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Arbitrating in the Ether of Intent

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ARBITRATING IN THE ETHER OF INTENT

JARROD WONG*

ABSTRACT

The U.S. Supreme Court's jurisprudence interpreting the Federal Arbitration Act (FAA) is incoherent in a respect that is fundamental yet not quite captured in existing legal literature. Specifically, in determining the core question of whether any particular dispute should be resolved by arbitration under the FAA, the Court has stubbornly relied on the concept of the parties' "intent" on the matter. "Intent," however, is at once elusive and polymorphic. It is elusive because the parties will often not have considered whether the particular issue is arbitrable, much less who—court or arbitrator—should decide that preliminary question. It is polymorphic as rendered by the Court, which has veered from looking for evidence of actual, conscious intent to constructive intent, and also from seeking out the intent to be bound procedurally by arbitration to the intent respecting the substantive terms of the arbitration agreement. These different senses of intent can and do conflict, but the careful differentiation thereof is masked by the Court's treatment of "intent" as a monolithic concept.

To illustrate the distorting influence on FAA jurisprudence, this Article dissects Supreme Court opinions in two broad sections of the FAA case law, both of which illustrate vividly the deforming effect of intent on it. The first concerns the carving up of jurisdiction between courts and arbitrators that goes to the foundations of the FAA, namely, the question of which decisionmaker—court or arbitrator—should determine whether the underlying dispute is arbitrable. The second is a controversy of more recent provenance that already has striking implications for all manner of consumer and employment contracts, specifically, the question concerning the availability of class arbitration. The result of this confused exercise is a tottering FAA case law built on ever more rarefied abstractions of "intent" that are little anchored in reality, yet impact in a very real way a broad range of contracts, including countless consumer and employment agreements. Thus, a complete and accurate account of the Court's jurisprudence under the FAA is not possible without a close scrutiny of the role of "intent," a concept that is ultimately wanting.

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I. INTRODUCTION

“Sometimes the reader will decide something else than the author’s intent; this is certainly true of attempts to empirically decipher reality.”

John M. Ford¹

Consider the curious state of affairs under the Federal Arbitration Act from this particularized perspective: As things stand before the U.S. Supreme Court, when one compares the cases of *Green Tree Financial Corp. v. Bazzle* and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, parties who want an arbitrator to decide whether class arbitration is available apparently do better to say nothing of the matter than to provide expressly for it in their agreement.

In *Green Tree Financial Corp. v. Bazzle*, the individual arbitration agreements between the bank and its customers were silent on whether the customers could proceed with class arbitration as opposed to bilateral arbitration. The Court determined that the arbitrator (rather than the court) should decide that question because its procedural nature made it more likely that the parties “intended” the arbitrator to resolve it.² Contrast *Bazzle* with *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, which similarly involved an arbitration agreement between the parties that was silent on whether the claimant could pursue class arbitration rather than bilateral arbitration.³ To resolve this issue, the parties entered into a supplemental agreement providing explicitly that the question of class arbitration be submitted to a panel of three arbitrators, which determined that class arbitration was in fact available.⁴ The Court, however, subsequently vacated the panel’s award, opining instead that the parties must have meant to preclude class arbitration.⁵ Notwithstanding the supplemental agreement, and even though it acknowledged that the matter was a question for the arbitrators, the Court overrode the arbitrators’ decision, and took it upon itself to interpret affirmatively the arbitration agreement as prohibiting class arbitration.⁶ Thus, parties who are intent on an arbitrator deciding the

1. Interview by Mary Anne Mohanraj and Fred Bush with John M. Ford, noted science fiction author (Apr. 29, 2002), <http://www.strangehorizons.com/2002/20020429/interview.shtml>.

2. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion); see *infra* Part II.B.i.

3. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1766 (2010).

4. *Id.* at 1765-66.

5. *Id.* at 1775-77.

6. *Id.* at 1770, 1776.

availability of class arbitration should apparently do anything but expressly designate the arbitrator for the job in their agreement.⁷ We are accordingly left with the paradox that silence best demonstrates the parties' intent on the matter.

Like *Bazzle*, many of the Court's FAA decisions pivot on the parties' "intent," notwithstanding the arbitration agreement's silence on the matter. In turn, underlying the Court's persistence in setting its compass by the parties' intent is its near-religious conviction that arbitration is no more or less than "a matter of contract."⁸ However, far from a lodestar, the parties' intent is often difficult to locate; indeed, the very term itself evades precise definition.⁹ As explored in detail below, so malleable is "intent" that it runs the significant risk of serving merely as a vehicle for the Court's own opinion, as has arguably happened in *Stolt-Nielsen*.¹⁰ At the same time, so sacred is "intent" that, having apparently divined it, the Court appears prepared to safeguard it, even at great cost to the FAA's integrity, as has debatably occurred in the recent case of *Rent-A-Center, West, Inc. v. Jackson*.¹¹

This Article examines these and other Supreme Court opinions on the FAA to illustrate the significant and often distorting influence of the concept of "intent" at the core of that case law. While there is ready consensus that the relevant FAA jurisprudence is at times incoherent,¹² one is hard pressed to find sustained efforts to explain

7. I do not maintain that this proposition is universally true. The purpose of this select and focused comparison between *Bazzle* and *Stolt-Nielsen* is simply to demonstrate that the Court's misplaced reliance on the concept of intent can lead to perverse results.

8. *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

9. See generally Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437 (2009); Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023 (2009). See also Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 394 (2007) ("[D]efinitions contained in the Restatement tend to be devoid of intent, focusing instead on 'manifestations of intent' . . .").

10. *Stolt-Nielsen*, 130 S. Ct. at 1770, 1775-77 (vacating the arbitrators' award interpreting the particular arbitration clause as allowing for class arbitration and affirmatively interpreting the clause to mean otherwise, in place of remanding the question back to the arbitrators); see *infra* Part II.B.ii.

11. *Rent-A-Ctr. W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (referring the question of whether the employment dispute is arbitrable to the arbitrator—rather than the court—on account of a delegation-to-the-arbitrator clause drafted by the employer that the Court found was immune to the employee's challenge that the broader stand-alone arbitration agreement containing the delegation clause was unconscionable because the challenge targeted the arbitration agreement as a whole, rather than the delegation clause itself). See *infra* Part III.C.

12. See, e.g., Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 63, 63 (2006) (criticizing Supreme Court jurisprudence on the issue of whether and what state arbitration procedures and standards conflict with the FAA as "murky at best and bizarre at worst"); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1143 n.180 (2006) ("[T]he larger academic literature on the Supreme Court's current arbitration jurisprudence . . . express similar interest and confusion about whether the Supreme Court's arbitration jurisprudence will ultimately produce a relatively equitable

comprehensively its contortions by reference to the Court's haphazard deployment of "intent."¹³ Instead, commentators seeking to make sense of this phenomenon have drawn battle lines between the consumer and the corporation,¹⁴ or between the employee and the employer,¹⁵ or even between state and federal courts.¹⁶ Yet, these various fault lines do not tell the whole story.

To bridge this gap, this Article analyzes two primary sections of the Supreme Court's FAA case law that exemplify starkly the warping effects of intent on it. The first concerns the fundamental allocation of jurisdiction between courts and arbitrators at the heart of the FAA, namely, the "gateway" question of which decisionmaker—court or arbitrator—should determine whether the underlying dispute is subject to arbitration.¹⁷ The second is a more recent, but already con-

dispute resolution culture or will instead effectively close off meaningful review for many employees and consumers.”).

13. Cf. Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 855 (2003) (noting that the Court's approach to arbitrability in *First Options* and *Howsam* “has potentially serious implications for the doctrine of separability, for it brings to the surface a fissure deeply embedded in the Supreme Court's case law over the nature of assent required to establish an agreement to arbitrate”); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1384 n.8 (1996) (criticizing the “unrealistic, formal and narrow view of contract consent and meaning demonstrated in recent [arbitration] cases”); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 167-68 (Winter/Spring 2004) (defending use of contract-law standards of assent).

14. See, e.g., Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for The Weak And Unwary?*, 21 J. CORP. L. 331 (1996); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995); Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275, 276 (1999); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 682 (1996); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 199 (1998).

15. See, e.g., Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J.L. & PUB. POLY 581, 583-88 (2004); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 38; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. L. REV. 637 (1996).

16. See, e.g., Hiro N. Aragaki, *Equal Opportunity For Arbitration*, 58 UCLA L. REV. 1189 (2011); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004).

17. See *infra* Part II.A.

troversial, issue that has far-reaching implications for all manner of consumer and employment contracts, specifically, the question concerning the availability of class arbitration.¹⁸

In undertaking this analysis, this Article does not—and does not mean to—determine directly the nature of “intent” and its normative value in contract law in general. That study is outside the scope of this Article. Rather, and regardless of its function in contract law more broadly, this Article aims to demonstrate that the Court’s reliance on “intent” in the specific context of these two significant FAA questions reveals it as a troubled and fickle concept here, with unsettling consequences for the resulting jurisprudence.¹⁹ The Court shifts, for instance, between seeking out the parties’ actual, conscious intent to arbitrate and what I term their “constructive intent” to arbitrate, whereby the Court sets out to construct the purely hypothetical agreement that the parties would have chosen had they directed their minds to it at the time of contracting. Compounding the problem, the Court also vacillates between emphasizing the parties’ intent to be procedurally bound by arbitration and their intent as to the substantive terms of their arbitration agreement.

The end result is an unstable FAA jurisprudence predicated on an abstract concept of “intent” that has little basis in reality but nonetheless impacts in very fundamental ways a broad range of contracts, including countless consumer and employment agreements. Further, much of the concept’s distorting influence is masked by the Court’s undifferentiated reference to “intent” as if it were monolithic. But a full account of the Court’s tangled FAA jurisprudence requires a deliberate and comprehensive parsing of “intent,” a concept that—for all of, or perhaps because of, its multi-faceted nature—leaves much to be desired.

Part I of this Article describes in summary the Court’s contract-law-centered approach to the FAA. Part II goes on to examine the role of intent in FAA jurisprudence, and studies in detail its distorting effects. Against this background, Part III maps out the contours of that distortion; analyzes the singular focus of the Court on intent in the interpretation of arbitration agreements, even when the agreements are silent on the relevant issue; and weighs the broader implications of such an approach, including its potential vulnerability to court manipulation and party gamesmanship.

18. See *infra* Part II.B.

19. That is, any value one attaches to “intent” in general is unnecessary, even irrelevant, for the purpose of evaluating the consequences of relying on it in the specific context of FAA law. It is those arbitration-specific consequences that are the focus of this Article.

II. THE COURT'S CONTRACTUAL APPROACH TO THE FAA

The idea of consent is central to the United States Supreme Court's conception of arbitration.²⁰ More fundamentally, the Court sees arbitration as nothing more than a question of contract, which, in its view, revolves around a volitional agreement that both parties have consented to. So devoted is the Court to this precept that it has become the unifying mantra in its decisions on the FAA. And so the Court has intoned that arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."²¹ Similarly, the Court has catechized us on the fact that "arbitration is strictly a matter of contract" between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.²² In the Court's view, the "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties have entered,"²³ and the primary purpose of the FAA is thus to "give effect to the contractual . . . expectations of the parties."²⁴ And—in case you missed the sermon—in this process, as with any other contract, the parties' intentions control.²⁵

This approach may lend itself to the situation when the parties have clearly signaled pre-dispute their "intent," whether by relevant words or conduct.²⁶ Things get decidedly more vexing, however, when

20. See *Geneva Sec., Inc. v. Johnson*, 138 F.3d 688, 691 (7th Cir. 1998) ("The Supreme Court's Steelworkers Trilogy makes clear a 'first principle' of federal arbitration law: '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'") (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 195 (1998) ("The United States Supreme Court has largely adopted the contractual approach to arbitration law.").

21. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

22. *Id.* at 472.

23. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1984).

24. *Volt Info. Scis., Inc.*, 489 U.S. at 479.

25. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

26. It bears observation that there are fierce critics in general of the Court's contract law-centered—approach to the FAA. See, e.g., THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON COMMERCIAL ARBITRATION* 157 (1997); Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN. ST. L. REV. 1081 (2009); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Advocates of this approach, however, base their support *inter alia* on the language of the FAA itself, specifically section 2 thereof, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." See, e.g., Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1004 n.13 (1996). As I argue in more detail below, however, accepting a contract-centered approach does not require the exclusive reliance on "intent" for the FAA questions examined here. See *infra* Part III.B.

the parties have failed to do so, including when the contract is ominously “silent” on the relevant issue and, therefore, “intent.” Because parties will not anticipate every potential dispute, the more likely eventuality is that they will quarrel over an issue on which the contract is silent. For example, even as fundamental a matter as arbitrability—that is, the question about whether the particular issue has been submitted to arbitration—may not have been expressly contemplated for the particular issue but has to be resolved before the merits of the underlying dispute can be considered.²⁷ A better example is the more abstruse yet critical question of *who* should decide arbitrability.²⁸ Here, the Court nonetheless employs the same consent-based theory even though it is highly unlikely that the parties will have contemplated, much less agreed on, these questions, as the Court itself has acknowledged.²⁹ Specifically, the Court does so by reference to what I call “constructive intent,” whereby the task for the Court is to construct the hypothetical agreement that the parties (or at least similarly-situated parties) would have chosen had they directed their minds to it at the time of contracting.³⁰ As suggested by its name, constructive intent does not reflect any actual intent of the parties but is intent that courts will deem parties to possess. Such an approach, however, can yield very different answers for the same question, as reasonable (judicial) minds will differ as to what the parties would have agreed to had they thought about the issue in dispute. It is not necessarily helpful to be looking for the parties’ “objective” manifestations of intent when there may have been no intent to begin with. Put differently, this is not so much an analytical framework as an exercise in conjecture.

Further, applying the contractual approach to federal arbitration law where the arbitration agreement is silent on the disputed issue arguably becomes more problematic as a doctrinal matter. The basis of the Court’s contractual approach to arbitration rests, in part, on section 2 of the FAA, which provides that “[a] written provision in . . .

27. See Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 BAYLOR L. REV. 753, 775 (2004) (“arbitrability questions . . . precede the resolution of the merits of the dispute between the parties”); Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1309 (2000) (“[T]he question of arbitrability is a preliminary one . . .”).

28. See *First Options*, 514 U.S. at 943.

29. *Id.* at 945 (“[T]he ‘who (primarily) should decide arbitrability’ question-is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers.”).

30. Cf. Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, 34 (2003) (describing in similar terms the default rules at play in the doctrine of separability, which rules “ ‘most closely mimic the hypothetical bargain that the parties themselves would have chosen in a completely spelled-out agreement’—or perhaps, the bargain that most similarly situated parties would have chosen—or at least, the bargain that it would be rational for such parties to have chosen *ex ante*”).

a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³¹

Section 2 and other provisions of the FAA were “designed ‘to overrule the judiciary’s long-standing refusal to enforce agreements to arbitrate,’ and to place such agreements ‘upon the same footing as other contracts.’”³² The legislative history noted that courts historically were so acutely hostile that “they refused to enforce *specific* agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction.”³³ As such, the focus of the FAA was to ensure that where parties had plainly entered into agreements to arbitrate, such agreements would be enforced.³⁴ Accordingly, when the arbitral dispute turns not on the enforcement of an extant arbitration agreement, but rather an issue on which the contract is silent, say whether the court or the arbitrator should determine the arbitrability of the dispute, it is not clear that the FAA compels courts to adopt a contractual approach in resolving the dispute. There is then even less justification for relying on as nebulous a concept as “intent” under the circumstances.

The next Part examines various instances where the Court has relied, *inter alia*, on the device of intent, whether actual or constructive, in interpreting arbitration agreements that were silent on the disputed issue, and how such reliance has led to inconsistency, if not incoherency, in result.

III. THE ROLE OF INTENT IN FAA JURISPRUDENCE

Two broad questions and their treatment within the FAA framework illustrate vividly the distorting effect of intent on the relevant case law. The first is the core FAA issue on the allocation of jurisdic-

31. 9 U.S.C. § 2 (2006); see Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1004 (1996) (noting that section 2 is “[t]he primary substantive provision of the FAA” and that its goal of overruling the judiciary’s long-standing refusal to enforce agreements to arbitrate represents “the core of the contractual approach to arbitration”); see also Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 195 (1998) (noting that the Court’s contractual approach to arbitration “rests on the premise that arbitration law is a part of contract law so courts must enforce agreements to arbitrate unless contract law provides a ground for denying enforcement”).

32. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (citations omitted).

33. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 n.6 (1985) (emphasis added) (quoting H.R. REP. NO. 68-96, at 1-2 (1924)).

34. See *id.* at 220 (noting that when Congress passed the Arbitration Act in 1925, it was “motivated, first and foremost, by a congressional desire” to change this anti-arbitration rule, and intended courts to “enforce [arbitration] agreements into which parties had entered”).

tion between the court and the arbitrator, namely the question of which decisionmaker—court or arbitrator—should determine whether the underlying dispute is subject to arbitration.³⁵ The second is the question of the availability of class arbitration, an issue that has significant implications for myriad consumer and employment contracts.

A. *Intent in Who-Decides-Arbitrability Questions*

Arbitration, like litigation, is a binding method of dispute resolution.³⁶ Under the FAA, then, a court “upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.”³⁷ The determination as such of whether there is an applicable arbitration agreement determines whether the relevant dispute is resolved by arbitration or litigation. There is, however, a preliminary question preceding such a determination, namely the question of *who*—court or arbitrator—gets to make this determination. This is an important preliminary inquiry as determining who gets first cut at the issue can change irrevocably the rules of interplay between the case and the two fora. For example, if the arbitrator gets to decide arbitrability and determines that the dispute is subject to arbitration, the resulting arbitral award can be vacated by a court only under the most limited of circumstances enumerated under the FAA.³⁸ Accordingly, the who-decides-arbitrability question matters a great deal to (counsel representing) parties who have a preference for one forum over the other. More broadly, what this means is that any question about the application of an arbitral clause potentially involves a significant meta-question not implicated in other kinds of disputes, namely the question of *who*—court or arbitrator—determines whether the arbitration clause applies.³⁹

As might be expected, this added layer of complexity in arbitral disputes, involving uniquely both an underlying arbitrability and a who-decides-arbitrability question, has only contributed to the complicated nature of FAA jurisprudence. In choosing, as it does, to apply

35. On the Court’s approach to arbitrability, see generally Jarrod Wong, *Court or Arbitrator—Who Decides Whether Res Judicata Bars Subsequent Arbitration Under the Federal Arbitration Act?*, 46 SANTA CLARA L. REV. 49, 79-81 (2005).

36. See 9 U.S.C. § 2 (2006) (providing that arbitration agreements “shall be valid, irrevocable, and enforceable”).

37. 9 U.S.C. § 3 (2006); *Prod. & Maint. Emps.’ Local 504 v. Roadmaster Corp.*, 916 F.2d 1161, 1163 (7th Cir. 1990) (en banc) (“Arbitration clauses are agreements to move cases out of court . . .”).

38. See 9 U.S.C. § 10 (2006) (providing the FAA’s exclusive grounds for vacating arbitral awards).

39. See *Alliance Bernstein Inv. Research & Mgmt., Inc. v. Schaffran*, 445 F.3d 121, 122 (2d Cir. 2006) (describing the “issue of *who* will decide the arbitrability question” as “preliminary” to the issue of “whether the claims *must* be arbitrated”).

the slippery concept of intent to both the underlying dispute and the meta-dispute, the Court has only exacerbated the problem. Indeed, in the course of two landmark decisions on the question of who—court or arbitrator—should decide the arbitrability of a dispute, the Court relied on different species of intent, veering from considering evidence of actual intent to applying constructive intent, leaving ever more uncertainty in its wake. The two decisions in question are *First Options of Chicago, Inc. v. Kaplan*⁴⁰ and *Howsam v. Dean Witter Reynolds, Inc.*⁴¹

1. First Options of Chicago, Inc. v. Kaplan

In *First Options*, the question before the Court was whether the district court or the arbitrator should decide if the respondents were bound to arbitrate a dispute under an arbitration agreement that the respondents had not personally signed.⁴² In ruling that the district court should decide the issue, the Court first distinguished between: (1) the arbitrability of the dispute (i.e., whether the parties have submitted a particular dispute to arbitration); and (2) the separate issue of *who*, court or arbitrator, determines the arbitrability of that dispute.⁴³ The Court found that just as the arbitrability of a dispute depends on whether the parties agreed to arbitrate that dispute, the determination of who “decide[s] arbitrability turns upon what the parties agreed about *that* matter.”⁴⁴ If the parties had agreed to arbitrate arbitrability, then the arbitrator should get to decide whether the dispute is arbitrable. On the other hand, if the parties had not agreed to submit the arbitrability questions to arbitration, then the court should decide the question independently, just as it would any question not submitted to arbitration.⁴⁵ The Court derived these conclusions “from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”⁴⁶ That is, as interpreted by the Court, both the arbitrability and the who-decides-arbitrability questions turn on the intent of the parties and are subject to that same analysis.⁴⁷

40. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

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

42. *First Options*, 514 U.S. at 942.

43. *Id.*

44. *Id.* at 943 (internal quotations marks omitted).

45. *Id.*

46. *Id.*

47. The Court’s articulation of these two questions is an instance of the Court’s all-encompassing contract-centered approach under the FAA. See Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 856 (2000) (“[L]ike other matters pertaining to the effectuation of the parties’ agreement to arbitrate, it is clear the Court believes the key role of the courts is to ascertain the precise nature of the parties’ bargain and, having done so, enforce it.”).

To determine the who-decides-arbitrability question, the *First Options* Court applied state law principles governing the formation of contracts.⁴⁸ Those state law principles required the Court to decide “whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration.”⁴⁹ Not surprisingly, the parties’ agreement did not expressly address the question of whether the court or arbitrator should determine if the underlying dispute was subject to arbitration.⁵⁰ As the Court itself noted, the question of who should determine arbitrability is a higher-level question that is so “arcane” that, in general, parties are unlikely to have considered it when drawing up the arbitration agreement.⁵¹ Having acknowledged, in essence, that the parties had no conscious intent to speak of, the Court nonetheless persisted in relying on the touchstone of intent to resolve the issue.⁵² Specifically, the Court recast the inquiry as how one would, in divining intent, “interpret silence or ambiguity on the ‘who should decide arbitrability’ point.”⁵³

Building on the fact that parties in general will not have considered, much less provided for, the issue, the Court held that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.”⁵⁴ In other words, the presumption is that courts, not arbitrators, should determine arbitrability, since the reality is that parties will likely not have any intent bearing on the who-decides-arbitrability question. The parties cannot be said to have agreed to arbitrators deciding this question, contract being the only means by which arbitrators are authorized to act.⁵⁵ Thus, what the Court effectively winds up doing here is applying an evidentiary test of *actual, conscious intent*: There being no clear evidence of actual intent on the part of the parties to entrust arbitrators to decide arbitrability, courts get to do so.⁵⁶

As we will see in the discussion of *Howsam* below, however, the Court ends up backpedaling some on this conclusion. Applying the test as articulated in *First Options* would lead to the court rather

48. See *First Options*, 514 U.S. at 944.

49. *Id.*

50. See *id.* at 947.

51. See *id.* at 945.

52. *Id.* at 947.

53. *Id.* at 945.

54. *Id.* at 944 (quoting *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

55. See *id.* at 945.

56. Note that this is not an exercise in constructive intent since the Court does not consider—as it does in *Howsam*, see *infra* Part II.A.ii,—those factors, e.g., comparative expertise of arbitrators, that would lead one to conclude what the parties would have agreed upon had they considered the issue. Instead, the Court relies simply on the (likely) lack of actual intent as establishing a lack of agreement. See *First Options*, 514 U.S. at 945.

than the arbitrator determining arbitrability in many cases. This result follows logically from relying on actual intent (or the lack thereof) and the fact that many arbitration agreements, or at least many of those agreements entered into prior to *First Options*, will be silent on the who-decides-arbitrability issue.⁵⁷ Such an outcome, however, does not sit comfortably with what the Court has itself described as “the law’s permissive policies in respect to arbitration,” and it remedied that oversight soon enough in *Howsam*.⁵⁸

One aside before we turn to *Howsam*, and it’s an important one that demonstrates further how muddled the reliance on intent is. The *First Options* Court also noted that the presumption applicable to the who-decides-arbitrability question is exactly opposite to the presumption applied when one is confronted with silence on the underlying arbitrability question regarding the scope of the arbitral clause, i.e., “whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.”⁵⁹ The presumption in the latter situation is that “[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”⁶⁰ The Court justified this presumption by noting that in a dispute about the scope of the clause, there is no question that the parties have agreed to the arbitration of *some* issues,⁶¹ and that “[i]n such circumstances, the parties likely gave at least some thought to the scope of arbitration.”⁶² Thus, in light of the FAA’s policy favoring arbitration, the Court reasoned that one should presume the parties agreed to arbitrate the particular matter absent evidence to the contrary.⁶³ Yet, just because the parties agreed to arbitrate certain other matters does not mean they had considered, never mind agreed to arbitrate, the particular matters at issue. It is equally possible that they simply did not think about, and therefore had no relevant intent bearing upon, the particular matter. If so, would it not be more consistent, in line with the Court’s holding on the “who” issue, to acknowledge the same and say that we cannot find any agreement to arbitrate the particular matter?⁶⁴ Conversely, if those FAA policies favoring arbitration would lead us to find an agreement to arbitrate the particular

57. The flip side of the story here is that going forward, and in response to the decision in *First Options*, the savvy party may well include a provision that specifies who determines arbitrability. This, however, opens up the possibility for manipulation by the more strategic party, as was possibly the case in *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010). See discussion *infra* Part III.C.

58. *First Options*, 514 U.S. at 945.

59. *Id.* at 944-45.

60. *Id.* at 945 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

61. *See id.*

62. *Id.*

63. *Id.*

64. *See supra* text accompanying notes 41-45.

issue notwithstanding the lack of any evidence one way or the other on intent, the same policies argue for allowing the arbitrator to determine arbitrability when there is a corresponding lack of evidence of intent relating to the “who” question.⁶⁵ But on to *Howsam*, which significantly qualifies, if not reverses in part, the Court’s decision in *First Options*.⁶⁶

2. *Howsam v. Dean Witter Reynolds, Inc.*

In *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court revised in part its opinion in *First Options* by adopting a test that turned on constructive rather than actual intent.⁶⁷ *Howsam* concerned a lawsuit brought by a securities broker in federal court to enjoin its customer from arbitrating a dispute before the National Association of Securities Dealers (NASD) on the ground that the customer was time-barred under an arbitration rule of NASD for initiating its request for arbitration more than six years after the dispute.⁶⁸ The district court dismissed the action, holding that the question of whether the arbitration was time-barred was one for the arbitrator.⁶⁹ On appeal, the Tenth Circuit Court of Appeals reversed.⁷⁰ Relying on its (entirely defensible) reading of *First Options*,⁷¹ the court of appeals determined that the issue was one for the district court because “application of the NASD rule presented a question of the underlying dispute’s ‘arbitrability’; and the presumption is that a court, not an arbitrator, will ordinarily decide an ‘arbitrability’ question.”⁷²

The Supreme Court, however, disagreed with the court of appeals (and therefore with itself in *First Options*), concluding, instead, that “the applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge.”⁷³ The Court explained that not every inquiry into whether a dispute is subject to arbitration is a so-called “question of arbitrability” that fell under the rule ar-

65. See *supra* text accompanying notes 43-48.

66. In an early article published in the *Santa Clara Law Review* in 2005, I had stated instead that *Howsam* “refined” or “clarified” the reasoning in *First Options*, which suggests that the decisions were compatible in a way that I do not now believe to be true. See Jarrod Wong, *Court or Arbitrator—Who Decides Whether Res Judicata Bars Subsequent Arbitration Under the Federal Arbitration Act?*, 46 SANTA CLARA L. REV. 49, 79, 82 (2005). I chalk it up to the folly of youth and a naïve faith in the Court’s wisdom; wistfully, I have since been disabused of both.

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

68. *Id.* at 81. The NASD rule in question provided “that no dispute ‘shall be eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute.’ ” *Id.* (quoting NASD CODE OF ARBITRATION PROCEDURE § 10304 (1984)).

69. *Id.* at 82.

70. *Id.*

71. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

72. *Howsam*, 537 U.S. at 82 (citation omitted).

73. *Id.* at 85.

ticulated in *First Options*.⁷⁴ Rather, and for the first time, the Court distinguished between “substantive arbitrability,” which is such a “question of arbitrability” for courts rather than arbitrators, and “procedural arbitrability,” which is not.⁷⁵

Having quite suddenly arrived upon this bifurcation, the Court, of course, needs to explain it. But it barely does so, and then only with the corresponding lack of clarity that comes with building a doctrine around intent. Specifically, the Court described substantive arbitrability questions as those questions that are

applicable in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.⁷⁶

But this inquiry begs the question: In the Court’s circular formulation, those arbitrability matters to be decided by a court are those matters parties expect would be decided by a court (and even when parties may have no such expectation whatsoever).⁷⁷ Seeming to acknowledge this, the Court valiantly goes on to provide examples. According to the Court, instances of substantive arbitrability questions include disputes “about whether the parties are bound by a given arbitration clause”—such as the one in *First Options*.⁷⁸ These instances also include disagreements over “whether an arbitration clause in a concededly binding contract applies to a particular type of

74. *Id.* at 84-85.

75. *Id.* (quoting UNIF. ARBITRATION ACT §6(c) & cmt. 2 (revised 2000), 7 U.L.A. 12-13 (Supp. 2002) (“RUAA”) in support of the distinction). Although the Court quotes and relies on the RUAA, which refers respectively to “substantive arbitrability” and “procedural arbitrability” in distinguishing between arbitrability matters to be decided by the court and the arbitrator, the Court does not itself consistently employ those terms. Instead, the Court refers to the former but not the latter as true “questions of arbitrability.” *Id.* at 84. Because the RUAA terminology is less confusing, this Article adopts that terminology, including when it describes the Court’s rulings.

76. *Id.* at 83-84.

77. See David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 76 (2003) (describing definition of gateway questions as “obscure”); cf. Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 865 (2003) (“One may reasonably question whether the Court’s new nomenclature will engender more confusion than clarification But it settles the law to know both that the procedural arbitrability doctrine is still viable, and, perhaps more important, how it is to be treated analytically in the post-*First Options* regime.”).

78. *Howsam*, 537 U.S. at 84. The Court cited, as examples, the disputes in *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995) and *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964), which held that “a court should decide whether an arbitration agreement survived a corporate merger and bound the resulting corporation.” *Id.*

controversy,” such as whether a labor-management—layoff controversy falls within the arbitration clause of a collective-bargaining agreement, and disputes over whether a clause providing for arbitration of various “grievances” covers claims for damages for breach of a no-strike agreement.⁷⁹

In contrast, matters of procedural arbitrability arise in “other kinds of general circumstance[s] where parties would likely expect that an arbitrator would decide the gateway matter” and are presumptively for the arbitrator to decide.⁸⁰ Examples of such issues include procedural defenses to arbitrability, including waiver or delay.⁸¹

Applying this dichotomous analysis, the *Howsam* Court determined that the applicability of the NASD time limit rule more closely resembled an issue of procedural arbitrability and was, therefore, a matter for the arbitrator and not the court.⁸² It found support for this conclusion in the fact that “the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it.”⁸³ In the absence of any statement to the contrary in the arbitration agreement, the Court found it “reasonable” to infer that the parties intended the agreement to reflect that understanding.⁸⁴

As an indication, however, of how precarious this exercise in intent is, notice that one of the principal examples the *Howsam* Court provided of a substantive question of arbitrability—i.e., disagreements over whether an arbitration clause in a concededly binding contract applies to a particular type of controversy—involves precisely the same kind of *scope-related* dispute designated by the *First Options* Court as one where we would presume that the particular type of controversy would be arbitrable.⁸⁵ If so, it would also be reasonable to assume that the parties would expect an arbitrator to make that call, since after all, arbitrators being “comparatively more expert about the [substance of the dispute], are comparatively better able to interpret and to apply it.”⁸⁶ But this would then *disqualify* it as a

79. *Howsam*, 537 U.S. at 84. (citing *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643 (1986) (holding that a court determines “whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement”) and *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241-43 (1962) (“holding that a court should decide whether a clause providing for arbitration of various ‘grievances’ covers claims for damages for breach of a no-strike agreement”)).

80. *Id.* at 84.

81. *See id.* *See also* *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (finding a contract dispute between the parties to be arbitrable even with the addition of claims of waiver and delay).

82. *Howsam*, 537 U.S. at 85-86.

83. *Id.* at 85.

84. *Id.*

85. *See supra* text accompanying notes 51-56.

86. *Id.*

substantive question of arbitrability. The point here, again, is that reasonable minds can and will disagree about what a party might expect, and intent remains a flimsy and malleable basis on which to apply the FAA.

Further, while it is likely the case that the parties in *Howsam* simply did not consider the who-decides-arbitrability question and thus had no relevant actual, conscious intent, the absence of actual intent is no longer the interpretive focus of the Court in *Howsam* as it was in *First Options*. Instead, the approach employed in *Howsam* looks to constructive, rather than actual, intent. Specifically, the *Howsam* Court saw its task as determining what “reasonable” people in the parties’ shoes would have concluded on that matter had they directed their minds to it; since “reasonable” parties in the *Howsam* situation would have wanted to rely on the NASD arbitrators’ comparatively greater expertise, the arbitrator gets to decide arbitrability.⁸⁷ In doing so, not only has the Court essentially adopted a test for a different kind of intent—i.e., constructive, rather than actual—it is invariably a less reliable test since the exercise is, by definition, hypothetical in nature. It is in fact this nebulous free-form exercise in constructive intent that accounts for a fair amount of the incoherence we see in the FAA jurisprudence examined in this Article, including recent and controversial case law involving class arbitration.

B. *Intent in Class Arbitration*

The availability of class arbitration has been a hot-button issue since at least the Court’s 2003 decision of *Green Tree Financial Corp. v. Bazzle*.⁸⁸ Cast in histrionic terms as the last holdout for the beleaguered consumer (or plaintiff class counsel, take your pick),⁸⁹ what began in *Bazzle* as a question on whether an arbitration clause silent on the availability of class arbitration permitted class authorization, has escalated into a pitched battle in *AT&T Mobility, LLC v. Concepcion* on whether a consumer who has expressly waived class arbitration may avoid that agreement on grounds that it is unconscionable under state law.⁹⁰ The troubled journey illustrates why a singular reliance on the amorphous concept of intent is a bad idea, and quite unnecessary to boot.

87. *Howsam*, 537 U.S. at 85.

88. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion). See *infra* Part II.B.i.

89. Cf. *Mandatory Arbitration Clauses: Undermining the Rights of Consumers, Employees, and Small Businesses*, PUB. CITIZEN, http://www.citizen.org/congress/article_redirect.cfm?ID=7332 (last visited Feb. 14, 2012) (“Class actions are the only effective remedy for wide-scale scams that rip off individual consumers . . . in small amounts.”).

90. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011). See *infra* Part II.B.iii.

1. Green Tree Financial Corp. v. Bazzle

Bazzle concerned contracts containing arbitration clauses between a commercial lender (Green Tree) and its customers, including the Bazzles.⁹¹ When a dispute arose between the parties, the Bazzles sought to bring a class action in state court in South Carolina, and Green Tree responded with a request to stay the court proceedings and compel arbitration.⁹² While the contracts between Green Tree and its customers contained an arbitration clause, it did not expressly mention class arbitration, so we are once again “faced at the outset with a problem concerning the contracts’ silence.”⁹³ Notwithstanding, the trial court both certified a class action and entered an order compelling arbitration, and the arbitrator subsequently appointed in the arbitration administered the proceeding as a class arbitration.⁹⁴ The arbitrator eventually issued an award in favor of the class, which was appealed ultimately to the South Carolina Supreme Court.⁹⁵

The South Carolina Supreme Court ended up affirming the award.⁹⁶ After discussing both California precedent upholding a court’s authority to order class-wide arbitration under section 4 of the FAA⁹⁷ and conflicting Seventh Circuit precedent holding that a court had no such authority,⁹⁸ the South Carolina court elected to follow the California approach, which it characterized as permitting a trial court to “order class-wide arbitration under adhesive but enforceable franchise contracts.”⁹⁹ Under this approach, the South Carolina court observed, a trial judge must “[balance] the potential inequities and inefficiencies” of requiring each aggrieved party to proceed on an individual basis against the “resulting prejudice to the drafting party” and should take into account factors such as “efficiency” and “equity.”¹⁰⁰ Applying these standards to the case before it, and in light of its finding that the arbitration clause in the Green Tree contracts was “silent regarding class-wide arbitration,”¹⁰¹ the South Carolina court ruled as follows:

[W]e . . . hold that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity,

91. *Bazzle*, 539 U.S. at 447 (plurality opinion).

92. *Id.* at 449.

93. *Id.* at 447.

94. *Id.* at 449.

95. *Id.* at 449-50.

96. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 363 (S.C. 2002), *vacated*, 539 U.S. 444 (2003).

97. *See id.* at 356-57 (discussing *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982)).

98. *See id.* at 356 (discussing *inter alia* *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995)).

99. *Id.* at 357, 360.

100. *Id.* at 357 & n.15.

101. *Id.* at 359 (emphasis omitted).

and would not result in prejudice. If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement.¹⁰²

Although unremarkable in other circumstances, it is striking in this context that the South Carolina court is looking to factors *beyond* intent in construing contracts—as is permitted under every variant of Contract Law save, apparently, that of the U.S. Supreme Court in relation to arbitration—taking into account such things as efficiency and public policy. As this approach readily instructs, the interpretation of contracts need not, and does not, turn exclusively on intent. Any such lesson was lost on the U.S. Supreme Court, however, when *Bazzle* made its way there after the Court granted certiorari to determine whether the South Carolina court's holding was consistent with the Federal Arbitration Act.¹⁰³

A virtual microcosm of FAA case law, the resulting *Bazzle* opinion was so fractured that no single rationale commanded a majority, thanks in part to its confusion over intent.¹⁰⁴ In short, the plurality, which disagreed with the dissenters about whether the who-decides-arbitrability question was a substantive question of arbitrability, only got its way because Justice Stevens reluctantly concurred with its result;¹⁰⁵ although, a detailed survey reveals various and ever more nuanced conflicts within the Court revolving around intent.

Writing for the prevailing plurality, Justice Breyer held that the relevant question was whether the South Carolina Supreme Court's interpretation was erroneous because, as both the petitioner and the joint dissent asserted, the contracts were not silent but instead should reasonably be read to *forbid* class arbitration.¹⁰⁶ However, this question itself was preceded by another, namely who, court or arbitrator, should decide whether the contracts were silent or else prohibited class arbitration.¹⁰⁷ Because the plurality saw the underlying arbitrability question here as asking “what kind of *arbitration proceeding* the parties agreed to,” which in turn was regarded as “concern[ing] contract interpretation and arbitration procedures,” this

102. *Id.* at 360 (footnote omitted).

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

104. *Id.* at 446.

105. *Id.* at 454-55 (Stevens, J., concurring in part and dissenting in part).

106. *Id.* at 450. The relevant arbitration clause provided “that disputes ‘shall be resolved . . . by one arbitrator selected by us [Green Tree] with consent of you [Green Tree’s customer].’” *Id.* (citation omitted). As the plurality pointed out, the dissent believed that class arbitration was “inconsistent with this requirement,” since “class arbitration involves an arbitration, not simply between Green Tree and a named customer, but also between Green Tree and other (represented) customers, all taking place before the arbitrator chosen to arbitrate the initial, named customer’s dispute.” *Id.* at 450-51 (emphasis added).

107. *Id.* at 451.

was a procedural rather than a substantive question of arbitrability.¹⁰⁸ Accordingly, the arbitrator rather than the court should decide the question per *Howsam*, and since the South Carolina trial court here had ordered class certification rather than defer to the arbitrator, the Court vacated the South Carolina Supreme Court's decision and remanded the case.¹⁰⁹

Now, while determining who decides arbitrability is not the only way the plurality might have approached the issue—see the South Carolina's Supreme Court's decision or, alternatively, the joint dissent's approach—such a framework is almost assured when one elevates the role of intent as the Court has. This then renders the resulting analysis vulnerable to the nebulous nature of intent. To wit, the joint dissent here disagreed with the plurality's categorization of the underlying arbitrability question as a procedural issue to be determined by the arbitrator.¹¹⁰ Instead of viewing the class arbitration question as one relating to merely the type of proceedings the parties had agreed to, the dissent would characterize the issue as one concerning the parties' agreement *about the way arbitrators are selected*.¹¹¹ Phrased thusly, the underlying arbitrability question more closely resembles, as the dissent argued, a substantive question of arbitrability for the courts.¹¹² What this again demonstrates is the pliability of the concept of (constructive) intent and its resulting uncertainty.

According to the dissent, then, the court rather than the arbitrator should determine whether the arbitration clause allows for class arbitration.¹¹³ But the dissent doesn't stop there. Even though the interpretation of contracts is a matter of state law that a federal court would not review,¹¹⁴ it found the South Carolina court's interpretation to be evidently contrary to the terms of the arbitration clause, which plainly forbade class arbitration, per the dissent.¹¹⁵ As such, the dissent would have held that the South Carolina court's interpretation was thereby preempted by the FAA, whose “‘central purpose’ . . . is ‘to ensure that private agreements to arbitrate are enforced according to their terms.’”¹¹⁶ Yet, such a conclusion is awkward, to say the least. The meaning of any such “terms” requiring enforcement must be determined by reference to the law governing the contract, here South Carolina law. It is thus not possible, by definition,

108. *Id.* at 452-53.

109. *Id.* at 444, 453.

110. *Id.* at 457 (Rehnquist, C.J., dissenting).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 457-58.

115. *See supra* text accompanying notes 110-12.

116. *Bazze*, 539 U.S. at 458 (Rehnquist, C.J., dissenting) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995)).

for the South Carolina court's interpretation of the clause to be contrary to its terms—they are one and the same thing.¹¹⁷ What the dissent has done, in effect, is to substitute and ordain *its own* interpretation as the authoritative interpretation, and then declare the South Carolina court's interpretation as contrary to it. To see this more clearly, one need only ask exactly what law the dissent was applying to arrive at its interpretation of the arbitration clause as prohibiting class arbitration. Since the FAA has no body of law (that I know of) relating generally to the interpretation of “terms,” and it was not applying South Carolina law, the dissent must simply have been interpreting the terms and determining the parties' intent according to its own, personal brand of the law. Which is to say that we've now replaced the parties' intent with the dissent's intent. And so we see, yet again, how slippery an exercise steeped in (non-existent or, at least, unexpressed) intent can be.

And finally, there's Justice Stevens' separate opinion, which while—and only just barely—concurring with the result reached by the plurality, injected a third strain of uncertainty into the mix. Although he did not endorse the plurality's rationale, Justice Stevens concurred in the judgment vacating and remanding because there would otherwise have been “no controlling judgment of the Court.”¹¹⁸ He did not take a definitive stance on the who-decides-arbitrability question, stating only that “[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator.”¹¹⁹ But because he did not believe that the petitioner had raised the question of the appropriate decision maker, he preferred not to reach that question and instead, would have affirmed the decision of the South Carolina Supreme Court on the ground that “the decision to conduct a class-action arbitration was correct as a matter of law.”¹²⁰ As Justice Stevens did not elaborate on the issue, one can only speculate as to whether he thought that the South Carolina Supreme Court's decision was correct as a matter of deference to state law or, more tantalizingly, because he believed one should look beyond intent to considerations of efficiency and public policy in construing contracts. What remains problematic, however, is the doctrinal inconsistency between Justice Stevens' preferred approach and that of the plurality. As discussed earlier, the who-decides-arbitrability question approach adopted by the plurality not only gives prominence to the role of intent, but also changes irremediably

117. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (“When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”).

118. *Bazzle*, 539 U.S. at 455 (Stevens, J., concurring in part and dissenting in part).

119. *Id.*

120. *Id.*

the rules of the game and thus the complexion of the case.¹²¹ Specifically, if—as the plurality decides here—the arbitrator should determine arbitrability,¹²² any resulting award issued by the arbitrator can only be vacated by a court under limited grounds enumerated under section 10 of the FAA.¹²³ Significantly, these grounds do *not* include an award that is erroneous under the law.¹²⁴ As the Court itself has recently noted, these grounds “restate the longstanding rule that, ‘[i]f [an arbitration] award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court . . . will not set [the award] aside for error, either in law or fact.’”¹²⁵

Thus, adopting the who-decides-arbitrability approach here would not be consistent with Justice Stevens’ preferred approach of resolving the dispute on the basis of the correctness of the South Carolina’s court decision.

Scarcely surviving its various crosscurrents of reasoning, the plurality opinion in *Bazzle* is all but displaced in the recent decision of *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, where the Court again confronts the question of whether an arbitration clause that is silent on class arbitration may be read nonetheless to allow for it.¹²⁶ Except that now in *Stolt-Nielsen*, the Court changes course, and the majority takes it upon itself to interpret the arbitration clause, thereby endorsing the approach adopted by the dissent in *Bazzle*.¹²⁷

121. See *supra* text accompanying notes 29-31.

122. *Bazzle*, 539 U.S. at 454.

123. See section 10(a) of the FAA which provides that the court may vacate the award:

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

9 U.S.C. § 10(a) (2006). The Court has expressly declared “that the statutory grounds are exclusive,” and “that the FAA confines its expedited judicial review to the grounds listed in 9 U.S.C. §§ 10 and 11,” *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578, 592 (2008).

124. See 9 U.S.C. § 10(a) (2006); see also *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (“[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.”).

125. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1780 (2010) (Ginsburg, J., dissenting) (quoting *Burchell v. Marsh*, 58 U.S. 344, 349 (1854)); see also *Wilko*, 346 U.S. at 436-37 (noting that the “[p]ower to vacate an [arbitration] award is limited,” and that “the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation”).

126. *Stolt-Nielsen*, 130 S. Ct. at 1764.

127. *Id.* at 1770.

2. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*

The issue in *Stolt-Nielsen* was whether the arbitrators had properly interpreted the arbitration agreement between commercial parties as allowing for class arbitration when the agreement was silent on the subject.¹²⁸ In a startling decision with Justice Alito writing for the majority, the Court not only vacated the award after finding that the arbitrators had exceeded their powers—which the Court was authorized to do—but also went on to interpret affirmatively the clause even though it was indubitably a question for the arbitrators.¹²⁹ Justice Alito defended the decision's reach on the ground that the majority, having “conclude[d] that there can be only one possible outcome on the facts,” saw “no need to direct a rehearing by the arbitrators.”¹³⁰ Ironically, as the discussion below details, this decision was purportedly premised on and justified by reference to the parties' intent.

Stolt-Nielsen involved a dispute between petitioner shipping companies and certain of its corporate customers, including AnimalFeeds International Corp., who had contracted for the shipment of their goods pursuant to a charter party (standard shipping contract in maritime trade), which is typically selected by the customers, as was the case with AnimalFeeds.¹³¹ AnimalFeeds' charter party provided in relevant part:

Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [*i.e.*, the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.¹³²

AnimalFeeds, along with other charterers, sued *Stolt-Nielsen* in federal court alleging illegal price fixing, and the parties were required, as a result of various court decisions, to arbitrate their anti-trust dispute pursuant to the arbitration clauses in their charter parties.¹³³ AnimalFeeds then served petitioners with a demand for class arbitration seeking to represent similarly placed customers of petitioners' services.¹³⁴ The parties—and this is significant—entered into

128. *Id.* at 1764.

129. *Id.* at 1770.

130. *Id.*

131. *Id.* at 1764-65.

132. *Id.* at 1765.

133. *Id.*

134. *Id.* at 1766.

a supplemental agreement to arbitrate the threshold issue of whether the charter party permitted class arbitration under the American Arbitration Association's Supplementary Rules for Class Arbitration (AAA Class Rules).¹³⁵ The parties also stipulated that the arbitration clause was "silent" with respect to class arbitration.¹³⁶ After hearing evidence and argument, including testimony from Stolt-Nielsen's experts regarding arbitration customs and usage in the maritime trade, the panel determined that the arbitration clause allowed for class arbitration.¹³⁷ The panel found persuasive the fact that various arbitration decisions after *Bazzle* had construed a wide variety of clauses as allowing for class arbitration, and also that the expert testimony offered did not demonstrate an "inten[t] to preclude class arbitration."¹³⁸ Under these circumstances, the panel concluded that *Bazzle*, together with general policy considerations, dictated its decision that the clause permitted class arbitration.¹³⁹

Stolt-Nielsen sought successfully to vacate the arbitration award in federal district court in New York, which found that the arbitration panel's decision was made in "manifest disregard" of the law.¹⁴⁰ Specifically, the district court considered the panel's reliance on *Bazzle* to be misplaced since *Bazzle* merely determined that the issue of class arbitrability was for the arbitration panel to decide, and did not in fact speak to the issue of whether the clause permitted class arbitration.¹⁴¹ The district court also found that if the panel had undertaken a "meaningful" choice-of-law analysis, it would have concluded that maritime and New York state law would have applied to preclude class arbitration.¹⁴² On appeal, the Second Circuit reversed after concluding that the relevant maritime and state laws were inconclusive on the issue, and that the arbitration panel could not thus have been in manifest disregard of the law.¹⁴³

The U.S. Supreme Court granted certiorari and reversed.¹⁴⁴ Writing for the majority, Justice Alito charged the arbitration panel with the cardinal sin of failing to determine the parties' intent in interpreting the arbitration clause, as was required under either of the two laws that potentially governed the contract (New York law and maritime law).¹⁴⁵ Had the panel done so, it would not have inferred

135. *Id.*

136. *Id.* at 1766.

137. *Id.*

138. *Id.*

139. *Id.* at 1768-69.

140. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 387 (S.D.N.Y. 2006).

141. *Id.* at 384-85.

142. *Id.* at 385-86.

143. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 101-02 (2d Cir. 2008).

144. *Stolt-Nielsen*, 130 S. Ct. at 1764, 1777.

145. *Id.* at 1768 & n.4.

from the silence on class arbitration an intent so to arbitrate given the radically distinct nature of class arbitration from bilateral arbitration.¹⁴⁶ For example, the chosen arbitrator would now resolve “disputes between hundreds or perhaps even thousands of parties” rather than “a single dispute between the parties to a single agreement,” and any resulting award would likewise “adjudicate[] the rights of absent parties,” as opposed to “bind[ing] just the parties to a single arbitration agreement.”¹⁴⁷ Additionally, under the AAA Class Rules, “‘the presumption of privacy and confidentiality’ that applies in many bilateral arbitrations ‘shall not apply in class arbitrations.’”¹⁴⁸ Indeed, Justice Alito went so far as to describe the panel’s conclusion as “fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.”¹⁴⁹

Instead of determining the parties’ intent, the majority found that the arbitration panel had “simply imposed its own conception of sound policy” in looking predominantly to what the panel perceived as “a post-*Bazzle* consensus . . . that class arbitration is beneficial in ‘a wide variety of settings.’”¹⁵⁰ In the process, the panel declined to be persuaded by

court cases denying consolidation of arbitrations, by undisputed evidence that the [particular type of] charter party had never been the basis of a class action, or by expert opinion that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration.¹⁵¹

Accordingly, as “the task of an arbitrator is to interpret and enforce a contract, not to make public policy,” the panel’s award “may be vacated under § 10(a)(4) of the FAA on the ground that the [panel] ‘exceeded [its] powers.’”¹⁵²

But the majority did not stop there. In addition to vacating the award, it took the highly unusual step of affirmatively interpreting the arbitration clause to prohibit class arbitration, even though the question was plainly one for the arbitrators.¹⁵³ It did so purportedly under section 10(b) of the FAA and on the ground that there was “only one possible outcome on the facts,” thereby dispensing with the need to refer the question back to the panel.¹⁵⁴

146. *Id.* at 1775-76.

147. *Id.* at 1776.

148. *Id.*

149. *Id.* at 1775.

150. *Id.* at 1769.

151. *Id.* at 1769 (footnote omitted) (internal quotation marks omitted).

152. *Id.* at 1767.

153. *See id.* at 1770, 1776.

154. *Id.* at 1770.

As the dissent points out, however, section 10(b) allows for no such thing.¹⁵⁵ As an initial matter, section 10(a) authorizes a court to vacate an arbitral award made in the district on enumerated grounds specified in the section.¹⁵⁶ Section 10(b) goes on to provide in its entirety that “[i]f an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, *direct a rehearing by the arbitrators.*”¹⁵⁷ Thus, section 10(a) allows the Court to vacate the award under particular circumstances, and section 10(b) further authorizes the Court in that event to refer the question back to the arbitrators if the deadline for the issuance of the award has not expired, but that is all. Section 10(b) most certainly does not authorize the court to substitute the arbitrator’s decision with its own.

In interpreting the arbitration clause, the majority has thus hijacked the role of the arbitrators. Yet, as the dissent notes, there was no question that the parties’ supplemental agreement “undoubtedly empowered the arbitrators to render their clause-construction decision.”¹⁵⁸ Even taken on its own terms, the majority’s “characterization of the arbitration panel’s decision as resting on ‘policy,’ not law, is hardly fair comment, for ‘policy’ is not so much as mentioned in the arbitrators’ award.”¹⁵⁹ Indeed, the dissent observed that the panel had explicitly indicated it had looked to the language of the parties’ agreement to determine if they “*intended* to permit or to preclude class action[s].”¹⁶⁰ Focusing on the wording of the clause, the panel emphasized its breadth and noted that similarly comprehensive language had been interpreted to permit class proceedings.¹⁶¹ It is thus plain that the arbitrators had “‘constru[ed] . . . the contract’ with fidelity to their commission” and since the Court may vacate the award if the panel exceeded its powers but not if it were erroneous, it “may not disturb the arbitrators’ judgment, even if convinced that ‘serious error’ infected the panel’s award.”¹⁶² Worse, the Court not only set aside the arbitral decision, it compounded that error by arrogating to itself the power to interpret the arbitration clause, and thereby “substitute[d] its judgment for that of the decisionmakers chosen by the

155. *See id.* at 1782 (Ginsburg, J., dissenting) (citation omitted) (“Section 10(b), the Court asserts, invests in this tribunal authority to ‘decide the question that was originally referred to the panel.’ The controlling provision, however, says nothing of the kind.”).

156. *See* 9 U.S.C. § 10(a) (2006).

157. 9 U.S.C. § 10(b) (2006) (emphasis added).

158. *Stolt-Nielsen*, 130 S. Ct. at 1780 (Ginsburg, J., dissenting).

159. *Id.*

160. *Id.* at 1781 (emphasis added).

161. *Id.*

162. *Id.* at 1782 (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

parties.”¹⁶³ The irony here is that the Court’s appropriation of the arbitrators’ role was justified on the basis of the “parties’ intent.”

As discussed in more detail below, however, the Court does not have to rely exclusively on the parties’ intent in determining whether class arbitration is available.¹⁶⁴ Indeed, the result in *AT&T Mobility LLC v. Concepcion*, which was the next occasion on which the Court pronounced on this issue, suggests as much.¹⁶⁵

3. AT&T Mobility LLC v. Concepcion

AT&T Mobility LLC v. Concepcion, a lightning rod of a case recently decided by the Court, is representative of a recent wave of cases brought by plaintiffs seeking to rely on the unconscionability doctrine to set aside, or at least limit, arbitration agreements in adhesion contracts.¹⁶⁶ The point of entry for these plaintiffs in resisting arbitration is the so-called “saving clause” in section 2 of the FAA, which provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁶⁷ By attacking the arbitration agreement as unconscionable under relevant state law and, accordingly on “grounds . . . for the revocation of any contract,” plaintiffs seek to have courts set aside the offending arbitral clause within the framework of the FAA itself.¹⁶⁸

In *Concepcion*, the contracts at issue were individual arbitration agreements between a cellphone company and its customers in California that expressly prohibited the customers from bringing class proceedings, including class arbitration.¹⁶⁹ Resisting arbitration, plaintiffs argued before the federal district court that the arbitration agreements were unconscionable under California law for enabling parties with superior bargaining power to perpetrate a scheme deliberately to cheat countless consumers out of individually small sums of money, thereby serving to exempt those parties from their own fraud.¹⁷⁰ In a prior decision, *Discover Bank v. Superior Court*, the California Supreme Court had specifically identified such a class-action waiver as unconscionable, and thus unenforceable, under California law.¹⁷¹ Taking its cue from *Discover Bank*, the district court decided

163. *Id.* at 1777.

164. *See infra* Part III.B.

165. *See* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

166. *See generally* Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622 (2009) (noting the sharp rise in unconscionability challenges to arbitration clauses in the last decade).

167. 9 U.S.C. § 2 (2006).

168. *Id.*

169. *See Concepcion*, 131 S. Ct. at 1744.

170. *See id.* at 1746.

171. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

in favor of plaintiffs and struck the class-proceeding waiver, and the Ninth Circuit Court of Appeals affirmed.¹⁷² A sharply divided U.S. Supreme Court reversed, however, in a decision that, like *Bazzle*, comprised a plurality, a stand-alone concurrence, and a dissent.¹⁷³

Concepcion is a significant and controversial decision for various reasons, and over which much ink will no doubt be spilt.¹⁷⁴ For the narrower purposes of this Article, however, it should initially be noted that because *Concepcion* involves an arbitration agreement expressly prohibiting class arbitration, it does not present the difficulties of ascertaining intent in the void of the parties' silence that are the primary concern of this Article. Nonetheless, *Concepcion* may be instructive insofar as it suggests that the Court may look outside "intent" to determine the validity of an arbitration agreement. In this regard, what bears observation in *Concepcion* is that the Court upheld the arbitration agreement with the class-action waiver with little reference to the parties' intent, even though that intent—to exclude class arbitration—could not have been plainer. Instead, the Court found for the petitioner on the ground that the *Discover Bank* rule was preempted for conflicting with the FAA's objective of facilitating efficient arbitration of claims.¹⁷⁵ Specifically, the Court found that the *Discover Bank* rule increased the complexity of arbitral procedures, thereby discouraging and effectively discriminating against arbitration.¹⁷⁶

It is evident, if not ironic, that the *Concepcion* Court could not refer to the parties' explicit and manifest "intent" to exclude class arbitration since the whole premise of the plaintiffs' argument is that any arbitration agreement based on such "intent" is necessarily defective because of the unconscionability of the class-action waiver.¹⁷⁷ As another indication of how untethered "intent" is to reality, it is worth observing that in all probability, the typical consumer here is as unlikely to comprehend the fact that she has waived the right to pursue class proceedings, as the fact that she has entered into an agreement

172. *Concepcion*, 131 S. Ct. at 1745.

173. *See id.* at 1744, 1753, 1756.

174. Indeed, the deluge has already begun. *See, e.g.*, Colin P. Marks, *The Irony Of AT&T v. Concepcion*, 87 IND. L.J. SUPPLEMENT 31 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012); Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in AT&T Mobility LLC v. Concepcion*, 45 LOY. L.A. L. REV. 435 (2012).

175. *Concepcion*, 131 S. Ct. at 1753.

176. *See id.* at 1750-53.

177. *See* Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006). *See generally* Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996) (explaining the contractual approach to the unconscionability doctrine used in arbitration contexts).

to arbitrate any dispute arising under the contract.¹⁷⁸ Yet, she will be deemed to have validly consented to the latter, but not necessarily the former.¹⁷⁹ In any event, the Court must and does look outside the parameters of “intent” in deciding whether the arbitration agreement is enforceable. Specifically, the Court upheld the arbitration agreement by looking to the public policies enshrined in the FAA and determined that allowing the application of California law relating to unconscionability here would frustrate those policies, and that conversely, enforcing the agreement would be compatible with them.¹⁸⁰

Writing for the plurality, Justice Scalia first identified the “overarching purpose of the FAA” as that of “ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”¹⁸¹ The opinion went on to consider whether California’s effective prohibition of class arbitration waivers under the *Discover Bank* rule was consistent with this purpose by directly examining what is entailed in class arbitration as opposed to bilateral arbitration.¹⁸² In the process, the Court observed that class arbitration is comparatively “slower, more costly, and more likely to generate procedural morass than final judgment.”¹⁸³ Additionally, class arbitration proceedings have to account for the due process rights of absent third parties, which the Court questioned whether Congress meant for arbitrators to manage.¹⁸⁴ Similarly, the Court doubted that Congress could have contemplated class arbitration with the higher stakes involved when it passed the FAA since arbitral awards are generally not appealable and can be set aside on judicial review only on the most limited of grounds.¹⁸⁵ Accordingly, the Court held that the FAA preempted California’s *Discover Bank* rule since “it ‘stands

178. Many commentators have noted that consumers seldom read, let alone, understand arbitration agreements. See, e.g., Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 731 (2008) (“[E]mpirical evidence shows that most consumers do not read [standard form contracts.]”); Senator Russell D. Feingold, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 296 (2002) (citing case where “bank knew that no more than four percent of card holders would read bill stuffers”); Amy J. Schmitz, *Consideration of “Contracting Culture” in Enforcing Arbitration Provisions*, 81 ST. JOHN’S L. REV. 123, 160 (2007) (“[C]onsumers rarely read or understand [arbitration agreements.]”). *A fortiori*, consumers are unlikely to appreciate such nuanced arbitral clauses as class proceeding waivers.

179. Admittedly, this comparison is apt insofar as we limit ourselves to the question of procedural, rather than substantive, unconscionability. Note, however, that the application of the *Discover Bank* rule would appear to require a finding of procedural unconscionability as well, hinging as it does on the fact that the class-action waiver be “found in a consumer contract of adhesion.” See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1100 (Cal. 2005).

180. *Concepcion*, 131 S. Ct. at 1748-53.

181. *Id.* at 1748.

182. See *id.* at 1750-53.

183. *Id.* at 1751.

184. See *id.* at 1751-52.

185. See *id.* at 1752.

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹⁸⁶

Again, for the limited purposes of this Article, what the decision suggests—regardless of whether one agrees with the particular comparisons drawn by Scalia—is that courts do not have to rely exclusively on the vexing concept of “intent” in deciding whether to enforce an arbitration agreement. For instance, in arriving at its decision, the Court identified and relied upon the fact that one of the goals of the FAA is the efficient and expeditious resolution of disputes through arbitration.¹⁸⁷ While the Court had looked to that goal in the context of determining if otherwise applicable state law is preempted, it would appear reasonable also to rely on such a general statutory policy for the purpose of interpreting the arbitration agreement, including determining if an arbitration agreement that is silent on class arbitration should be read to allow for it. Accordingly, courts need not simply look to “intent,” but should also consult other FAA policies in interpreting arbitration agreements, particularly when those agreements are silent on the disputed issue.

IV. TO ALL INTENTS AND PURPOSES

Having examined some of the ways in which the concept of intent has warped FAA case law, this Article now considers the contours and content of that distortion, the inexplicable tunnel vision associated with intent, and the broader implications, including its potential vulnerability to manipulation.

A. *Intent to be Bound vs. Intent as to Terms*

Much of the tension revolving around intent in the Court’s FAA jurisprudence can be traced to one fundamental yet poorly recognized schism in this area: The intent of the parties to be *bound* versus the intent of the parties as to the *terms* of the contract.

In his groundbreaking monograph, *The Common Law Tradition: Deciding Appeals*, Karl Llewellyn tackled the problem of intent in standard contracts by bifurcating the concept between the specific intent to be bound by negotiated terms (what are called “dickered” terms) and a blanket assent to all “reasonable” nondickered terms.¹⁸⁸

186. *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

187. *See id.* at 1748 (“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”); *see also id.* at 1749 (identifying “two goals of the Arbitration Act [as] enforcement of private agreements and encouragement of efficient and speedy dispute resolution”) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

188. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960). On standard forms and related consent issues, *see generally* Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of*

This bifurcation can be reconceptualized and applied in the context of arbitration as a distinction between (1) the parties' intent as directed to the terms of the contract, and (2) the parties' intent to be bound by arbitration.¹⁸⁹ The former concerns the parties' agreement to the particular terms in the contract including the arbitral clause, that is, its content or *substance*. The latter, however, speaks to the parties' agreement to be bound, in general, by the arbitral *process*, including the agreement to respect as binding any award legitimately issued by the arbitrator.

While the Court has used "intent" as a seemingly monolithic term, these two senses of intent can and have led to conflicting results. For example, the *Stolt-Nielsen* majority focused on whether the arbitral clause could be read as an agreement by the parties to class arbitration and then ultimately interpreted it as excluding such a definition based on its own reading of the clause.¹⁹⁰ That the majority was concerned with the meaning of the arbitral terms as agreed to by the parties is apparent from its affirmative displacement of the arbitrators' interpretation based on what it saw as "only one possible outcome on the facts."¹⁹¹ In choosing to "see the question as being whether the parties *agreed to authorize* class arbitration," the majority was looking to the parties' intent as to *terms*.¹⁹² In contrast, the dissent in *Stolt-Nielsen* emphasized that the "parties' supplemental agreement, referring the class-arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision."¹⁹³ That is, the bargain that was struck between the parties was for the arbitrators' decision to be binding, even if infected with factual or legal error, so long as they did not exceed their powers. Thus, the dissent was looking to the parties' intent to be *bound*.

Restatement Subsection 211(3), 82 WASH. L. REV. 227, 230, 273 (2207); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002). Also, in 2006, the *Michigan Law Review* published a symposium issue devoted exclusively to issues of standard form contracts and, more specifically, "boilerplate." See Symposium, "*Boilerplate*": *Foundations of Market Contracts Symposium*, 104 MICH. L. REV. 821 (2006) (including articles by Omri Ben-Shahar, Lucian A. Bebchuk, Richard A. Posner, Robert A. Hillman, Jason Scott Johnston, Ronald J. Mann, Douglas G. Baird, James J. White, David Gilo, Ariel Porat, Robert B. Ahdieh, Kevin E. Davis, Michelle E. Boardman, Stephen J. Choi, G. Mitu Gulati, Henry E. Smith, Margaret Jane Radin, and Todd D. Rakoff).

189. Note that Llewellyn offered this distinction to ensure the protection of reasonable expectations. See LLEWELLYN, *supra* note 188. For the purposes of this Article, I differentiate between the two species of intent to show that they can and do conflict, which explains in turn why the Court, while using the single misnomer of "intent," is in fact applying different meanings of the term, thereby leading to different results.

190. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775; see also *supra* Part II.B.ii.

191. *Stolt-Nielsen*, 130 S. Ct. at 1770.

192. *Id.* at 1776.

193. *Id.* at 1780 (Ginsburg, J., dissenting).

Conversely, the *Bazzle* plurality regarded the underlying arbitrability question here as asking “what kind of arbitration proceeding the parties agreed to,” which “concerns contract interpretation and arbitration procedures.”¹⁹⁴ As such, it conceived of the dispute in procedural terms, and in finding that the parties had agreed to refer the arbitrability question to arbitrators, looked to the parties’ intent to be *bound*.¹⁹⁵ The *Bazzle* dissent, however, saw the dispute differently, preferring simply to reverse the South Carolina Supreme Court’s interpretation on the ground that its interpretation was erroneous in that it contravenes the terms of the arbitration agreement about the selection of an arbitrator.¹⁹⁶ Thus, in focusing as the dissent does on the substantive import of the arbitral clause, it was looking was looking to the parties’ intent as to the *terms*.

In short, because the Court’s discussion of intent conflates the two distinct varieties of intent, which can and do lead to conflicting outcomes, it exacerbates the incoherence resulting from reliance on an already confused concept.

B. *Whither the Singular Focus on Intent?*

The Court has not only treated intent as a monolithic construct, it has treated it as practically the *only* construct for interpreting and enforcing arbitration agreements under the FAA. But there is no reason for this limitation, particularly with regard to those cases involving arbitration agreements that are silent on the disputed issue.¹⁹⁷ This is true even assuming we proceed under the contractual approach to federal arbitration law endorsed by the Court, which has made it abundantly clear that it views the FAA as “reflect[ing] the fundamental principle that arbitration is a matter of contract.”¹⁹⁸

Contract law, however, does not rely solely on the concept of intent for the purposes of enforcing contracts. For instance, a classic

194. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (emphasis omitted).

195. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2002); *see supra* Part II.B.i.

196. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 459 (2003) (Rehnquist, C.J., dissenting); *see supra* Part II.B.i.

197. Section 2 of the FAA requires courts to enforce arbitration agreements absent any generally applicable contractual defense for their revocation. 9 U.S.C. § 2 (2006). Accordingly, where the court determines that the contract evidences an agreement to arbitrate, the court must enforce the agreement to arbitrate, consonant with the “the FAA’s primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms,” which would explain the Court’s focus on “intent.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). However, where the contract is silent on the disputed arbitral issue (which may not even concern an agreement to arbitrate *per se*), there are no such “terms” on which to base an analysis of “intent” and, for the same reason, likely no intent either. Under these circumstances, the FAA would not appear to constrain a court’s ability to look beyond “intent” in interpreting the arbitration agreement and resolving the dispute. Indeed, the FAA would not even appear to require a contractual approach under these circumstances. *See supra* Part I.

198. *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *see also supra* Part I.

contract law treatise notes that “public policy” is relied upon in “guiding courts in their decisions whether or not to enforce contracts,” and goes on to devote the next thirty-seven pages to exploring that question.¹⁹⁹ Examples would include the strict construction of covenants restricting trade and the use of land, and the unenforceability of illegal contracts or other contracts violating public policy as expressed in statutes.²⁰⁰ Indeed, recall the discussion above of *Bazzle*, which involved a decision by the South Carolina Supreme Court holding that the arbitration agreement may be interpreted as allowing for class arbitration, even if it was silent on the subject, provided it served the interests of “efficiency” and would not result in prejudice.²⁰¹ Similarly, as also discussed above, *Concepcion* suggests that FAA policies, including that of promoting efficient and expeditious dispute resolution, may be consulted when interpreting an arbitration agreement.²⁰²

As such, to the extent contract law incorporates other values and looks to considerations such as public policy and efficiency in construing contracts, the same should be employed in interpreting arbitration agreements so long as they do not discriminate against arbitration and do not conflict with FAA policies.²⁰³ However, not only has the Court generally avoided reference to criteria other than intent in interpreting arbitration agreements, it has, on occasion, been positively hostile to arbitrators relying on anything other than intent to construe the arbitration agreement. In *Stolt-Nielsen*, the Court decried the arbitrators for relying on public policy to interpret the arbitration clause and, in fact, vacated the arbitral award on that basis.²⁰⁴ The Court found the arbitrators to have exceeded their powers under section 10(a)(4) of the FAA since “what the arbitration panel did was simply to impose its own view of sound policy,” which was improper, “for the task of an arbitrator is to interpret and enforce a contract, not to make public policy.”²⁰⁵

Yet the Court has been quite happy to allow arbitrators to assume jurisdiction over statutory claims—including antitrust claims—which are legal expressions of public interest.²⁰⁶ As the Court itself

199. E. ALLAN FARNSWORTH ET AL., *CONTRACTS: CASES AND MATERIALS* 544, 545-84 (7th ed. 2008).

200. *See id.*

201. *See Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 360 (S.C. 2002); *see also supra* Part II.B.i.

202. *See supra* Part II.B.iii.

203. For the possible implications of section 2 of the FAA, *see supra* note 197.

204. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767-68 (2010).

205. *Id.*

206. *See, e.g., Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (upholding use of arbitration under the Securities and Exchange Act of 1933); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (upholding use of arbitration under antifraud clauses of section 10(b) of the Securities Exchange Act of 1934 and treble damage claims under RICO); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S.

made clear, the FAA “provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.”²⁰⁷ Indeed, in this regard, one commentator notes that the “ship sailed a long time ago” on “the exploded idea that arbitral competence does not extend to matters of ‘public policy.’”²⁰⁸ Correspondingly, once we agree that contract law allows for inquiry into values other than intent, including public interest considerations, arbitrators are automatically authorized to rely on such values in construing contracts.

C. Malleability and Susceptibility

As noted earlier, the amorphous nature of intent, particularly when we are dealing with constructive intent, is a conjectural exercise that all but invites the Court to substitute its view for the parties’ intent.²⁰⁹ This arguably happened in *Stolt-Nielsen*, when the Court not only vacated the panel’s award but also proceeded affirmatively to interpret the arbitration clause.²¹⁰

Perhaps more worryingly, this same malleability also potentially allows for strategic behavior by the parties, particularly in light of the inability of arbitrators to look to public policy considerations to construe the arbitration agreement. This particular risk is adumbrated in the Court’s recent decision in *Rent-A-Center, West, Inc. v. Jackson*.²¹¹

In *Rent-A-Center*, the Court held, in a 5-4 decision, that an arbitrator rather than a federal district court should determine the arbitrability of an employment dispute where the parties had entered into an arbitration agreement that provided not only for arbitration arising out of the employment, but which also stated that

the Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this

614 (1985) (holding that arbitration agreement dealing with Sherman Antitrust Act claims did not violate public policy).

207. *Mitsubishi Motors*, 473 U.S. at 627.

208. Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, 51 (2003).

209. See *supra* Part I. In all fairness, the same criticism may well be leveled against relying on “public policy,” which is potentially subject to manipulation by courts seeking to arrive at a particular result; cf. U.C.C. § 2-302 cmt. 1 (noting that section 2-302 was drafted to allow “the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished . . . by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.”). However, the broader point made with respect to public policy is that a court could consult public policy *in addition* to other factors apart from “intent” in deciding whether to enforce an arbitration agreement.

210. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1768-73 (2010); see *supra* Part II.B.ii.

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

[Arbitration] Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.²¹²

That is, the employer, who had drafted the agreement, deliberately overrode the usual presumptions underlying the who-decides-arbitrability question by specifically and comprehensively providing that the “who” here was the arbitrator for all arbitrability questions, including substantive questions of arbitrability. Accordingly, the parties were deemed to have “intended” the delegation of all arbitrability questions to the arbitrator for resolution.²¹³

Except, of course, that the employee in all likelihood had no understanding of the implications of this delegation clause.²¹⁴ Now, ordinarily, to the extent the situation raises unconscionability or similar concerns, this would be addressed under the saving clause of the FAA, which requires courts to enforce arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract.”²¹⁵ The operation of the saving clause would take the case away from the arbitrator and place it back in the hands of the court. That at least is what the employee in *Rent-A-Center* argued should occur, asserting as he did that the arbitration agreement was substantively unconscionable because it was one-sided in requiring arbitration of claims that the employee was likely to bring but not claims that the employer was likely to bring.²¹⁶ The employee also alleged that the arbitration agreement’s fee-splitting provision and its limits on discovery were substantively unconscionable.²¹⁷

The district court ordered arbitration, but a divided panel of the Ninth Circuit reversed, without oral argument.²¹⁸ Justice Scalia, writing for a majority of the Court, said that “[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.”²¹⁹

The question, then, in the case at bar was whether the delegation provision was valid under section 2. Under the Court’s precedent—employing

212. *Id.* at 2775.

213. *Id.* at 2779.

214. *Cf.* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 76 (2003) (noting that the definition of substantive questions of arbitrability adopted in *Howsam* “is fanciful in the context of adhesive arbitration clauses—virtually all arbitration clauses in the consumer and employment contexts, where this doctrine will perhaps most often be applied—to talk about the parties’ expectations, when one of the parties is unlikely to have had any expectations or even awareness of the arbitration clause”).

215. 9 U.S.C. § 2 (2006).

216. *Rent-A-Ctr.*, 130 S. Ct. at 2780.

217. *Id.*

218. *Id.* at 2776.

219. *Id.* at 2777-78.

what is known as the separability doctrine—the arbitration clause is treated as severable from and independent of the contract that houses or contains that arbitration clause.²²⁰ Accordingly, only a challenge to the validity of the arbitration clause itself, as opposed to a challenge to the entire container contract, will trigger the operation of the saving clause, and place the dispute back in the court’s hands.

Applying these principles to the case, Justice Scalia held that the employee’s unconscionability arguments did not target the delegation provision specifically, but rather applied generally to the entire agreement.²²¹ Accordingly, the delegation provision, being severable, would survive such a general challenge, which means the saving clause is not activated and the dispute goes to the arbitrator for adjudication. What was unusual here, however, was that the container contract was an arbitration agreement in its entirety (i.e., the agreement here did not involve the standard scenario of an employment contract containing an arbitration clause but rather an arbitration agreement containing a delegation clause).²²² The dissent believed this distinctive feature meant that here, exceptionally, the saving clause would operate even if the challenge (as was the case here) did not target the delegation clause but rather went to the entire agreement generally since the entire agreement was nothing more than an arbitration agreement.²²³

The rather dramatic net result here is that the emphasis on “intent” (played out in the form of the savvy delegation clause) has trumped the spirit if not the letter of the saving clause notwithstanding the latter’s codification in the FAA. While it is true that this outcome is also attributable to the unusual circumstance of an arbitration agreement constituting the entirety of the written agreement between the parties, that circumstance is something the sophisticated employer (or seller) can—and in this case, did—control. There would appear to be a significant incentive for an employer or seller not only to include such a delegation clause but also to separate the arbitration agreement from the underlying contract such that the arbitration agreement is a stand-alone document containing the delegation clause. Such a selective structuring would appear to clear a path to arbitration while side-stepping the separability doctrine. In short, then, the Court’s elevation of “intent” effectively creates the potential for manipulation of the arbitration agreement by the

220. On the separability doctrine, see generally Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1 (2003); Alan Scott Rau, *Separability in the United States Supreme Court*, 2006 STOCKHOLM INT’L ARB. REV. 1 (2006); Stephen J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107 (2007).

221. *Rent-A-Ctr.*, 130 S. Ct. at 2779.

222. *Id.*

223. *Id.* at 2787-88 (Stevens, J., dissenting).

(drafting) party with greater bargaining power to shunt the parties into arbitration by way of a unilaterally-imposed delegation clause, which the Court would nonetheless endorse as reflecting *both* parties' explicit "intent" to refer all arbitrability questions to the arbitrator.

V. CONCLUSION

The Court's FAA jurisprudence, as it relates to the determination of arbitrability and class arbitration, suffers from an incoherence that can be traced to the pervasive role of "intent" in its contract-centered theory of arbitration law. "Intent" in this context, however, is at once elusive and polymorphic. It is elusive because the parties—even sophisticated ones, never mind the consumers and employees—will often not have considered the relevant arbitrability question and, thus, have no actual intent regarding the same. It is polymorphic as rendered by the Court, which has careened from looking for evidence of actual, conscious intent to constructive intent, and from the intent to be bound procedurally by arbitration to the intent respecting the substantive terms of the arbitration agreement. It is these chameleon qualities of "intent" that create many of the tensions we see in FAA case law, but that are themselves camouflaged by the Court's treatment of the concept as monolithic. As such, a complete and accurate account of the Court's jurisprudence under the FAA requires us also to scrutinize closely the role of "intent," a concept that is ultimately wanting.