

2010

## Allocating Power Between Courts and Arbitrators - and Why Scholars of Federal Courts Should Care

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### Repository Citation

Bruhl, Aaron-Andrew P., "Allocating Power Between Courts and Arbitrators - and Why Scholars of Federal Courts Should Care" (2010). *Popular Media*. Paper 383.  
[http://scholarship.law.wm.edu/popular\\_media/383](http://scholarship.law.wm.edu/popular_media/383)

**MONDAY, FEBRUARY 22, 2010**

## **Allocating power between courts and arbitrators - and why scholars of federal courts should care**

The Federal Arbitration Act makes arbitration agreements as enforceable as all other contracts. In April, the Supreme Court will hear argument in *Rent-A-Center v. Jackson*, which concerns the question of who - court or arbitrator - decides a claim that an arbitration agreement is unconscionable and thus unenforceable. In this case, the arbitration agreement itself assigns (or at least purports to assign) that power to the arbitrator. The Ninth Circuit, however, held that unconscionability was an issue for the court. This case holds obvious interest for those who study ADR, consumer law (most consumer contracts have arbitration clauses, whether or not you know it), and employment law (this case is an employment discrimination suit). What I hope to show you is that it is just as interesting for those who study federal courts and judicial politics. Beneath the surface, the case is, in a sense, more *Bush v. Gore* than *Williams v. Walker-Thomas Furniture*.

To see why the case is so intriguing, one has to appreciate what one might call its strategic context. The Supreme Court is strongly pro-arbitration. Some state and federal courts are not quite so enthusiastic, at least when it comes to consumer and employment contexts with their largely adhesionary contracts. (Please note that I'm not discussing whether the Court's decisions in this area, and its broader pro-arbitration stance, reflect sound interpretations of the relevant statute, good policy, etc.) Over the course of the last couple of decades the Supreme Court has shut off most avenues for challenging arbitration agreements at the wholesale level - state law cannot declare particular fields like consumer transactions off limits from arbitration, courts cannot deem arbitration per se violative of public policy, etc. All such arguments are preempted by the Federal Arbitration Act. What remains, though, is the possibility for retail-level challenges to particular arbitration clauses under section 2 of the Act, which allows ordinary contract defenses that would invalidate any contract. So arbitration itself cannot be questioned, but a particular arbitration clause might be invalidated as the product of duress, fraud, etc.

In the last few years, as other routes for challenging arbitration have been closed off, unconscionability has become a surprisingly common and surprisingly effective way of attacking arbitration agreements. The challenges do not attack arbitration per se - federal law *favors* arbitration - but instead target various aspects of a particular arbitration process: a given clause might forbid class arbitrations, bar punitive damages or otherwise restrict remedies, sharply curtail discovery, require a consumer to pay hefty arbitrator's fees, etc. There have been many cases on these topics in recent years, and a good number of them sustain the challenge to the arbitration clause.

These cases have generated lots of petitions for certiorari in which businesses, assisted by amici like the Chamber of Commerce, charge that some state courts and lower federal courts are using unconscionability to discriminate against arbitration in violation of federal law. That is, while ordinary contract defenses can be used to invalidate an arbitration clause, those doctrines are not supposed to be used differently in the arbitration context in order to disadvantage arbitration. Perhaps surprisingly, given its pro-arbitration stance, the Supreme Court has for years let these petitions go by. My suspicion is that the Court has avoided these cases because it feels ill-equipped to resolve whether a lower court is discriminating against arbitration. First, unconscionability analysis often requires a fact-intensive inquiry. Second, and more important, determining whether a lower court is using unconscionability differently when it comes to arbitration requires an engagement with the details of state law and a comparison of lots of prior unconscionability cases. Third, and maybe most important of all, a holding that the lower court is applying unconscionability unfairly, especially when the lower court says it is applying the same analysis it applies elsewhere, carries with it some serious expressive baggage. Essentially, it requires the Supreme Court to say that the lower court is being dishonest. That happens, but when it does so, it is a big deal (think cases like *Bush v. Gore* or the cases from the 50s/60s rejecting supposed procedural defaults in the state courts).

The nice thing about a case like *Rent-A-Center v. Jackson*, at least from the point of view of a pro-arbitration court, is that it concerns not the merits of an unconscionability challenge but instead the allocation question - a question of *who* decides. That doesn't require diving into the weeds of state law and the record. If the Court assigns the issue to the arbitrator, that will be a very easy rule to monitor for compliance (unlike deciding whether the lower court applied unconscionability correctly). All of those unconscionability cases out there will instantly become not wrong but *irrelevant* - because courts won't be deciding the issue anymore. And it won't matter whether some lower courts can be trusted to apply unconscionability correctly, because they will be cut out of the picture.

All of the analysis above suggests reasons why the Supreme Court would find it useful to assign unconscionability to the arbitrator. On the other side, there are some reasons for it not to do that. Notably, it might be that judicial review for unconscionability operates as a sort of safety valve that makes arbitration of consumer and employment disputes palatable.

If you find this line of argument compelling, or at least interesting, I explore it in an *NYU Law Review* article available [here](#). A much shorter and more accessible version is available [here](#).

To this point I haven't said anything about the more narrowly doctrinal aspects of the case. I think that, as with many cases that reach the Supreme Court, the conventionally authoritative legal materials leave enough room here that acceptable legal reasoning could get you to either result. In brief (and this compressed summary probably won't make sense to non-specialists): On Jackson's side, one might say, as the Ninth Circuit did, that the *Prima Paint* separability doctrine does not apply here because this is a challenge specifically to an agreement to arbitrate. (Indeed, this was a stand-alone arbitration agreement, not a larger contract that included an arbitration clause.) On the other side, I can imagine Rent-A-Center arguing that there is a separable agreement to arbitrate here. After all, the agreement to arbitrate is not *itself* unconscionable - it can't be. Rather, the problem is the limitations on remedies and so forth. So one could imagine that there is an underlying theoretical agreement to arbitrate that remains uninfected, and then Jackson is supposed to go to arbitration to try to get the arbitrator to invalidate the offensive restrictions. That would be slicing separability pretty thinly, of course.

Posted by Aaron Bruhl on February 22, 2010 at 09:23 AM in [Civil Procedure](#), [Judicial Process](#) | [Permalink](#)

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