much more in common with the summary reversals described above than the other argued cases in the Court's docket.

Among those cases that raised important legal issues, most have done more than simply correct errors. Of the eighteen arbitration cases decided after argument from O.T. 2000 through the present, half decided what I see as important arbitration law issues in ways that were not limited to their facts (although several of those could have turned out to be much narrower decisions, as discussed below).⁵⁹ Another couple of cases resolved circuit splits on what I would call less significant issues, but ones that benefited from their resolution.⁶⁰

That said, several argued arbitration cases involved narrow holdings that have largely been limited to their facts. For example, in *Green Tree Financial Corp.-Alabama v. Randolph*,⁶¹ the Supreme Court held that a plaintiff must introduce some evidence that arbitration costs precluded her from effectively vindicating her federal statutory rights.⁶² But the Court

⁵⁷ *Id.* at 355–60.

⁵⁸ Pet. for Writ of Cert. at 6, *Preston v. Ferrer*, 552 U.S. 346 (2007) (No. 06-1463). The more important issue addressed by the Court was how to construe the choice-of-law clause in the contract, *see infra* text accompanying notes 68–74, but that issue was not even mentioned in the cert petition.

⁵⁹ *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Vaden v. Discover Bank*, 556 U.S. 49 (2009); *Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

⁶⁰ *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009); *C&L Enter. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

⁶¹ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

⁶² The case involved a preliminary issue of whether it was immediately appealable, over which the circuits were divided. *Id.* at 87 n.3. The Supreme Court unanimously held that it was. *Id.* at 88.

provided no guidance on what evidence would be sufficient—since the plaintiff had introduced none⁶³—making the decision quite a narrow one.

More recently, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Supreme Court vacated an arbitral award on the ground that the arbitrators imposed their own policy preferences in concluding that an arbitration clause permitted class arbitration.⁶⁴ The Supreme Court then went on to hold that on the facts of the case the clause did not authorize class arbitration, with the key fact being that the parties had stipulated that the agreement was silent on class arbitration.⁶⁵ In both respects, the decision is remarkably narrow. Certainly a stipulation that a court construes as conceding away the entire case is unusual. And the Court emphasized in *Stolt-Nielsen* that the arbitrators had not made any attempt to construe the language of the contract itself, suggesting that if they had done so the award might be upheld. After *Stolt-Nielsen*, not surprisingly, arbitrators made sure to focus on the contract language in making their awards,⁶⁶ and the Court subsequently upheld such an award in *Oxford Health Plans LLC v. Sutter*.⁶⁷ After *Sutter*, *Stolt-Nielsen* has largely been limited to its facts.

Other decisions were initially applied broadly but eventually limited by the Supreme Court. The best illustration of this is from before the time period covered in Table 1, but it is still worth discussing because of its continuing importance. In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, the Court held that the parties' choice-of-law clause—as construed by the California Court of Appeal—incorporated by reference a California arbitration statute providing for a stay of arbitration pending resolution of a related dispute.⁶⁸ As a result, even if the California statute otherwise would have been preempted under *Southland Corp. v.*

⁶³ *Id.* at 92.

⁶⁴ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 673–75 (2010).

⁶⁵ *Id.* at 686–687 & n.10 (“We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was ‘no agreement’ on the issue of class-action arbitration.”).

⁶⁶ Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1154–58 (2011).

⁶⁷ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013).

⁶⁸ *Volt Info. Sci., Inc. v. Board of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478–79 (1989). In addition to its timing, *Volt* also differs from the other cases discussed here because it involved one of the vestiges of the Supreme Court's mandatory jurisdiction (a vestige that no longer exists). *Id.* at 473 n.4; see Act of June 7, 1988, Pub. L. No. 100-352, 102 Stat. 662. As a result, at least in theory, the Court did not have the same degree of discretion in deciding whether to review the case then as it would today.

Keating, it was not preempted because the parties had made it part of their arbitration agreement.

Volt quickly became an important way for courts to avoid FAA preemption.⁶⁹ Most contracts with arbitration clauses include choice-of-law clauses as well. If that choice-of-law clause incorporates by reference a state law alleged to be inconsistent with the FAA, the state law is “saved” from preemption. It becomes instead a term of the parties’ contract that the FAA requires to be enforced.

In *Volt*, the Court deferred to the California Court of Appeal’s interpretation of the choice-of-law clause.⁷⁰ In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, however, the Court adopted a different interpretation from the California court in *Volt*.⁷¹ The *Mastrobuono* Court concluded that the “best way to harmonize” the choice-of-law and arbitration clauses was to interpret the choice-of-law clause “to encompass substantive principles that New York courts would apply, but not to include [New York’s] special rules limiting the authority of arbitrators.”⁷² The Court reiterated that holding in *Preston v. Ferrer*.⁷³ Since then, most courts have followed the Supreme Court’s interpretation, and the use of a choice-of-law clause to evade FAA preemption has declined substantially.⁷⁴ Although *Volt* is often cited, its importance as a practical matter has been much restrained.

The same is true of *Green Tree Financial Corp. v. Bazzle*.⁷⁵ In *Bazzle*, a plurality of the Court concluded that arbitrators, rather than courts, must determine whether an arbitration clause permits class arbitration.⁷⁶ In response to *Bazzle*, the American Arbitration Association adopted rules for administering class arbitrations,⁷⁷ and proceeded to administer over 350 class

⁶⁹ See *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2260 (2002).

⁷⁰ 489 U.S. at 474–77.

⁷¹ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 n.4 (1995).

⁷² *Id.* at 63–64; see also *id.* at 59 (questioning whether to construe choice-of-law clause also as “includ[ing] the caveat, ‘detached from otherwise-applicable federal law.’”).

⁷³ *Preston v. Ferrer*, 552 U.S. 346, 362–63 (2008).

⁷⁴ See, e.g., *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 890 (Tex. 2010) (“Courts rarely read such general choice-of-law provisions to choose state law to the exclusion of federal law.”).

⁷⁵ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

⁷⁶ *Id.* at 451–52 (Breyer, J.).

⁷⁷ American Arbitration Association, Supplementary Rules for Class Arbitrations (Oct. 8, 2003), http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf.

arbitrations under standards based in part on *Bazzle*.⁷⁸ But in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, the Court criticized such reliance on *Bazzle*,⁷⁹ and in *Oxford Health Plans LLC v. Sutter* the Court made clear that who decides whether an arbitration clause authorizes class arbitration remains an open question.⁸⁰ *Bazzle* has been left with essentially no remaining effect.

Finally, several other cases involve unusual facts so that the decisions might have been limited in reach. But despite that possibility, subsequent courts have applied them broadly. In *Rent-A-Center West, Inc. v. Jackson*, the Court held that arbitrators rather than courts must decide whether an arbitration clause is unconscionable when the parties have delegated that issue to the arbitrators.⁸¹ *Rent-A-Center* was unusual, however, in that it contained a detailed delegation clause.⁸² Such clauses are rare,⁸³ and the main reason *Rent-A-Center* has been applied so broadly is that courts have treated institutional arbitration rules as including similarly broad delegation provisions,⁸⁴ which is open to question.⁸⁵ And as has often been pointed out, the arbitration clause in *AT&T Mobility LLC v. Concepcion* contained an incentive provision setting a minimum award of \$7,500 (increased to \$10,000) if the arbitrator awarded more than AT&T's last settlement offer.⁸⁶

⁷⁸ Gregory A. Litt & Tina Praprotnik, *After Stolt-Nielsen, Circuits Split, but AAA Filings Continue*, MEALEY'S INT'L ARB. REP., July 2012, at 27.

⁷⁹ 130 S. Ct. 1758, 1770–72 (2010).

⁸⁰ 133 S. Ct. 2064, 2068 n.2 (2013).

⁸¹ 130 S. Ct. 2772, 2779 (2010).

⁸² *Id.* at 2777.

⁸³ Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 34–35 (2013).

⁸⁴ *See, e.g.*, *Oracle Am., Inc. v. Myriad Grp., A.G.*, 724 F.3d 1069, 1077 (9th Cir. July 26, 2013) (UNCITRAL arbitration rules); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (AAA arbitration rules).

⁸⁵ *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 4–14, reporters' note to cmt. (e) (Tentative Draft No. 2, 2012).

⁸⁶ AT&T Mobility actually filed a brief opposing certiorari in *T-Mobile USA, Inc. v. Laster*, presenting the same issue as *Concepcion*, arguing as follows:

The coming wave of decisions addressing third-generation arbitration provisions [like the one in AT&T Mobility's contract] could put the preemption issue to rest without necessitating this Court's involvement by making clear that these provisions are fully enforceable under state law. Alternatively, if one or more federal courts of appeals holds that even third-generation arbitration provisions are unenforceable under state law, the preemption issue will be much more sharply presented. In that circumstance, it will be clear that state law categorically precludes an enforceable consumer arbitration provision that requires individual arbitration,

Again, such provisions are rare,⁸⁷ although they have become more common after *Concepcion*.⁸⁸ Lower courts might have limited *Concepcion* to its unusual facts, although they have almost never done so.

Although certainly not all, at the very least a number of recent Supreme Court arbitration decisions in argued cases either have been, or could have been, largely limited to their facts. As such, and subject to the caveats noted above,⁸⁹ those cases can be characterized as largely involving error correction.

III. POSSIBLE EXPLANATIONS FOR ERROR CORRECTION IN SUPREME COURT ARBITRATION CASES

Given the extent of error correction in Supreme Court arbitration cases, the next question is, why? Why has the Court issued decisions in arbitration cases that are largely limited to their facts, doing little more than correcting errors?

I offer three possible explanations. First, in the summary reversals as well as some of the narrow decisions in argued cases, the Court is responding to lower court resistance to its arbitration decisions, essentially keeping those courts in line. Second, and more generally, many of the Supreme Court cases discussed above involve legal standards rather than legal rules. The nature of standards (which require individualized determinations on the facts of the case), combined with the incentives of parties seeking Supreme Court review, can lead to narrow decisions largely limited to their facts. Third, because of nuances of arbitration law, the Court has granted review in “poor” cases—cases that do not present well, if at all, the issue it is trying to decide.

and the question for the Court will be whether the FAA preempts states from imposing a de facto across-the-board ban on consumer arbitration provisions that require individual arbitration.

Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party at 21–22, *T-Mobile USA, Inc. v. Laster*, 553 U.S. 1064 (2008) (No. 07-976); see *T-Mobile USA, Inc. v. Laster*, 553 U.S. 1064 (2008) (denying certiorari).

⁸⁷ Rutledge & Drahozal, *supra* note 83, at 36–37.

⁸⁸ Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 857–59 (2012).

⁸⁹ See *supra* text accompanying notes 9–11.

A. Lower Court Resistance to Supreme Court Arbitration Doctrine

The Supreme Court's expansive interpretations of the FAA have been unpopular in some quarters, to say the least. Much of the criticism is directed at the Court's decision in *Southland Corp. v. Keating*, in which it held that the FAA applies in state court and preempts conflicting state law.⁹⁰ Justice O'Connor (in dissent in *Southland* itself⁹¹) and Justices Thomas and Scalia (in dissent in *Allied-Bruce Terminix Cos. v. Dobson*⁹²) have strongly criticized the decision. Indeed, Justice Thomas continues to dissent from opinions in argued cases that apply the FAA in state court,⁹³ and Justice Scalia has indicated his willingness to overrule *Southland* if enough members of the Court agree to do so.⁹⁴

Lower courts have not only expressed disagreement with the Supreme Court's decisions, they have affirmatively sought to evade those decisions through creative and sometimes strained interpretations of the FAA.⁹⁵ Perhaps the best-known expression of disagreement is a concurring opinion by Justice Terry Trieweiler of the Montana Supreme Court in a decision later vacated by the U.S. Supreme Court:

What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of [the State of Montana's] procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.

....

⁹⁰ 465 U.S. 1, 21 (1984).

⁹¹ *Id.* at 36 (O'Connor, J., dissenting).

⁹² *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., joined by Scalia, J., dissenting).

⁹³ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting).

⁹⁴ *Allied Bruce*, 513 U.S. at 284 (Scalia, J., dissenting).

⁹⁵ A possible rationale comes from often-reversed Ninth Circuit Judge Stephen Reinhardt, who is reputed to have said, in response to Supreme Court reversals of his decisions, that "[t]hey can't catch 'em all." See Matt Rees, *The Judge the Supreme Court Loves to Overturn*, THE WEEKLY STANDARD (May 5, 1997), <http://www.theweeklystandard.com/content/public/articles/000/000/001/414ilyss.asp>.

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Nothing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as “therapy for their crowded dockets.” These decisions have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up.

It seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens. The last I checked, there were plenty of capable people willing to do so.⁹⁶

The West Virginia Supreme Court of Appeals’ opinion in *Marmet Health*, described above, is another illustration of a court not just disagreeing with the Supreme Court’s FAA preemption cases, but saying bluntly that it disagrees and acting accordingly.⁹⁷

Aaron-Andrew Bruhl has explained how courts used unconscionability doctrine to evade the Supreme Court’s FAA preemption decisions (at least until reined in to some degree by *AT&T Mobility LLC v. Concepcion*).⁹⁸ He emphasized that “[t]he flexibility of unconscionability doctrine . . . creates the potential for the conflicting judicial preferences to express themselves through manipulation of state law,”⁹⁹ and cited state court judges explaining

⁹⁶ *Casarotto v. Lombardi*, 886 P.2d 931, 940–41 (Mont. 1994) (Trieweiler, J., concurring), *vacated sub nom.*; *Doctor’s Assoc., Inc. v. Casarotto*, 515 U.S. 1129 (1995).

⁹⁷ *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 278–79 (W. Va. 2011), *rev’d sub nom.*; *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam); *see supra* text accompanying note 42. For other examples, *see, e.g.*, *Feeney v. Dell Inc.*, 993 N.E.2d 329, 331 (Mass. 2013) (“Although we regard as untenable the Supreme Court’s view that ‘the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims,’ we are bound to accept that view as a controlling statement of Federal law.”); *Selma Med. Ctr., Inc. v. Fontenot*, 824 So. 2d 668, 681 (Ala. 2001) (Moore, C.J., dissenting) (“Because Congress wrote and enacted the FAA as a procedural device and intended that it apply exclusively in federal courts, it has no application to the case before us—a case between Alabama residents and Alabama corporations, based on state-law claims, for which exclusive jurisdiction lies in a court of the State of Alabama.”); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 504 (Mo. 2012) (Price, J., dissenting) (“The majority’s newly created right to an attorney for consumer claims morphs into a right to class arbitration proceedings, and then morphs into a right to void individual arbitration agreements altogether. While this is certainly clever lawyering, it is not the law and it openly flaunts the FAA and *Concepcion*.”).

⁹⁸ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁹⁹ Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1488 (2008).

how they will “write their way around the FAA” if need be.¹⁰⁰ Of course, state court resistance to FAA preemption predates their use of unconscionability doctrine, as Professor Bruhl recognizes.¹⁰¹ As discussed above, courts also have sought to avoid FAA preemption by construing the scope of the FAA narrowly¹⁰² and by construing choice-of-law clauses to incorporate by reference state laws that might otherwise be preempted.¹⁰³

The continued resistance of some state courts to the Supreme Court’s arbitration doctrine explains a number of the Court’s “error correction” decisions. The decisions do involve error correction, but with the purpose of keeping lower courts in line in the face of such resistance.¹⁰⁴ All of the summary reversals in arbitration cases (with the possible exception of *KPMG v. Cocchi*) reflect clear evidence of state court resistance to the Supreme Court’s FAA preemption decisions.¹⁰⁵ *Preston v. Ferrer* might also be viewed in that light,¹⁰⁶ following as it did on the heels of *Buckeye Check Cashing, Inc. v. Cardegna*.¹⁰⁷ Occasional federal court cases also might be

¹⁰⁰ *Id.* at 1456 n.136 (quoting POUND CIVIL JUSTICE INSTITUTE, THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS: REPORT OF THE 2003 FORUM FOR STATE APPELLATE COURT JUDGES 119, 123 (2006)).

¹⁰¹ *Id.* at 1430–31 (citing *Allied-Bruce and Alafabco*).

¹⁰² *See supra* text accompanying notes 43–45; *see also* Bruhl, *supra* note 99, at 1430–31.

¹⁰³ *See supra* text accompanying notes 68–74.

¹⁰⁴ For an illustration in another subject area *see* *Cavazos v. Smith*, 132 S. Ct. 2, 7–8 (2011) (per curiam) (“The decision below cannot be allowed to stand. This Court vacated and remanded this judgment twice before, calling the panel’s attention to this Court’s opinions highlighting the necessity of deference to state courts in § 2254(d) habeas cases. Each time the panel persisted in its course, reinstating its judgment without seriously confronting the significance of the cases called to its attention. Its refusal to do so necessitates this Court’s action today.”) (citations omitted); *see also* Kirshbaum, *supra* note 35, at 2 (“The idea behind these so-called summary reversals is to correct especially egregious errors or to chasten a lower court that may be deliberately flouting or ignoring the [C]ourt’s precedent.”); Orin Kerr, Youngblood, *Young Blood, and the Supreme Court’s Role in the Criminal Justice System*, ORINKERR.COM (June 20, 2006) (copy on file with author) (“My own pet theory is that Chief Justice Roberts thinks that some lower courts are being sloppy in criminal cases: He wants to pressure them to be more careful by sending a signal that the Supreme Court is watching.”).

¹⁰⁵ *See supra* text accompanying notes 42–48.

¹⁰⁶ *Preston v. Ferrer*, 552 U.S. 346 (2008); *see* Bruhl *supra* note 99, at 1469 (stating that *Preston v. Ferrer* “did not appear to be very important in terms of having a broad impact and was in that sense a poor candidate for certiorari. But it presented a readily manageable question of preemption, and in that way it was attractive.”).

¹⁰⁷ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *see supra* text accompanying notes 54–58.

seen as involving resistance to Supreme Court arbitration doctrine, such as *CompuCredit Corp. v. Greenwood*.¹⁰⁸ The resistance there was from the Ninth Circuit, which was the only circuit to hold that the Credit Repair Organizations Act precluded enforcement of pre-dispute arbitration agreements before being reversed by an almost-unanimous Supreme Court.¹⁰⁹

Overall, then, one explanation for error correction in Supreme Court arbitration decisions is that it is necessary to discipline lower courts that otherwise might not adhere to settled Supreme Court doctrine.

B. Rules Versus Standards: “Easy Cases Make No Law”

The Supreme Court’s arbitration cases involve a mix of rules and standards. The distinction between the two is defined in the law and economics literature as follows:

Rules are those legal commands which differentiate legal from illegal behavior in a simple and clear way. Standards, however, are general legal criteria which are unclear and fuzzy and require complicated judiciary decision making. A speed limit whose violation leads to a fine of 100\$ is a rule, whereas a norm for car drivers to “drive carefully” whose violation leads to damage compensation is a standard. In the latter case the legal norm leaves open what exactly the level of due care is and how the damage compensation is to be calculated.¹¹⁰

¹⁰⁸ *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012). The resistance in *CompuCredit* was not to the Court’s FAA preemption cases, but rather to its cases holding that federal statutory claims were arbitrable.

¹⁰⁹ *Greenwood v. CompuCredit Corp.*, 615 F.3d 1204, 1211 (9th Cir. 2010), *rev’d*, 132 S. Ct. 665 (2012). Justice Ginsberg was the only dissenter. 132 S. Ct. at 676 (Ginsberg, J., dissenting); see also Ronald Mann, *Opinion Analysis: Court Rebukes Ninth Circuit (Again) in Reaffirming Arbitration Agreements*, SCOTUSBLOG.COM (Jan. 11, 2012), <http://www.scotusblog.com/?p=136587> (“So the real question, then, is whether there is anything more interesting in *Greenwood* than a factbound application of settled Federal Arbitration Act (‘FAA’) jurisprudence to rein in a disloyal court of appeals. Perhaps.”).

¹¹⁰ Hans-Bernd Schaefer, *Legal Rules and Standards*, in 2 ENCYCLOPEDIA OF PUBLIC CHOICE 347, 347 (Charles Rowley & Friedrich Schneider, eds., 2003) (citations omitted); *Mindgames, Inc. v. W. Publ’g Co.*, 218 F.3d 652, 657 (7th Cir. 2000) (Posner, J.) (“A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard’s rationale. A speed limit is a rule; negligence is a standard.”); see Frank Cross et al., *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1 (2012); Ezra Friedman & Abraham L. Wickelgren, *A New Angle on Rules versus*

In the arbitration context, a decision construing federal law to permit arbitration of a certain statutory claim (or not, as the case may be) or holding that the arbitrator (or the court) is to decide a certain challenge to the arbitration clause establishes a rule. Examples of cases establishing rules include *CompuCredit Corp. v. Greenwood*,¹¹¹ *Hall Street Associates, LLC v. Mattel, Inc.*,¹¹² *Vaden v. Discover Bank*,¹¹³ *Buckeye Check Cashing, Inc. v. Cardegna*,¹¹⁴ *Howsam v. Dean Witter Reynolds*,¹¹⁵ and *Circuit City Stores, Inc. v. Adams*.¹¹⁶ By comparison, a decision holding that an arbitration agreement is enforceable on the facts of the case—such as that it does not preclude the claimant from vindicating his or her federal statutory rights—establishes and applies a standard. Cases like *Green Tree Financial Corp.-Alabama v. Randolph*,¹¹⁷ *Rent-A-Center West, Inc. v. Jackson*,¹¹⁸ *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,¹¹⁹ *AT&T Mobility LLC v. Concepcion*,¹²⁰ and *American Express Co. v. Italian Colors Restaurant*¹²¹ all establish, or might be construed as establishing, standards rather than rules.¹²²

Standards, (Jan. 23, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990592; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

¹¹¹ *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012). Of course, at a broader level of generality, *CompuCredit* might be seen as involving application of a standard (how a court determines whether Congress intended to preclude arbitration of a statutory claim) rather than a rule. My focus, however, is on how future parties will seek to have courts apply the decision, and from that perspective the outcome of the decision is a rule that claims under the Credit Repair Organizations Act are arbitrable.

¹¹² *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

¹¹³ *Vaden v. Discover Bank*, 556 U.S. 49 (2009).

¹¹⁴ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

¹¹⁵ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

¹¹⁶ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

¹¹⁷ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

¹¹⁸ *Rent-A-Center W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

¹¹⁹ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

¹²⁰ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

¹²¹ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

¹²² I say “might be construed as involving standards” because a very narrow application of a standard might instead be construed as establishing a rule that certain behavior never satisfies the standard. For example, the issue in *American Express Co. v. Italian Colors Restaurant* was whether a class arbitration waiver precluded the plaintiffs from vindicating their statutory rights under the federal antitrust laws because the case

ERROR CORRECTION

Scholars have identified a variety of implications of the choice between rules and standards.¹²³ I discuss an additional implication of the choice of a standard here: that the breadth of a court decision applying a standard varies depending on how strong the case is on its facts (i.e., where the case falls in the distribution of similar cases) and the outcome of the case. If the case is a strong one on its facts, and the court rules that the strong case satisfies the standard, the decision can turn out to be a very narrow one. If the case had come out the other way, however, the decision would have been a very broad one.

Consider the following illustration. Assume that a court is deciding whether an arbitration agreement is enforceable in the face of a challenge that it precludes the claimant from effectively vindicating his or her federal statutory rights.¹²⁴ Some cases present strong facts for enforcing the arbitration agreement—i.e., for rejecting the effective vindication challenge. Other cases present weak facts for enforcing the arbitration agreement—i.e., for accepting the effective vindication challenge.¹²⁵ Figure 1 depicts the

was not economical to pursue other than on a class basis. *Id.* at 2308. The lower courts considered evidence on how much it would cost to litigate the case and whether there were alternative ways of pursuing the case other than as a class action. Even at oral argument in the Supreme Court, the Justices asked numerous questions about the factual viability of the plaintiffs' claim. On that view, the case involved the application of a standard to the facts of the case.

That said, Justice Scalia in particular asked questions at oral argument suggesting that the effective vindication doctrine is not available to challenge the enforceability of an arbitration clause. If the defense is altogether unavailable, the Court has adopted a legal rule rather than a legal standard. And the Court ultimately held that the unavailability of class relief does not preclude a claimant from effectively vindicating its rights under a federal statute enacted prior to the adoption of the Federal Rules of Civil Procedure—arguably a rules-based rather than standards-based approach. *Id.* at 2310–11.

¹²³ *E.g.*, Schaefer, *supra* note 110, at 347–50; *see also* Bruhl, *supra* note 99, at 1474–77 (arguing that the Supreme Court addresses the “who decides” issue to avoid complicated factual and legal issues under the savings clause of FAA Section 2).

¹²⁴ The Court in *American Express Co. v. Italian Colors Restaurant* seemed to accept, albeit only in dicta, that under some circumstances an arbitration agreement might be unenforceable under an “effective vindication” theory. *Id.* at 2310–11.

¹²⁵ *Id.* at 2314 (Kagan, J., dissenting):

Consider several alternatives that a party drafting an arbitration agreement could adopt to avoid antitrust liability, each of which would have the identical effect. On the front end: The agreement might set outlandish filing fees or establish an absurd (*e.g.*, one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum. On the back end: The agreement might remove the arbitrator's authority to grant meaningful relief, so that a judgment gets the claimant nothing worthwhile. And in the middle: The agreement might block the claimant from presenting the kind of proof that is necessary to establish the

distribution of cases as a bell curve—that is, it assumes that the cases are normally distributed.¹²⁶ The parties obviously have an incentive to present the strongest possible case for their respective positions to the court. Moreover, if the court (such as the Supreme Court) has control over its docket, it may be more likely to decide to hear cases in the tails of the distribution (either very weak or very strong cases, as indicated in Figure 1).¹²⁷

Under principles of *stare decisis*, the court's decision to enforce or not to enforce an arbitration agreement in a particular case provides information about the likely outcome of future cases. If a court enforces an arbitration agreement, we know that arbitration agreements in cases with facts stronger than those in the decided case are also likely to be enforced. But we do not know for sure how cases with facts weaker than the decided case are likely to come out. The facts in those cases may not be strong enough to satisfy the standard. Conversely, if a court refuses to enforce an arbitration agreement, we know that arbitration agreements in cases with facts weaker than those in the decided case also are likely not to be enforced. Again, we do not know for sure how cases stronger than the decided case are likely to come out.

defendant's liability—say, by prohibiting any economic testimony (good luck proving an antitrust claim without that!).

¹²⁶ The point in the text holds for other distributions, but the bell curve makes the point more plainly.

¹²⁷ Given the uncertainty over the application of a standard in cases likely to make it to the Supreme Court (or perhaps the applicable standard itself), one would not necessarily expect to see the parties settle the extreme cases.

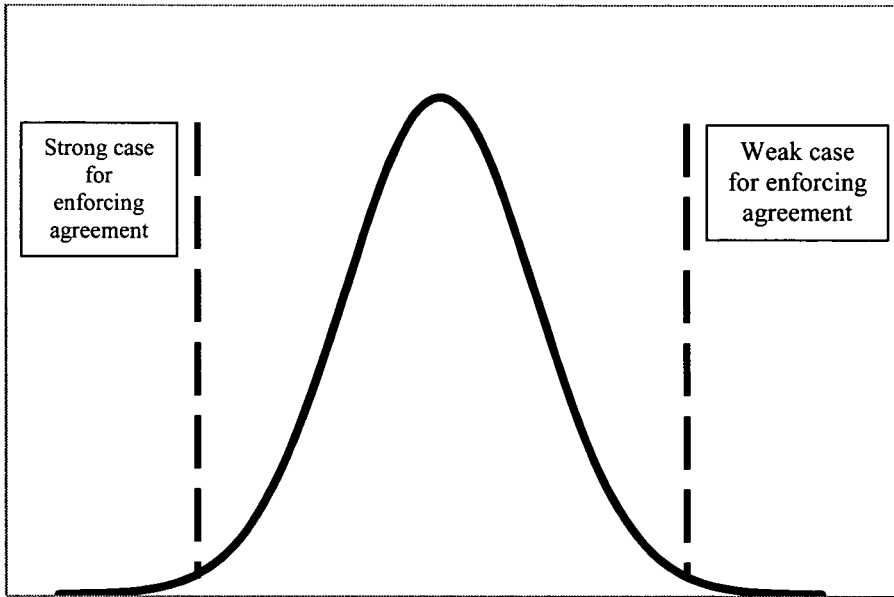


Figure 1. Normal Distribution of Case Strengths

As such, the strength of a case can have significant implications for how broad a ruling the court issues. Figures 2 and 3 illustrate this point. If the decided case has very strong facts for enforcement, as in Figure 2, a decision enforcing the agreement actually provides information about very few cases—only those cases in the far left part of the distribution, in which we now know the arbitration agreement is enforceable. Indeed, at the extreme, if the facts of the decided case are sufficiently strong, the decision may provide no information about other cases (which have weaker facts). In other words, “easy cases make no law.”¹²⁸ By comparison, if the court refuses to enforce the arbitration clause in such a case, we know how all cases with facts weaker than those in the decided case are likely to come out. If the decided case has particularly strong facts—i.e., is in the far left tail of the distribution—that means we now know how a large number of cases should come out, as illustrated in Figure 3.

¹²⁸ George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 960 n.76 (1992) (“[T]he aphorism ‘hard cases make bad law’ makes little sense. The aphorism should be ‘easy cases make no law.’” (citation omitted)).

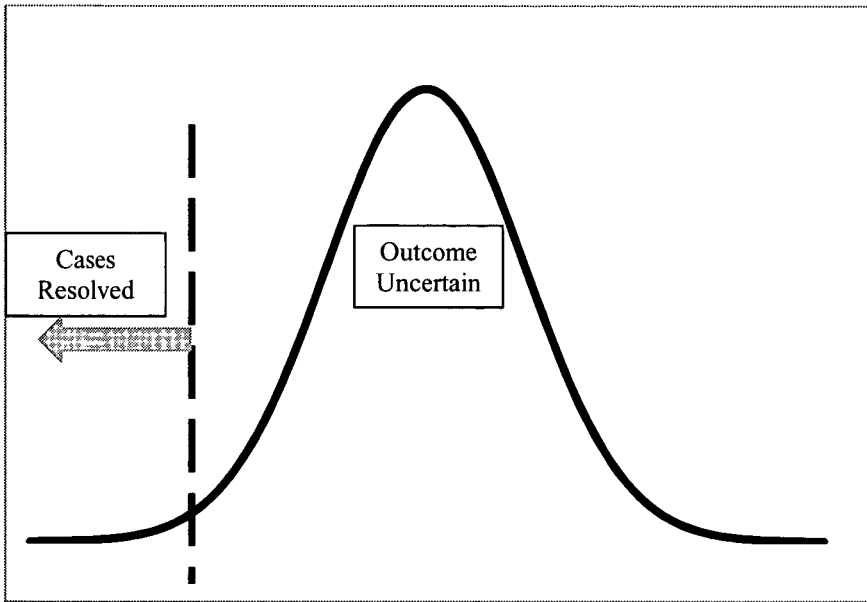


Figure 2. Precedential Effect of Enforcing Agreement in Strong Case

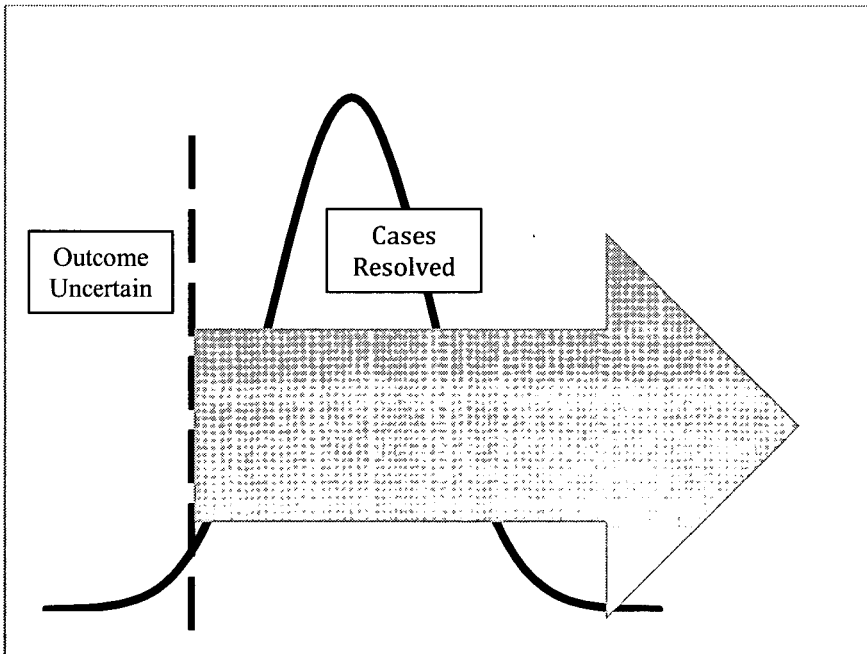


Figure 3. Precedential Effect of Not Enforcing Agreement in Strong Case

Stated otherwise, a case that is a narrow decision based on unusual facts could, in fact, have been a very broad decision had it come out the other way. Take, for example, the Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*.¹²⁹ As discussed above, the Eleventh Circuit in *Green Tree* held that the risk of incurring high arbitration costs alone, even in the absence of any evidence of the actual costs of arbitration, was enough to invalidate the arbitration clause.¹³⁰ On its facts, that is a very weak case for invalidating the arbitration clause (and hence a very strong case for enforcing the clause) and a very strong case for reversing the Eleventh Circuit. It is a case far to the left in the tail of the distribution in Figure 1.

If the Supreme Court had affirmed the Eleventh Circuit's decision, the Court's decision would have been a broad one. It would have resolved a large number of other cases because the risk of high costs, without regard to the evidence that costs precluded the claimant from actually bringing his or her claim, would have been sufficient to invalidate an arbitration clause.¹³¹ Under that hypothetical decision, all the cases with stronger evidence of high arbitration costs likewise should result in the invalidation of the agreement. Such an outcome is shown in Figure 3—indeed, it may be even more extreme than Figure 3 because the facts for refusing to enforce the agreement were extremely weak. But instead the Court reversed the Eleventh Circuit, holding that an absence of evidence alone is insufficient. Since in most cases raising this issue the plaintiff can provide at least some evidence of high arbitration costs, the decision in *Green Tree*—as it came out—actually was very narrow.

Several of the “error correction” cases described above appear to be cases involving the application of standards to very one-sided facts: *Green Tree* and *Stolt-Nielsen*¹³² are the best examples. *Amex*, *Concepcion*, and *Rent-A-Center* likewise are all cases with unusual facts (discussed further below¹³³) that might have resulted in narrow decisions under legal standards. Such narrow decisions involve error correction as I define it here, but would have been much broader decisions (going well beyond error correction) had they come out the other way.

¹²⁹ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

¹³⁰ See *supra* text accompanying notes 61–63.

¹³¹ Alternatively, the decision might have been characterized as adopting a rule rather than one applying a standard. See *supra* note 122.

¹³² Given the Supreme Court's interpretation of the stipulation at issue in *Stolt-Nielsen*, it likewise was a very weak case on the merits. See *supra* text accompanying notes 64–65.

¹³³ See *supra* text accompanying notes 61–67.

C. The Selection of (Poor) Cases for Review

A third reason for the prevalence of error correction in Supreme Court arbitration cases is that the Court too often has chosen poor cases to review. Mistakes in selecting cases happen, even given the strong bias against granting review. But arbitration law is sufficiently technical that generalists like Supreme Court justices (and their clerks) may not, at the certiorari stage, appreciate how various arbitration doctrines will affect the ultimate outcome of the case.¹³⁴ As a result, the Court grants cases that it should not grant, which results in narrow, “error correction” decisions.

The Court’s “class arbitration trilogy”—*Bazzle*,¹³⁵ *Stolt-Nielsen*,¹³⁶ and *Sutter*¹³⁷—highlights a number of the complications involved in selecting an arbitration case that is a “proper vehicle” for Court review. The question presented in the cert petition in *Bazzle* was “[w]hether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.”¹³⁸ But because the case itself was from a state court, an initial question was whether the FAA even applied. Justice Thomas dissented from the decision in *Bazzle* on the ground that the FAA did not apply,¹³⁹ although the rest of the Justices duly followed *Southland*. Because of Justice Thomas’s views, only eight Justices will reach the merits when the Court reviews an FAA case from a state court, creating a greater potential for split decisions (as happened in *Bazzle*).¹⁴⁰

¹³⁴ For even harsher criticisms of the Court’s tax decisions see Staudt *supra* note 33, at 890–91.

¹³⁵ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

¹³⁶ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010).

¹³⁷ *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

¹³⁸ Pet. for Writ of Cert. at i, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634).

¹³⁹ *Bazzle*, 539 U.S. at 460 (Thomas, J., dissenting).

¹⁴⁰ *Id.* at 447 (Breyer, J.). The Court seems to have figured this out. Aside from summary reversals, the only state court arbitration cases it has taken since *Bazzle* are *Buckeye Check Cashing* and *Preston v. Ferrer*, both of which were unanimous (except for Justice Thomas). See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting). The Court’s most controversial recent arbitration cases all were from federal courts, and Justice Thomas fully participated (*e.g.*, *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)).

Second, even if the FAA applies, it might apply differently in state court than in federal court. By their terms, most provisions of the FAA apply only in federal court,¹⁴¹ as the Supreme Court has acknowledged (although not yet held).¹⁴² Only FAA section 2, which makes arbitration agreements “valid, irrevocable, and enforceable,”¹⁴³ has been held to apply in state court,¹⁴⁴ and the Supreme Court’s FAA preemption cases all involve FAA section 2. The FAA surely does constrain (to some degree) state laws that address other parts of the arbitration process, such as the enforcement of awards.¹⁴⁵ But the analysis and outcome may be different in state court than in federal court.¹⁴⁶

Third, a preliminary question to almost all issues of arbitration law is who decides that issue, the court or the arbitrator. So in *Buckeye Check Cashing, Inc. v. Cardegna*, for example, the Supreme Court held that the arbitrator, rather than a court is to decide whether a contract with an arbitration clause is illegal.¹⁴⁷ Accordingly, in *Bazzle*, the plurality ultimately concluded that the arbitrator and not a court needed to decide whether the

¹⁴¹ See, e.g., 9 U.S.C. §§ 3, 4, 9, 10 (2012).

¹⁴² See *Vaden v. Discover Bank*, 556 U.S. 49, 71 n.20 (2009) (“This Court has not decided whether §§ 3 and 4 apply to proceedings in state courts, and we do not do so here.”) (internal citation omitted); *Volt Info. Scis. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 n.6 (1989) (“While we have held that the FAA’s ‘substantive’ provisions—§§ 1 and 2—are applicable in state as well as federal court, we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court.”) (internal citations omitted); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984) (“In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings.”).

¹⁴³ 9 U.S.C. § 2 (2012).

¹⁴⁴ *Southland Corp.*, 465 U.S. at 20.

¹⁴⁵ For example, a state law that makes all arbitration awards non-binding would surely be preempted as inconsistent with FAA section 2.

¹⁴⁶ If *Hall Street Associates, LLC v. Mattel, Inc.* had come from a state court instead of the Ninth Circuit, for example, it might have come out differently. See Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 906, 922–26 (2010).

¹⁴⁷ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–49 (2006); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

arbitration clause permitted class arbitration.¹⁴⁸ As a result, the plurality never even reached the question on which cert had been granted.¹⁴⁹

Finally, even if the Court wants to address the “who decides” question, it can only do so if the parties have not already resolved that issue themselves. If the parties have agreed to have the arbitrator (or the court) decide the question, then that is who makes the decision. This reality caused problems for the Court in both *Stolt-Nielsen* and *Sutter*. Both cases appeared to be follow-ups to *Bazze*, such that the Court might finally resolve the question of who decides whether an arbitration clause authorizes class arbitration. But in both cases, the parties had agreed after the dispute arose to have the arbitrator decide the question, leaving the Court reviewing the award under FAA section 10 rather than resolving the “who decides” issue.¹⁵⁰

Other potential complications come from unusual facts in the cases themselves (what Suja Thomas would call “atypical” cases¹⁵¹). As discussed above, both *Concepcion* and *Rent-A-Center* involved unusual arbitration clauses—*Concepcion* because it included an incentive provision and *Rent-A-Center* because of the unusually precise delegation clause.¹⁵² *Stolt-Nielsen*, *Amex*, and *Sutter* were unusual in another way—they all involved business-to-business arbitrations in cases raising issues that usually arise in business-to-consumer disputes.¹⁵³ Only *Stolt-Nielsen* has been largely limited to its facts, but the other cases all could have had much more limited reach than they did.¹⁵⁴

¹⁴⁸ *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 452–53 (2003).

¹⁴⁹ For another example see *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 405–07 (2003) (not deciding whether contractual punitive damages limitation prevented plaintiff from “obtaining ‘meaningful relief’” in arbitration; instead holding that deciding whether punitive damages limitation covered treble damages was preliminary issue that must be decided by the arbitrator).

¹⁵⁰ See *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) (“But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures.”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 680 (2010) (“But we need not revisit that question here because the parties’ supplemental agreement expressly assigned this issue to the arbitration panel . . .”).

¹⁵¹ See *supra* text accompanying notes 12–13.

¹⁵² See *supra* text accompanying notes 81–88.

¹⁵³ *Sutter*, 133 S. Ct. at 2067 (dispute between physicians and health insurance company); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) (dispute between credit card company and merchants); *Stolt-Nielsen*, 559 U.S. at 667 (dispute between shipping company and merchant customers).

¹⁵⁴ *Bales and Gerano* argued that “the Supreme Court has chosen for its arbitration docket a set of cases with wholly atypical fact patterns in what appears to be a deliberate

IV. CONCLUSION

Despite the axiom that that the “Supreme Court is not a court of error correction,” a number of the Court’s arbitration cases are narrow decisions that do little more than correct errors by lower courts. I offer three explanations for these types of decisions, each of which explains some of the cases: (1) the Court is responding to resistance by lower courts to its FAA arbitration doctrine; (2) cases involving the application of legal standards to one-sided facts can result in narrow decisions; and (3) the Court has chosen some poor cases for review.

To address the latter explanation, I conclude with a few suggestions for how the Court might improve its choice of arbitration cases for review. Another way of viewing these suggestions is not as directed to the Court but rather as directed to counsel—as questions to consider in seeking or opposing certiorari before the Court:

- Avoid cases from state courts when federal court cases present the same issue. The unsettled scope of FAA preemption in state court (and Justice Thomas’s persistence in his view that the FAA does not apply at all in state court) make it more straightforward to resolve arbitration issues in federal court cases, if possible.
- Avoid cases arising out of post-dispute arbitration clauses. As illustrated by *Stolt-Nielsen* and *Sutter*, the presence of a post-dispute arbitration agreement can change the legal analysis and prevent the Court from addressing the issue it might otherwise want to address.
- Avoid cases with atypical rather than typical arbitration clauses. Cases with atypical clauses increase the risk of a narrow decision by the Court and the resulting greater uncertainty as to how the decision applies to future cases.
- Avoid business-to-business cases that address issues arising most often in consumer or employment cases—again, to reduce the uncertainty resulting from atypical facts.

effort—successful so far—to advance its pro-arbitration policy agenda without provoking a political backlash.” Bales & Gerano, *supra* note 14 (manuscript at 4). They argue, for example, that in *Concepcion*, “[b]y using a very pro-consumer arbitration agreement to destroy the unconscionability defense, the Court was able to provide a smokescreen to its anti-consumer ruling.” *Id.* (manuscript at 34). Perhaps that is the Court’s motivation. But it certainly is not the case that the Court’s “smokescreen” somehow protected its decision in *Concepcion* from public scrutiny. The decision has been highly controversial despite the atypical facts, as has been the decision in *Amex*.

