Statutory Misconstruction: How The Supreme Court Created a Federal Arbitration Law Never Enacted by Congress

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This article will focus on how a simple procedural statute enacted to require enforcement of arbitration agreements in federal court has become unrecognizable as the law Congress adopted in1925. Today, as a result of judicial construction, the Federal Arbitration Act [1] ("FAA") reaches much further and imposes itself on a far greater proportion of our citizens than was ever envisioned in 1925. The FAA as interpreted affects statutory rights, consumer rights, and employee rights, as well as state police powers to protect those rights.[2] Today's statute, which has been construed to pre-empt state law,[3] eliminate the requirement of consent to arbitration,[4] permit arbitration of statutory rights,[5] and remove the jury trial right from citizens

[1] 9.U.S.C. §1 *et seq.*

[2] *See generally*, Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 401 (1996) ("Under the [arbitration] law written by the Court, birds of prey will sup on workers, consumers, shippers, passengers, and franchisees; the protective police power of the federal government, and especially of the state governments is weakened..."; ...[D]isplacing adjudication through pre-dispute arbitration clauses systematically reduces the legal liability of corporate defendants.")

[3] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[4] Carbajal v. H&R Block Tax Services, Inc. 372 F. 3d 903 (7th Cir. 2004) (Arbitration clauses in adhesion contracts are generally enforceable.) Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). Arbitration clauses have been enforced even when consumers were illiterate or blind. Washington Mutual Finance Group v. Bailey, 364 F.3d 260 (5th Cir. 2004) (illiterate consumers bound to arbitration agreement in loan and insurance agreement, even though no knowledge of arbitration requirement); American General Financial Services, Inc. v. Griffin, 327 F. Supp. 2d 678, 683 (N.D. Miss. 204) (blind consumer held to arbitration agreement even though no knowledge of agreement).

[5] *See* Mitsubishi v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987).

without their knowledge or consent,[6] is a statute that would not likely have commanded a single vote in the 1925 Congress.[7]

What processes and methods have enabled the judiciary to create a law never enacted by Congress? This article will examine the interpretive methods the judiciary, particularly the Supreme Court, has used in major cases that have defined the FAA, as well as the effect of the choices it made. Part I will examine the context of the FAA, including the drafting and political history, to see how the proponents of the Act and members of Congress understood the arbitration act that was adopted virtually without opposition. Part II will explore how Erie v. Tompkins[8] and Guaranty Trust v. York[9] produced a dilemma that caused the first major misstep in interpreting the FAA. This occurred in Prima Paint v. Flood & Conklin,[10] when the Supreme Court incorrectly asserted that the 1925 Congress relied exclusively upon the commerce clause as the underlying power for enacting the FAA. Part III will examine how the misstep in *Prima Paint* led to even greater missteps in two subsequent cases, Moses H. Cone Memorial Hospital v. Mercury Construction Corp.[11] and Southland v. Keating.[12] In those cases, the Supreme Court

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[6] *See* Jean R. Sternlight, Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial, 16 Ohio St. J. Disp. Res. 669 (2001).

[7] *See* Carrington and Hagen, *supra* note 2, at 402 ("[I]f the FAA had been presented to Congress as legislation having the effects ascribed to them by the Court...[it would not] have been assured of a single vote of approval.")

[8] 304 U.S. 64 (1938).

[9] 326 U.S. 99 (1945).

[10] 388 U.S. 395 (1967).

[11] 460 U.S. 1 (1983).

[12] 465 U.S. 1 (1984).

recast a procedural statute that was applicable only in federal court into a substantive statute applicable in both state and federal courts. Part IV will follow the increasing expansion of the statute, which the Court interpreted not only to cover statutory claims, an area never anticipated by the enacting Congress, but also to cover worker agreements, which had been expressly excluded by Congress in 1925.[13] Finally, the major misconstructions which took place in *Prima Paint* and *Southland* have recently been reconfirmed by the Court in its February, 2006 decision, Buckeye Check Cashing, Inc. v. Cardegna.[14] Moreover, in *Buckeye*, the Court expanded the holding in *Prima Paint* by finding that an arbitrator rather than a court should decide a claim that a contract is void for illegality.[15]

The article concludes that none of the different interpretive methods used by the Court to construct the current statute served to cabin judicial discretion to legislate, which has resulted in a complete rewriting of the statute. The statute's new architecture has had a substantial impact on our legal system. The FAA that has been created by the Supreme Court in the last twenty-five years reflects judicial policy preferences reminiscent of the policies prevailing at the beginning of the last century, including laissez-faire economics, and an antipathy to state laws and regulations favoring individuals, consumers, and small businesses.

I. Intended Scope of the FAA

In the 1920's, Julius Cohen and Charles Bernheimer had a three step plan for promoting arbitration: "The first is to get a State statute, and then to get a Federal law to cover interstate

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[13] *See infra* notes 39-49 and accompanying text.

[14] ____ U.S. ____ (2006).

[15] *See id.,* at ___.

and foreign commerce and admiralty, and third to get a treaty with foreign countries."[16] The two men had already successfully combined forces in New York, where in 1920, Cohen, a lawyer who served as general counsel for the New York State Chamber of Commerce, and Bernheimer, a cotton goods merchant who chaired the Chamber's arbitration committee, were instrumental in obtaining the first modern state arbitration statute.[17] The New York statute made all arbitration agreements enforceable, including agreements to arbitrate future disputes. Before the enactment, a party to an arbitration agreement could at any time prior to the award simply refuse to arbitrate, and courts would not enforce the agreement.[18] This was true whether the agreement was to arbitrate future disputes, or to submit an existing dispute to arbitration.[19]

Cohen and Bernheimer were strong believers in the efficacy of arbitration. Although justifiably proud of their success in New York, they wanted arbitration to be enforceable beyond the state's borders. If a New York party agreed to arbitrate with a citizen of another state, in the other state, for example, in Vermont, which did not have a similar law, the arbitration agreement would not be enforced in Vermont state court. More importantly, any enforcement attempt in federal court under diversity jurisdiction would fail, because the federal courts would not enforce the agreement. Federal and state courts both followed ancient rules of English law that

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[16] Cohen testimony at Joint Hearings on S. 1005 and R. 646 before the Joint Committee of the Subcommittees on the Judiciary of the United States Senate and House of Representatives, 68th Cong. 1st Session 17, at 16 (1924) (hereinafter, "Joint Hearings").

[17] *See generally,* Ian R. MacNeil, AMERICAN ARBITRATION LAW, pp.28, 34-37 (1992). Professor MacNeil defines "modern" arbitration statutes as those that make agreements to arbitrate future disputes irrevocable. *Id.* at 15.

[18] *See* W. Sturges, Commercial Arbitration and Awards, §76 at 237-39 (1930).

[19] *See* MacNeil, *supra* note 17, at 20.

"performance of a written agreement to arbitrate would not be enforced in equity, and... if an action at law were brought...such agreement could not be pleaded in bar of the action, nor would such an agreement be ground for a stay of proceedings until arbitration was had."[20]

Cohen and Bernheimer's next push, therefore, was twofold: to get Congress to pass a federal law that would make arbitration agreements enforceable in federal court, and to get the National Conference of Commissioners on Uniform State Laws to put forth a Uniform Arbitration Act which could then be adopted by each state, making arbitration agreements also enforceable in state courts. Finally, a third step would be for the United States to enter into a treaty with other nations to enforce international arbitration agreements and awards.[21]

The original Federal Arbitration Act was drafted, principally by Julius Cohen, on the model of the New York statute.[22] In their campaign to convince Congress to pass legislation that would make arbitration agreements enforceable in federal court, Bernheimer and Cohen adopted different functions.[23] Bernheimer organized the support of the national business organizations.

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[20] S. Rep. No. 5365, 68th Cong., 1st Sess, 2 (1924). The Senate Report also noted that the arbitration agreement "was subject to revocation by either of the parties at any time before the award," and that this rendered the agreements "ineffectual" because "the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy."*Id.*

[21] *See* Joint Hearings*, supra* note16.

[22] *See id*. at 15, 40.

[23] Their work began in advance of the passage of the New York statute. In 1918, Cohen published a book, Commercial Arbitration and the Law. Under Bernheimer's leadership, the New York Chamber of Commerce joined forces with the New York State Bar Association to work on this issue. Cohen and Bernheimer were effective proselytizers, helping to pass an arbitration statute in New Jersey after the New York statute was adopted. *See* MacNeil, *supra* note 17, at 28, 31, 42-43.

Cohen spearheaded the legal case.

Bernheimer told the Joint Hearings of the Senate and House Subcommittees that "the statement I make is backed up by 73 commercial organizations in this country, who have, by formal vote, approved the bill before you gentlemen."[24] He stated the practical, business case: "Arbitration saves time, saves trouble, saves money... It preserves business friendships... It raises business standards. It maintains business honor, prevents unnecessary litigation, and eliminates the law's delay by relieving our courts."[25]

Cohen, on the other hand, sought to convince Congress of the value of arbitration from the legal perspective. Cohen's strategy can be seen in the brief he submitted to Congress which was made part of the record of the Congressional hearings.[26] He explained why making arbitration agreements enforceable would provide a much needed remedy for existing problems in the legal system. He also sought to persuade Congress that although courts had in the past refused to enforce arbitration agreements, this resulted from an anachronism in the law which Congress had the power to correct. Further, he emphasized that public policy would be well served by Congress adopting this legislation.

Cohen asserted that the statute was directed to three evils: 1. Long delays caused by congested courts and excessive motion practice; 2. the expense of litigation; and 3. the failure through litigation, to reach a decision regarded as just.[27] Businessmen needed solutions that were

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[24] *See* Joint Hearings, *supra* note 16, at 7-8.

[25] *See id.*

[26] *See* Joint Hearings, *supra*, note 16 at 33-41.

[27] *See id.* at 34-35.

simpler, faster, and cheaper. An arbitration act that would make arbitration agreements enforceable would accomplish those goals and provide a remedy to the three evils. Cohen made clear in his brief that what was being proposed to accomplish these goals was simple and limited -- a statute that would apply only to procedure in the federal courts. It would not affect state law.

> The statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. .. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure, whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made. But whether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought.[28]

Cohen emphasized that because the statute was procedural, it would not "infringe upon the provinces or prerogatives of the States."[29] Rather, he noted, "[t]here is no disposition...by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute cannot have that effect."[30]

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[28] *Id*. at 37.

[29] *Id.* at 39.

[30] *Id.* at 40. One of Cohen's fellow reformers, Alexander Rose, who represented a precursor of the American Arbitration Association at the Joint Hearings - The Arbitration Society of America – echoed Cohen's call for federal legislation.

> We have a weakness in our system of arbitration, We need, and we must have the cooperation of the Federal courts. We must have....the Federal statute because while the dispute is a domestic one, we can well dispose of it. But when a merchant in New York sells his merchandise to someone in a foreign jurisdiction, his arbitration law is defeated...In short, he needs the aid of the Federal law.

Id. at 27. Like Cohen, Rose did not conceive of the law as having any direct applicability to the states. Rather, he believed that if Congress adopted the statute, one significant benefit would be that States, many of which had no arbitration laws, would be inspired to adopt similar laws.

> There is one excellent result to be achieved in the enactment of this bill, apart

Cohen also emphasized that the procedures for compelling arbitration as well as for enforcing the award would be much more straightforward than litigated motions, thereby reducing expense and delay through formalities or legal technicalities. He noted that "Enforcement proceeds with a minimum of legal intervention, and parties are assured of ...[a] speedy and expert hearing..."[31]

In explaining why this particular legislation was needed, Cohen first noted that since an arbitration agreement is essentially a business contract, it should be treated the same as other business contracts.[32] Unlike other contracts, however, parties could revoke an arbitration agreement at any point prior to the award being rendered.[33] Moreover, although the revocation was considered a breach, courts would not provide relief in the form of specific performance, nor could a party obtain a stay of court proceedings so that an arbitration could go forward.[34] Damages were technically available, but in practice were difficult if not impossible to prove.[35]

> from the enactment itself: it will set a standard throughout the United States. There are many States which have no arbitration law...[T]he enactment of this law, extending its effect all over the United States, will have an effect upon the cause of that much-desired thing–uniform legislation...I have no doubt all of the States would pattern after it. *Id.* at 28.

[31] *Id.* at 40. Rose made the case for simplicity more dramatically. "[T]he crying demand and the need of the hour is what? It is to simplify legal matters... [Y]ou can have here a system of arbitration which is one that the people want; the public want it. They want speedy justice, and they want plain justice, in as simple terms as it can be reduced to." *Id*. at 26-27.

[32] *See id*. at 39.

[33] *See* MacNeil, *supra* note 17, at 20.

[34] *See id.*

[35] *See id*. *See also* W. Sturges, *supra* note 18, §§85, 87, at 255-58, 262.

This situation permitted "the dishonest party [to] escape from his obligations."[36]

Cohen's brief explained the English origins of the courts' refusal to enforce arbitration agreements:

> For many centuries, there has been established a rule, rooted originally in the jealousy of courts for their jurisdiction, that parties might not, by their agreement, oust the jurisdiction of the courts. This rule was so firmly established that our American courts did not feel themselves free to change the rule...[37]

Although courts did not feel free to make this change themselves, once the New York legislature adopted a statute making arbitration agreements enforceable, New York courts, according to Cohen, whole-heartedly accepted the change.[38]

Cohen, Bernheimer and their colleagues took great pains to impress upon Congress the limited scope of the proposed legislation. W. H. H. Piatt, testifying in his capacity as Chairman of the Committee of Commerce Trade and Commercial Law of the American Bar Association, explained, in response to a concern that the legislation would apply to seamen, that the statute was not intended to cover workers.[39] Although the bill did not specifically exclude all employment contracts, the constitutional jurisprudence at the time viewed most employment contracts as involving intrastate and not interstate commerce.[40] Seamen, on the other hand, could

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[36] *See* Joint Hearings, *supra* note 16 at 39.

[37] *Id.*

[38] *Id., citing* Berkovitz v. Arbib & Houlberg, Inc. 230 N.Y. 261 (1921).

[39] Sales & Contracts to Sell in Interstate & Foreign Commerce and Federal Commercial Arbitration: Hearing Before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong. 4th Session 2, at 9 (1923) (hereinafter, "1923 Hearings").

[40] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (Souter, dissenting) ("When the Act was passed (and the commerce power was closely confined) our case law indicated that

be viewed as having contracts that were in foreign or interstate commerce. Piatt and the other proponents had no objection to specifically excluding them, and sought to make clear that other workers, similar to seamen, who might be perceived as working in interstate commerce, would also be excluded, since the FAA was not intended to cover employment contracts at all.[41] Piatt thus suggested adding the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce",[42] noting that "[i]t is not intended that this shall be an act referring to labor disputes, at all."[43]

Emphasizing that the legislation should not apply to workers, Herbert Hoover, then Secretary of Commerce, sent a letter to Congress on this point that was incorporated in the records of both the 1923 Hearings and the 1924 Joint Hearings. Hoover characterized the objection that had been raised as an objection "to the inclusion of workers' contracts in the law's scheme."[44] He suggested clarification by using virtually the same language as that recommended by Piatt, but with the addition of "railroad employees" to the list.[45] The language in the Hoover letter was the actual language added to the statute: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged

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the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce." (citations omitted).

[41] *See infra* notes 43- 48 and accompanying text.

[42] 1923 Hearings, *supra* note 39, at 9.

[43] *Id.*

[44] 1923 Hearings, *supra* note 39, at 14; Joint Hearings, *supra* note 16, at 21.

[45] 1923 Hearings, *supra* note 39, at 14; Joint Hearings, *supra* note 16, at 21.

in foreign or interstate commerce."[46]

Thus, the supporters of the legislation did not believe that it would apply to any workers at all. Under the view of the commerce clause at that time, the Act did not apply to contracts of most workers.[47] It only applied to contracts of workers actually engaged in interstate or foreign commerce, such as seamen or railroad employees, and those workers were specifically excluded. Piatt explained that the act was "purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this."[48] This was the central concept behind the act: to provide for enforceability of arbitration agreements between merchants -- parties presumed to be of approximately equal bargaining strength -- who needed a way to resolve their disputes expeditiously and inexpensively.[49]

The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations. All of the examples given by Bernheimer as to cases

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[46] 9 U.S.C. §1.

[47] *See supra*, note 40 and accompanying text.

[48] 1923 Hearings, *supra* note 39, at 9.

[49] As Bernheimer testified on behalf of all the business associations he represented:

> The bill on the one hand aims to eliminate friction, delay, and waste, and on the other to establish and maintain business amity... If inexpensive but dependable arbitration were possible instead of costly, time-consuming and troublesome litigation, the risk [of doing business] would be correspondingly smaller and the price made to conform therewith. Not only will the suggested law accomplish all of this, but it will help to conserve perishable and semiperishable food products and save many millions of dollars in foodstuffs now wasted because of the lack of legally binding arbitration facilities.... The merchants want this very badly. *Id.* at 3, 7.

he knew about or cases he had personally been involved with through the New York Chamber of Commerce were cases between merchants. At one point in the hearings, Senator Walsh of Montana raised the question whether the legislation would apply to contracts which were not really voluntary, for example, where one party, such as an insurance company or a railroad company, had much more bargaining power, and was able to provide a contract on a "take it or leave it" basis.[50] Piatt, who was testifying at the time, said,

> I would not favor any kind of legislation that would permit the forcing a man to sign that kind of a contract...I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants with one another, buying and selling goods.[51]

Cohen was also asked to respond to a concern about adhesion contracts during the Joint Hearings. The Chairman, Senator Sterling, first asked Cohen to explain the reason courts had not been willing to enforce arbitration agreements. Cohen initially referred to the courts' concerns about "ouster of jurisdiction,"[52] but then acknowledged,

> [T]he real fundamental cause was that at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them. And the courts said, "If you let the people sign away their rights, the powerful people will come in and take away the rights of the weaker ones." And that is still true to some extent.[53]

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[50] *Id*. at 9. "The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all.... It is the same with a good many contracts of employment. A man says, "These are out terms. All, right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all." *Id.*

[51] *Id.* at 10.

[52] Joint Hearings, *supra* note 16*,* at 14.

[53] *Id.* at 15.

Senator Sterling then quizzed Cohen specifically about whether this was not also the case with respect to "take it or leave it" contracts between railroads and shippers. In response, Cohen claimed that shippers were protected by the bills of lading act, and further, that

> the Federal Government, through its regularly constituted bodies...protect[s] everybody. Railroad contracts and express contracts and insurance contracts are provided for. You cannot get a provision into an insurance contract today unless it is approved by the insurance department. In other words, people are protected today as never before.[54]

Cohen and his fellow supporters thus indicated that this bill would not apply in adhesion contracts for several reasons. First, there were protections written into law; second, protective requirements were issued by federal agencies; and third, that was simply not the intent of the legislation, which was specifically aimed at voluntary resolution of disputes between merchants. Arbitration was, as Alexander Rose noted, "a purely voluntary thing. [The legislation] is only the idea that arbitration may now have the aid of the court to enforce these provisions which men voluntarily enter into."[55] The new law was not intended to permit a party with greater economic strength to compel a weaker party to arbitrate. As Representative Graham noted in the House Floor Debate in 1924, "[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts – an agreement to arbitrate, when *voluntarily* placed in the document by the parties to it."[56] Representative Graham emphasized the narrow scope of the bill:

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[54] *Id.*

[55] *Id.* at 36.

[56] House Floor Debate, 65 Cong. Record 1931 (1924). *Emphasis added*.

> It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to . ..It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and admiralty contracts.[57]

Cohen's final task was to assure Congress that it had the power and the authority to adopt the legislation. Although this did not seem to be seriously in doubt, there had been a state and federal constitutional challenge to the New York arbitration statute.[58] That challenge had been soundly rejected by the New York Court of Appeal in a decision by Judge Cardozo that Cohen cited extensively in his brief.[59] With respect to Congress' authority, Cohen asserted that it did *not* depend upon the commerce or admiralty power. Rather,

> [its authority] rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal Courts. So far as congressional acts relate to the procedure in the Federal courts they are clearly within the congressional power. This principle is so evident and so firmly established that it can not be seriously disputed.[60]

According to Cohen, since the arbitration act related solely to procedure in the Federal Courts,

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[57] *Id.*

[58] Berkovitz v. Arbib & Houlberg, Inc. 230 N.Y 261 (1921).

[59] *Id., cited* in Joint Hearings, *supra* note 16, at 39. There had also been a constitutional question raised as to whether the New York statute could apply in an admiralty case to compel a party to arbitrate. Red Cross Line v. Atlantic Fruit Company, 264 U.S. 109 (1924). The U.S. Supreme Court held that New York state was free to provide for specific performance of contractual arbitration clauses because the statutory remedy sought did not change the substantive admiralty law or attempt to govern the remedy in admiralty court. *Id.* at 124.

[60] Joint Hearings, *supra* note 16, at 37. Cohen cited to Art I, section 8, of the U.S. Constitution, which gives Congress power "to constitute tribunals inferior to the Supreme Court," and Art III sections 1 and 2, which provided that "The judicial power of the United States shall be vested...in such inferior courts as the Congress may from time to time ordain and establish." *Id.*

the question of whether there was authority under the commerce clause was not at issue.[61]

Cohen noted that the proposed law, by simply declaring the policy of recognizing and enforcing arbitration agreements in the Federal courts, "does not encroach upon the province of the individual States."[62] He then speculated, however, that Congress probably does have "ample power to declare that all arbitration agreements connected with interstate commerce or admiralty transactions shall be recognized as valid and enforceable even by the State Courts."[63] Having made the argument that Congress probably had broad authority under the commerce clause to enact the statute, Cohen concluded, however, that even if it were found that Congress had no such power, it would not affect the current statute. Because the primary purpose of the statute was to make arbitration agreements enforceable in the Federal courts, Congress therefore "rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."[64]

It did not appear that members of the Joint Subcommittees hearing testimony on the bill were too concerned about their authority. At one point, this brief conversation took place between Representative Dyer and the Chairman, Senator Sterling:

> Dyer: "There is no question of the authority of Congress to legislate on this subject as provided in the bill, is there?"
>
> Chairman: "I do not think there is."
>
> Dyer: "The authority and jurisdiction is ample?"

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[61] *Id.* Cohen specifically noted that in declaring arbitration agreements to be valid, the statute was not declaring their existence as a matter of substantive law. *Id*. at 38.

[62] *Id.* at 38.

[63] *Id.*

[64] *Id.*

Chairman: "Yes."[65]

There was, however, no discussion among the Committee members as to what constituted the basis for that authority and jurisdiction. The sole discussion is found in Cohen's brief, attached to the proceedings. The Committee Report for the House, however, states that

> The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential.[66]

The House Report suggests that Congress clearly had the power to pass a procedural act whose purpose is to enforce contracts in federal courts. The Report continued, however, by noting that "the remedy is founded *also* upon the Federal control over interstate commerce and over admiralty."[67] By use of the word "also," the reference to the commerce and admiralty power appears to be a fall-back position, a secondary basis of power. The passage as a whole makes clear that Committee members saw the arbitration act as Cohen presented it: a statute providing for enforcement, and therefore relating to remedies, which meant a procedural, not a substantive statute, and one that related only to procedures in Federal Court.[68] Such a statute was well

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[65] *Id.* at 24.

[66] H.R. Rep. No. 96, 68th Cong. 1st Sess., 1 (1924) (hereinafter, "House Report").

[67] *Id*. at 2. *Emphasis added*.

[68] *See* Joint Hearings, *supra,* note 16, at 39-40. *See also* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 Law & Contemp. Prob. 5, 17 (2004) (noting that at the time of the FAA enactment, "both remedial and procedural matters were deemed to be *lex fori* - the law of the court - rather than *lex loci* - the substantive law of the jurisdiction") *citing* Red Cross Line v. Atlantic Fruit Co, 264

within Congress' authority to establish and control Federal Courts.[69]

Having been passed without a single negative vote in either the House or the Senate, the Federal Arbitration Act was signed into law in 1925, and became effective January 1, 1926.[70] Cohen immediately took steps to educate the legal public about the Act, publishing an article on *The New Arbitration Law* in February, 1926.[71] He essentially incorporated into the article the brief he provided to Congress, but he changed emphasis somewhat, adapting his text to a different audience-- attorneys and law professors. First, Cohen devoted more argument to the fact that the statute provides "improvement of ...procedural remedies," noting that changes in procedure are "sponsored by the legal profession in the interest of the better administration of justice," and that the new statute "is simply a new procedural remedy, particularly adapted to the settlement of commercial disputes."[72] Second, he put more emphasis on the voluntary nature of the application of the Act. "No one is required to make an agreement to arbitrate. Such action by a party is entirely voluntary...[The new arbitration law] is merely a new method for enforcing a contract freely made by the parties thereto."[73] Third, and most important, Cohen, the great proponent and activist for arbitration, made a strong argument to the legal community that

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U.S. at 122-23 (1924) (Brandeis, J.) ("The [New York] Arbitration Law deals merely with the remedy in the state courts") and Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 290 (1921) (Cardozo, J.) ("Arbitration is a form of procedure whereby differences may be settled.")

[69] *See supra* notes 60-66 and accompanying text.

[70] *See infra* note 79.

[71] Julius Cohen, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265 (1925-26).

[72] *Id.* at 279.

[73] *Id.*

arbitration has limitations and should not be misused. Arbitration was a remedy that was well-suited, according to Cohen,

> to the dispositions of the ordinary disputes between merchants as to questions of fact – quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law –the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or [related] questions of law....[74]

On the other hand, Cohen noted that not all questions arising out of contracts should be arbitrated. Arbitration should not, for example, be used to resolve more complex issues. Specifically, Cohen informed his fellow members of the profession that arbitration was "not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes."[75] These kinds of question were not within the particular experience of arbitrators, and thus were "better left to the determination of skilled judges with a background of legal experience and established systems of law."[76] Although Cohen had not expressly made this argument to Congress, he and others had testified at the Hearings as to the limited nature of the bill. And Cohen's position in the article is consistent with his position before Congress, because the case he and others made to Congress was exactly what Cohen described in his article as the proper use of arbitration -- to resolve heavily fact-based disputes between merchants, "where all meet upon a common ground."[77]

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[74] *Id.* at 281.

[75] *Id.*

[76] *Id.*

[77] *Id.*

We know from the legislative history and from contemporary writings what the reformers wanted, what they believed the Act would accomplish, and what they told the members of Congress the legislation was intended to accomplish. The purpose of the arbitration act was primarily to make arbitration agreements enforceable in federal court,[78] and secondarily to provide procedures that would make this enforcement process simple and expeditious, thereby enabling merchants to resolve their disputes more cheaply and easily. The FAA was a bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength, over questions arising out of their daily relations. The bill was not the result of trade-offs or strategic compromises, because it was essentially unopposed.[79] The FAA would only apply when arbitration was voluntarily agreed to by the parties. According to Cohen, its leading proponent and principal drafter, the legislation was to apply to disputes involving facts and simple questions of law, not statutory or constitutional issues, since arbitration was simply not a proper method for deciding points of law of major importance. The legislation would not apply to workers or labor disputes. Because the statute dealt with enforcement, and therefore simply ensured a remedy, it was a procedural statute, and only applied in federal courts. It would not affect state law or state courts in any way. It was this limited statute that the Congress of

[78] Of course, for the parties to be in federal court there had to be some basis of federal jurisdiction other than the arbitration agreement. *See infra* notes 201-202.

[79] Statement of Mr. Julius Henry Cohen, Joint Hearings, *supra* note 16, at 13 ("Mr. Chairman, the question was asked, who opposes this bill? There is no open opposition anywhere."). Earlier opposition by seamen and railroad employees had been diffused when a provision was added excluding them from coverage of the Act. *See infra* notes 310-311 and accompanying text. The ABA Committee on Commerce, Trade, and Commercial Law, noted in an article published in the ABA Journal in 1925, immediately after the bill's passage, that "not a single dissenting vote was registered in either House or Senate." *The United States Arbitration Law and Its Application,* 11 ABA J. 153 (1925).

1925 believed it was enacting. We will see, however, that our courts have turned this legislation into something else entirely.

Today, the statute which was enacted as a procedural statute effective only in federal court has been interpreted to apply to states[80] and to pre-empt state law that conflicts with the Court's interpretation of the FAA.[81] A state statute which attempts to protect citizens by regulation of the use of arbitration is preempted unless the specific arbitration clause can be shown to be unconscionable. The Court, for example, struck down as pre-empted by the FAA a Montana statute which required notice of an arbitration clause to be given on the front page of any contract.[82] In addition, although the FAA was never meant to apply to consumers, and was not supposed to apply except when parties consented knowingly and voluntarily, the Court has upheld application of arbitration clauses in adhesion contracts.[83] And despite Julius Cohen's admonition that arbitration should not apply to anything other than the heavily factual disputes between merchants in their relations with each other, and that arbitration should not be used to resolve complicated legal issues, the Court has determined that rights created under federal statutes, such as securities laws, antitrust laws and anti-discrimination statutes, can be adequately protected by the arbitration process.[84] Moreover, even workers who were specifically excluded

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[80] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[81] Dr's Associates v. Casarotto, 517 U.S. 681 (1996)

[82] *Id.*

[83] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), Allied Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)

[84] Mitsubishi v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987), Rodriguez de Quijas v. Shearson/American

by the language of the FAA, have, through the interpretative processes of the Court, been found to be covered, so that employers may compel their employees to agree to arbitrate any disputes if they want to be hired.[85] Additionally, individuals have been held to agreements they have not signed and not even read, even though enforcement means they have waived a constitutional right to a jury trial without knowledge or consent.[86] And finally, the Court has suggested that waiver of a class action arbitration, in an adhesion contract, is probably enforceable if that is what was intended by the parties.[87]

The Court has, step by step, built a house of cards that has almost no resemblance to the structure envisioned by the original statute. Each card put in place by the Court builds on the prior flimsy court-created structure. The edifice we have today incorporates policies and practices that were never considered or developed by our legislative branch, and in fact goes far beyond and even against what the1925 Congress enacted. The consistent effect of the Court's interpretation, as will be developed below, is to diminish individual rights, to significantly reduce access to the courts and the right to a jury trial, and to favor strong economic interests at the expense of the weaker party to an extent not seen since the *Lochner* Court of the early 1900's.[88]

Express, 490 U.S. 477 (1989), *Gilmer, supra* note 83.

[85] Circuit City Stores, Inc. v. Saint Clair Adams, 532 U.S. 105 (2001).

[86] *See* Sternlight, *supra* note 6.

[87] Green Tree Financial Corporation v**.** Bazzle, 539 U.S. 444 (2003).

[88] In Lochner v. New York, 198 U.S. 45 (1905) the court struck down protective state legislation providing that no laborer could be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day, holding this was not a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and

This article will document how a simple procedural statute attained such an expansive reach without any further legislative enactments, and will discuss the implications of this form of judicial lawmaking. The next sections of this article will consider the landmark cases in which the Court's interpretation of the FAA resulted in an entirely different statute from the one enacted in 1925.

II. *Prima Paint* and the Post-*Erie* Dilemma

A. The Impact of Erie v. Tomkins[89]

There are several stages in the transformation of the original FAA into the expansive statute it is today. A critical turning point was in Prima Paint v. Flood & Conklin,[90] where the Court had to decide, post-*Erie*, whether a federal court could apply the FAA in a diversity case. Cases leading up to *Prima Paint* show a development moving logically but not inevitably to the result in that decision.

The *Erie* decision in 1938 declared that there was no general federal common law, and thus required federal courts in diversity cases to enforce the common law as determined by the state in which they were located.[91] *Erie* held that in a diversity case a federal court must apply state substantive law, but federal procedural law. That decision overruled Swift v. Tyson, 41 U.S. (16 Pet.)1 (1842), under which, for almost a century, a federal court having jurisdiction of a

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void under, the Federal Constitution.

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

[90] 388 U.S. 395 (1967).

[91] *Id.*

case because of diversity of citizenship did not have to apply the unwritten law, that is, the common law, of the State in which it sat. Rather, when the common or general law applied, a federal court could use its own independent judgment as to what the law was or should be.[92] Under Swift v. Tyson, non-statutory law had been considered a unitary "transcendental body of law outside of any particular state," and a "'brooding omnipresence' of Reason," and federal courts considered themselves free to determine what Reason, and therefore what law, was required.[93]

Under *Erie*, the FAA, which was considered a procedural statute, would still be applicable in a diversity case. In Guaranty Trust v. York, however, the Court clarified *Erie* by saying that it is not the application of the labels "substantive" or "procedural" that determines whether state or federal law should be applied.[94] Instead, if the application of federal law would produce a different outcome from the application of state law, then the federal court must apply state law.[95]

Thus, the Supreme Court came to be faced with the question whether a federal court decision to require arbitration was outcome determinative. In Bernhardt v. Polygraphic Company,[96] a wrongful discharge case that was removed to federal court in Vermont on diversity grounds, the issue was whether the FAA applied, therefore requiring enforcement of the

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[92] *See id.* at 71.

[93] Guaranty Trust Co. v. York, 326 U.S. 99, 102-103 (1945).

[94] *Id*. at 109.

[95] *Id.*

[96] 350 U.S. 198 (1956).

parties' agreement to arbitrate.[97] Vermont law appeared to permit parties to revoke an arbitration agreement at any point prior to the award.[98] Application of the FAA would permit a court to stay judicial proceedings so the arbitration could go forward. The question whether the FAA or Vermont law governed in this diversity case appeared to be squarely before the Court. However, the Court initially dodged the issue by determining that the contract at issue -- an employment contract -- was not covered by Section 2 of the FAA because it was not "a contract evidencing a transaction involving commerce."[99] The Court therefore denied the stay of judicial proceedings provided for in Section 3 of the Act,[100] because Section 3 proceedings were only available for contracts which fit under Section 2. Thus, since the FAA was inapplicable, Vermont law applied, making the arbitration agreement unenforceable.

The Court could have stopped there, but it did not. It went on to discuss whether "*apart from the Federal Act, a provision of a contract providing for arbitration is enforceable in a diversity case.*"[101] This is a curious statement, since apart from the Federal Act, federal courts had not been willing to enforce arbitration agreements. Apparently, however, the Court was nonetheless considering whether, absent applicability of the FAA, a judge-made federal procedural rule could require arbitration in a diversity case, despite a contrary state rule.[102] In

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[97] *Id*.

[98] *Id*. at 199-200.

[99] 9.U.S.C. §2.

[100] 9.U.S.C. §3.

[101] 350 U.S. at 202.

[102] For a fuller discussion of this point, *see* Schwartz, *supra* note 68 at 33.

considering whether a decision to require arbitration was outcome determinative, the Court emphasized the differences in arbitration and litigation, concluding that "the change from a court of law to an arbitration panel may make a radical difference in ultimate result."[103] It therefore concluded that such a judge-made federal rule would be outcome determinative, requiring that a conflicting state law on arbitration would have to be applied. Thus, a federal court could not impose arbitration in a diversity case where a state rule conflicted with a judge-made federal rule. However, because this finding was not necessary to the holding of the case, it was dicta, and did not establish that the FAA could not apply in diversity cases. Nonetheless, Justice Frankfurter, in his concurrence, opined that because differences in arbitration and litigation can affect the outcome of a case, the FAA was not applicable to diversity cases.[104]

A main purpose of the FAA, of course, was to require enforcement of arbitration agreements in diversity cases.[105] That purpose, and therefore the FAA itself, would be undermined if parties from states like New York, which required arbitration agreements to be enforced, could not enforce such agreements in federal court against parties from states like Vermont, which permitted revocation. Although the Court in *Bernhardt* side-stepped the issue by finding the

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[103] 305 U.S. at 203. "The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action...Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by ... the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial..." *Id.* (citations omitted).

[104] 350 U.S. at 208.

[105] *See* 388 U.S. 395, 418 (Black, dissenting) ("...[T]o hold the act inapplicable in diversity cases would be severely to limit its impact.")

contract in question not covered by the FAA, it was only a matter of time before the question of FAA applicability in a diversity case involving a contract in interstate commerce would arise. Eleven years later, the Court faced that question head-on in Prima Paint v. Flood & Conklin.[106]

B. *Prima Paint*

Prima Paint involved the interstate sale of a business and an accompanying consulting contract.[107] The main thrust of the opinion was whether a court or an arbitrator would determine Prima Paint's claim of fraud in the inducement of the contract.[108] The Court decided that under the FAA, if the fraud at issue was alleged to be in the formation of the contract, as opposed to being in the formation of the arbitration agreement, an arbitrator would determine the issue.[109] A contrary result would obtain under New York law, which apparently required that a court determine the issue of fraudulent inducement, regardless of whether the fraud was in the contract itself or in the arbitration agreement.[110] In other words, if the FAA applied, litigation would be stayed under section 3, and the arbitrator would determine the inducement issue. If New York law applied, the court would make this determination. Thus, the question was squarely put whether, in light of *Bernhardt's* declaration that a decision to arbitrate was outcome determinative, the federal court could apply the FAA in a diversity case, or whether it must defer to state law.

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[106] 388 U.S. 395 (1967).

[107] 388 U.S. at 397.

[108] *Id*. at 396.

[109] *Id.* at 403-04.

[110] *Id*. at 410-11 (Black, dissenting).

Prima Paint presented a real dilemma. If the Court applied *Bernhardt's* "outcome determinative" test, and followed Frankfurter's concurring opinion that the FAA was "substantive" under the *Erie* test so that it should not apply in diversity cases, the result would emasculate the FAA and thwart the intent of the 1925 Congress.[111]

The easiest solution might have been suggested by Hanna v. Plumer, [112] decided two years earlier. In *Hanna*, the Court determined that a Federal Rule on service of process would apply in federal court rather than a conflicting state rule, regardless of whether application of the federal rule would affect the outcome.[113] In more recent times, the Court in Stewart v. Ricoh has made clear that if there is a valid federal rule enacted under the Rules Enabling Act, or a federal statute on point, that rule or statute applies in a diversity case.[114] In other words, if Congress has spoken on the issue, then the outcome determinative test of *Guaranty Trust* would not come into play. If Congress has not spoken, and a federal judge-made rule conflicts with state law in a diversity case, then the outcome determinative test must be applied.[115]

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[111] *See* Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law,* 71 Va. L. Rev. 1305, 1320 (1985)("By declaring enforcement of arbitration to be 'substantive' in effect, the *Bernhardt* decision shut off the option of treating the FAA as a rule of federal procedure without significance in the *Erie* scheme").

[112] 380 U.S. 460 (1965).

[113] *Id.* at 473. The Federal Rules of Civil Procedure are adopted by the Supreme Court pursuant to the delegation by Congress under the Rules Enabling Act, 28 U.S.C. §2072. 380 U.S. at 463-64.

[114] Stewart v. Ricoh, 487 U.S. 22, 27 (1988) ("...a district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers"). *See also*, Erwin Chemerinsky, FEDERAL JURISDICTION (1999), at 320.

[115] 326 U.S. at 109. *See also Ricoh,* at 27, n.6, *citing Hanna v. Plumer* at 468 ("If no

The question, then, is why, after *Hanna,* didn't the Court in *Prima Paint* simply say the FAA applies because it is a validly enacted federal statute on point in this case? The reason appears to be that at the time of *Bernhardt* and *Prima Paint*, the Court was concerned about the constitutional power of Congress to enact rules that were applicable to substantive areas of state law, such as contracts, in a diversity case.[116] Language in *Erie* suggested that the Article III power to control federal courts did not give Congress the right to create rules which affected substantive areas of state law.[117] It was only in *Ricoh* that those concerns were resolved in favor of Congressional power. Thus, as the courts in *Bernhardt* and its progeny viewed *Erie*, for the FAA to apply in a diversity case, the statute must have been based on Congress' power under the commerce clause.

Prior to *Prima Paint*, the Second Circuit, in Robert Lawrence v. Devonshire,[118] had faced the dilemma raised by *Bernhardt.* On facts similar to those in *Prima Paint*, the *Robert Lawrence* court found the arbitration clause was severable from the rest of contract, and that

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federal statute or rule [is applicable], the district court proceeds to evaluate whether application of a federal judge-made law would disserve... "the twin aims of Erie: discouragement of forum-shopping and avoidance of the inequitable administration of the laws."

[116] *Bernhard*, 350 U.S. at 203, emphasized that in enforcing a state-created contract right in a diversity case, the federal court is in essence "only another court of the State", *citing Guaranty Trust*, at 108. It further noted that "the federal court therefore may not 'substantially affect the enforcement of the right as given by the State,'"*citing Guaranty Trust* at 109.

[117] The Erie Court stated, "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state...And no clause in the constitution purports to confer such a power upon the federal courts." 304 U.S. at 78. *See* Hirshman, *supra* note 111, at 1317.

[118] 271 F.2d 402 (1959).

arbitrators would decide the issue of fraud in the inducement of that contract.[119] The court dealt with the potential constitutional issue by finding a congressional intent "to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements..."[120], and by asserting that Congress based the Arbitration Act "in part on its undisputed substantive powers over commerce and maritime matters."[121] The Second Circuit therefore broadly held that the Arbitration Act created "national law equally applicable in state or federal courts,"[122] which encompassed "questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs..."[123]

Since the two lower court opinions in *Prima Paint* expressly relied on the reasoning of *Robert Lawrence* in reaching their decisions,[124] *Prima Paint* at its core was a review of the *Robert Lawrence* holding. Although the Supreme Court agreed with the result in *Robert Lawrence*, it did not approve the broad scope of the decision. It stated that the question was not "whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases" but rather, "whether Congress may prescribe how federal courts are to conduct

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[119] *Id* at 410, 412.

[120] *Id.* at 404.

[121] *Id.* at 407.

[122] *Id.* The court acknowledged that in other contexts, "enforceability of an arbitration agreement had generally been considered to be procedural only" at 405, and that the point about the law being substantive and applying in state or federal court "has only rarely been noticed," at 407.

[123] *Id.*

themselves with respect to subject matter over which Congress plainly has the power to legislate."[125] The question concerning "whether Congress may prescribe how federal courts are to conduct themselves"[126] suggests the Court viewed application of the FAA as fundamentally procedural. Nonetheless, the remaining clause appears to move closer to a substantive interpretation, by referring to "subject matter over which Congress plainly has power to legislate."[127] While the meaning is somewhat oblique, one implication is that while Congress had the power to legislate over the subject matter at issue, it had not done so. What Congress specifically had not done was create federal subject matter jurisdiction when it enacted the FAA.[128] That Congress did not create subject matter jurisdiction in the federal courts for the FAA suggests that the law was not intended to provide any substantive rights. Because *Bernhardt* announced that enforcement of arbitration entailed substantive rights, the question became whether these substantive rights were constitutional.

Perhaps, in referring to subject matter over which Congress had power to legislate (that was unexercised), the Court in *Prima Paint* was referencing the dormant commerce clause. This

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[124] *See* 360 F.2d 315 (1966), and 262 F. Supp. 605 (1966).

[125] *Prima Paint* at 405.

[126] *Id.*

[127] *Id.*

[128] For a party to go to federal court on a claim under the FAA, there must be a separate basis of federal jurisdiction, such as diversity. 9 U.S.C. §4 makes this clear: " A party aggrieved by the alleged failure...of another to arbitrate under a written agreement...may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28...." The Court in *Southland* stated that "the Federal Arbitration Act...does not create any independent federal-question jurisdiction under 28 U.S. C. §1331 or otherwise." 465 U.S. at 16, *citing* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25, n.32 (1983).

is an analogous area of constitutional jurisprudence where the Court interprets and applies the interstate commerce clause in the absence of Congressional enactments based on that clause. From early in our history, the federal courts have been active under the interstate commerce clause to protect the national economy from interference by state laws burdening commerce.[129] Dormant commerce cases have arisen, *inter alia*, in situations like the FAA, where Congress had power to enact substantive law, but had not done so.[130] Thus, although Congress did not grant federal subject matter jurisdiction over arbitration contracts in interstate commerce, the Court was perhaps assuming that Congress' inherent power to do so provided the Court with the ability to apply the FAA, even if quasi-substantive, in a diversity case.[131]

Ultimately, however, the Court in *Prima Paint*, adopted *Robert Lawrence's* basic solution. Federal law could prevail in a diversity case because "it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"[132] By asserting that the FAA is "based

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[129] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (Commerce Clause is an independent limit on state power, even where Congress has not acted).

[130] *See, e.g*. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (Even though there was no federal law regulating permissible length of trains, Arizona Train Limits Law struck down for imposing serious burden on interstate commerce).

[131] Seventeen years later, in Southland v. Keating, Chief Justice Burger referred specifically to Gibbons v. Ogden, *supra* note 118, noting that Congress' "plenary" authority under the Commerce Clause provided the power for *Prima Paint* to have "clearly implied that the substantive rules of the Act were to apply in state as well as federal courts." 465 U.S. 1 at 11-12.

[132] 388 U.S. at 405, *citing* H.R. Rep. No. 96, 68th Cong. 1st Sess., 1 (1924); S. Rep. No. 5365, 68th Cong. 1st Sess., 3 (1924).

upon and confined to" Congress' interstate commerce and admiralty powers,[133] however, the Court ignored specific and repeated references in the legislative history to Congress' constitutional power to control federal courts as the basis for the FAA,[134] thereby misconstruing the legislative history of the FAA quite significantly.[135] Julius Cohen's brief, which was incorporated in the record of the Joint Hearings of House and Senate Subcommittees, made two points very clearly. First, the FAA "relate[s] solely to procedure of the Federal courts."[136] Second, Congress' power to adopt the statute "rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."[137] This power, according to Cohen, comes from Article III, sections 1 and 2, giving Congress the power to establish inferior courts, and from the necessary and proper clause of Article I section 8.[138] In his congressional testimony, Cohen put it more simply: "The theory on which you do this [provide for federal court enforcement of arbitration agreements] is that you have the right to tell the Federal courts how to proceed."[139]

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[133] *See id.*

[134] *See supra* notes 60-68 and accompanying text.

[135] In a footnote, the Court acknowledged that perhaps the 1925 Congress did not see its jurisdiction as completely "confined" to its control of interstate commerce and admiralty, because, before *Erie,* which came down in 1938, Congress may have believed it had power to create rules governing questions of "general law," that is, non-statutory, common law. 388 U.S. at 405, n. 13.

[136] Joint Hearings, *supra* note 16, at 37.

[137] *Id.* Cohen also asserted that in enacting the FAA, "Congress rests *solely* upon its powers to prescribe the jurisdiction and duties of the Federal Courts." *Id* at 38. *Emphasis added.*

[138] *Id.*

[139] *Id.* at 17.

Moreover, the Senate and House Committee Reports do not support a finding that the commerce and admiralty powers were the exclusive bases of power to enact the FAA, although cited by the Court for that proposition.[140] The Senate Report does not state what the basis is, and the House Report refers to federal control over interstate commerce and admiralty as a fall-back, after determining that arbitration enforcement is properly a subject of federal control because it is a matter of procedure to be determined in federal court, and not one of substantive law.[141]

The Court did not go so far as to say, like the *Robert Lawrence* court, that the FAA represented national law equally applicable in state or federal courts, or that it encompassed questions of interpretation, construction, validity, revocability as well as enforceability of arbitration. Rather, the Court in *Prima Paint* asserted that the FAA text, in section 4, provided an explicit answer to the question of severability. By framing its decision in terms of an explicit answer found in the text, the Court appeared to be trying to avoid the full breadth of the *Robert Lawrence* approach.[142]

In *Prima Paint*, the Court reached a pragmatic result, but used an unfortunate method to get there. From one perspective, the decision may appear to be a good example of dynamic statutory interpretation. That view says a judge may legitimately interpret a statute in a way that goes beyond or even against the original purpose or intent, if justified by changes in current

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[140] 388 U.S. at 405, *citing* H.R. Rep. No. 96, 68th Cong. 1st Sess., 1 (1924); S. Rep. No. 5365, 68th Cong. 1st Sess., 3 (1924).

[141] *See supra* notes 60-68 and accompanying text.

[142] In his dissent, however, Justice Black pointed out that "The Court thus holds that the Arbitration Act, designed to provide merely a procedural remedy,...authorizes federal courts to fashion a federal rule to make arbitration clauses 'separable' and valid." 388 U.S. at 411.

circumstances or mores.[143] As Professor William Eskridge has noted, from the time of Blackstone, there has been recognition that judges have the power to adapt statutes to changing circumstances, to consider the reason and the spirit of the statute.[144] Certainly the *Prima Paint* Court appears to have adapted the FAA to a change in circumstances – the sea change brought about by *Erie* and *Guaranty Trust* – and interpreted the statute in a way that preserved the intent of the enacting Congress to apply the statute in federal court in diversity cases.

There are two problems, however, with the methodology used by the Court to reach this result. First, it wrongly characterized legislative history, and second, it did not specifically limit its decision. In incorrectly claiming in1967 that the underlying power Congress relied upon in 1925 was exclusively the commerce clause, the Court supplied a basis for arguing that Congress intended to create broad substantive rights in enacting the FAA, which would pre-empt state substantive rights. This is, of course, entirely contrary to the legislative history.[145]

The Court at the very least should have been much more specific about the limitations inherent in the rationale for its decision, rather than leaving it open to be expansively misconstrued in subsequent cases. For example, it could have made clear in the majority decision what Justice Black stated in dissent, that Congress never intended the FAA to apply to states.[146]

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[143] William N. Eskridge, Jr., Dynamic Statutory Interpretation, pp. 10-11.

[144] *Id.* at 116, *citing* 1 Blackstone, *Commentaries*, 61.

[145] *See supra* notes 60-68 and accompanying text.

[146] *Id. a*t 424 (Black dissenting) ("The Court here does not hold today...that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect – which the Court seems to leave up in the air – would flout the intention of the framers of the Act.")

It could also have more specifically limited to the extent to which it viewed the statute as providing substantive rights. Instead, by its misuse of legislative history, and its failure to limit the decision to reflect the limited scope of the FAA, the *Prima Paint* Court unleashed the statute from its moorings, and sent it on a journey from which it has never returned.

III. *Prima Paint's* Expansive Progeny: *Moses H. Cone* and *Southland.*

Although *Prima Paint* had avoided a specific finding that the FAA was a substantive statute that could be applied in state court,[147] sixteen years later, in Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,[148] the Court caverlierly stated in dicta, without citing to support or authority, that the FAA created a body of federal substantive law of arbitrability, and that the FAA governed in either state or federal court.[149] In *Moses H. Cone*, the hospital had sued a construction company in state court. The construction company petitioned in federal court for an order compelling arbitration under section 4 of the FAA. The federal district court stayed the federal court suit pending resolution of the state court suit, but the federal court of appeals, en banc, reversed the stay order and remanded to the district court for an entry of an order compelling arbitration. The main focus of the U.S. Supreme Court's decision was on the question of abstention: should the federal suit be stayed out of deference to the parallel litigation in state court? In answering that question in the negative, the Court found that the district court's stay of

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[147] *See* O'Connor, J. (dissent) in *Southland*, 465 U.S. at 24 ("[T]he Prima Paint decision 'carefully avoided any explicit endorsement of the view that the Arbitration Act embodied substantive policies that were to be applied to all contracts within its scope, whether sued on in state or federal courts.'") *citing* Hart and Wechsler, The Federal Courts and the Federal System 731-32 (2d ed. 1973).

[148] 460 U.S. 1 (1983).

[149] *Id.* at 24.

the federal suit had thwarted Congress' clear intent "to move parties...into arbitration as quickly and easily as possible...The stay thus frustrated the statutory policy of rapid and unobstructed enforcement of arbitration agreements."[150] Although this sufficed to decide the case, the Court went on inexplicably to declare that Section 2 of the FAA not only created substantive law, but that it applied in either state or federal court.[151]

Moreover, the Court also emphasized in *Moses H. Cone*, without citing any authority, that there is a strong federal policy favoring arbitration. In fact, however, nothing in the legislative history suggests a strong federal policy favoring arbitration. The 1925 Congress never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes. It simply made arbitration of commercial and maritime agreements enforceable in federal court, because until 1925, such agreements had essentially been revokable at will by the parties.[152] At no point did anyone argue that arbitration was overall a superior method of resolving disputes. Rather, Congress was persuaded that where merchants were concerned, arbitration provided a less expensive option that should be made available to those who voluntarily agreed to this alternative. The Act, therefore, would provide enforcement of agreements to arbitrate. However, there appears to be no basis for Justice Brennan to state that "Section 2 is a congressional declaration of a liberal federal policy *favoring* arbitration agreements" [153] and that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of

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[150] *Id*. at 22-23.

[151] *Id*.

[152] *See supra* notes 18-19 and accompanying text.

[153] 460 U.S. at 24. *Emphasis added*.

arbitrable issues should be resolved in favor of arbitration..."[154]

The so-called "policy favoring arbitration" appears to be one created by the judiciary out of whole cloth. A possible explanation for its creation, however, is that the Court may have indiscriminately superimposed on the FAA the national labor policy favoring collective bargaining agreements. Indeed, just a few year after the Court made the above statements in *Moses H. Cone*, the Court in Mitsubishi Motors Corp v. Soler Chrysler-Plymouth[155] cited not only *Moses H. Cone* for the proposition that "any doubts..should be resolved in favor of arbitration", but also Steelworker v. Warrior & Gulf Navigation Co., [156] a labor arbitration case, perhaps in order to shore up the lack of authority for the statement in *Moses H. Cone*. In the *Steelworker* case, the Court, interpreting §301 of the Labor Management Relations Act, stated,

> [T]he judicial inquiry under §301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance.... An order to arbitrate the particular grievance should not be denied unless ... the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[157]

So the policy announced as a federal policy with regard to the FAA, was instead, a policy pertaining to the labor law field.[158] In that field, there are strong national policy justifications for

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[154] *Id.*

[155] 473 U.S. 614 (1985).

[156] 363 U.S. 574, 582-83 (1960).

[157] *Id.*

[158] *See* Schwartz, *supra*, note 68 at 41, who argued that not only was there a "nationalist pull of federal labor law on the FAA,", but also that civil rights-oriented judicial nationalism may have caused Justice Brennan to make the sweeping statements set forth in *Moses H. Cone*, because he and some of his colleagues may have seen the rejection of a federal court's stay of litigation in deference to a state court "as an opportunity to make good civil rights law in the

favoring arbitration of collective bargaining agreements - to prevent strikes and worker violence, to preserve labor peace and to promote industrial stabilization.[159] These policy reasons do not pertain to the FAA, which simply provides that arbitration of commercial and maritime disputes can be a workable alternative to litigation.[160]

Because the *Moses H. Cone* Court had already announced in dicta that the FAA governed in state and federal court, the majority of justices in Southland v. Keating,[161] which was decided approximately one year later, probably did not think they were taking a very big step in holding that the FAA pre-empted state law. In fact, however, this was a giant leap in the misconstruction

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coded form of neutral procedural and prudential rules." *Id.* at 43.

[159] *See id.* at 43-44. ("...[t]he analogy between federal labor policy and the FAA is faulty. Arbitration pursuant to collective bargaining agreements is a part of a substantive national labor policy. It is a quid pro quo for a union's giving up the right to strike, and therefore a 'stabilizing' and 'therapeutic' influence that promotes 'industrial stabilization' and 'industrial peace' nationwide. Arbitration pursuant to the FAA is simply an alternative to litigation."

[160] Some courts have applied the FAA to labor arbitration agreements, *see e.g.* Tenney Engineering v. United Electrical Radio and Machine Workers, 207 F.2d 450 (3rd Cir. 1953) (en banc), but this runs counter to legislative history and to Supreme Court decisions that did not apply the FAA to labor contracts. *See e.g.* Textile Worker Union v. Lincoln Mills, 353 U.S. 448 (1957), where Justice Frankfurter, in dissent, points out that the majority implicitly held that the FAA did not apply to labor arbitrations:

> "... I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for >contracts of employment,= were available, the Court would hardly spin such power out of the empty darkness of '301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." *Id.* at 466.

[161] 465 U.S. 1 (1984).

of the FAA. *Prima Paint, Moses H. Cone*, and *Southland,* started the Court down a path of creating its own statute, one entirely different from the statute enacted by Congress.

The question in *Southland* -- whether the California Franchise Investment Law, which did not allow arbitration of claims arising under that law, was pre-empted by the FAA -- did not appear to be a difficult decision for the majority. One factor that made the decision easier than it should have been was that the appellees in *Southland* had assumed, based on the *Moses H. Cone* dicta, that the FAA applied to the states. Because the appellees conceded this point in their brief, the issue was not vigorously debated.[162] The Court asserted in *Southland* that the decision in *Prima Paint* "finding the Arbitration Act was an exercise of Commerce Clause power, clearly implied that the substantive rules of the Act were to apply in state as well as federal courts."[163] It then noted that *Moses H. Cone* had expressly stated "what was implicit in *Prima Paint, i.e.*, the substantive law the Act created was applicable in state and federal courts."[164]

Almost all of the commentators who have written about *Southland*, and several justices, agree that this case was wrongly decided and inconsistent with Congressional intent.[165] Yet there were six justices in the majority, with Justice Stevens concurring in part and dissenting in part,

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[162] *See* Brief of Appellees in No. 82-500 (filed June 6, 1983) at 25, n. 30; *see also* Brief Amici Curiae of State Attorneys General in Allied Bruce Terminix, No. 93-1001, 1993 U.S. Briefs 1001, p. 2 (1994); Keating v. Superior Court, 645 P.2d 1192, 1203 (1982).

[163] 465 U.S. at 12.

[164] *Id*. at 12.

[165] *See e.g.* Schwartz*, supra*, note 68. *See also infra* note 193. One commentator who has attempted to support the decision in *Southland* is Professor Christopher Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act,* 78 Notre Dame L. Rev. 101 (2002). *See infra* note 193.

and only Justices O'Connor and Rehnquist taking full issue with the Court's decision. To reach its decision, the Court had to virtually ignore the legislative history that it nonetheless claimed to rely upon. Although stating that the legislative history is "not without ambiguities,"[166] the Court found that it supported an intent by Congress for the FAA to bind state courts as well as federal courts.[167] Writing for the majority, Chief Justice Burger asserted that the FAA was based on Congress' authority under the Commerce Clause to enact substantive rules, that Congress had the power under the Commerce Clause to make the FAA applicable in state as well as federal courts, and that it impliedly did so when it enacted the FAA.[168] Chief Justice Burger also suggested that a broader purpose of making the FAA apply in state courts could be inferred from the fact that the contracts referred to are those involving interstate commerce. According to the Chief Justice, "if Congress...was creating what it thought to be a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce."[169]

These points represent at best pure speculation which a fair reading of the legislative history quickly undercuts. As Professor Schwartz has pointed out, language in the bill concerning contracts involving commerce was amended at the request of Senator Walsh, who wanted to narrow the effect of the Act, not expand it.[170] The original bill introduced in Congress provided coverage of three categories: "any contract or maritime transaction or transaction

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[166] *Id.* at 12

[167] *Id*. at 12-14.

[168] *See id.* at 11-12

[169] *Id*. at 14.

[170] *See* Schwartz*, supra* note 68, at 21-22.

involving commerce."[171] The application of the FAA to "any contract" would have included contracts not in interstate commerce.[172] At the time, contracts not considered in interstate commerce included most employment contracts and insurance contracts.[173] Senator Walsh's amendment limited contracts covered by the act to "contracts evidencing a transaction involving commerce."[174] His clear intent was to prevent the application of the FAA to contracts such as those of insurance and employment, which he considered adhesion contracts.[175] Thus, by limiting the scope of the FAA to contracts which were actually considered in interstate commerce, Congress was reducing the reach of the bill, not expanding it to apply in state courts.

The speculation that Congress had a broader purpose than just creating a remedy in federal courts is repeatedly shown to be unwarranted in the numerous representations that the statute would not apply to the states,[176] that it was only a procedural statute,[177] and that there

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[171] S. 4214, 67th Cong., 4th Sess., §2 (1922); H.R. 646, 65 Cong. Rec. 11,081 (1924).

[172] At the time, the FAA could only apply to "any contract" if it were a procedural statute. *See* Schwartz *supra* note 68 at 21.

[173] *See id.* at 22, n. 107.

[174] *See id*, n.102.

[175] 1923 Hearings, *supra* note 39, at 9 (Remarks of Senator Walsh) ("The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily [sic] things at all. Take an insurance policy.. You can take that or you can leave it...It is the same with a good many contracts of employment...").

[176] *See e.g.* House Report, *supra* note 66, at 1-2 ("Before [arbitration] agreements could be enforced *in the Federal courts*...this law is essential...The bill declares simply such agreements for arbitration shall be enforced, and provides a procedure *in the Federal courts* for their enforcement.") *emphasis added*; *see also* Joint Hearings, *supra* note 16, at 39 (Cohen Statement) ("There is no disposition...by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. That statute cannot have that effect."); *see also id.* at 28 (Rose Statement that the federal law would inspire states to adopt their own arbitration

were efforts afoot through the ABA to promote a Uniform Arbitration Act for the states that would deal with arbitrations in state court.[178] There is, however, language in Cohen's brief, which was incorporated in the record of the Joint Hearings, that supports the commerce and admiralty powers as alternative (but not exclusive) bases of Congress power. Entitled "Legal Justification," the section begins by explaining that Congress' power to enact the FAA arises from the constitutional power Congress has to establish and control inferior courts.[179] Cohen then

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laws) ("[T]he enactment of this law, extending its effect all over the United States, will have an effect upon the cause of that much-desired thing-uniform legislation...I have no doubt all of the States would pattern after it.").

[177] *See* House Report, *supra* note 66, at 1 ("Whether or an agreement for arbitration shall be enforced or not is a question of procedure"); *see also supra* note 57, Congressman Graham's statement on the floor of the House that the FAA "does not involve any new principle of law except to provide a simple method...in order to give enforcement...It creates no new legislation, grants no new rights, except a remedy to enforce an agreement...",; *see also supra* note 79 at 154, article by the Committee on Commerce Trade and Commercial Law of the ABA, upon passage of the FAA, explaining the Act it had been involved in drafting: "The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."

[178] In the 1920's , the A.B.A was working on drafts of both a federal arbitration act and a Uniform State Arbitration Act, both patterned on the New York Act. *See* MacNeil*, supra* note 17, at 41-56. *See* 1923 Hearings, *supra* note 39, at 2, where Charles Bernheimer refers to an ABA report on the parallel tracks of federal and state legislation ('the adoption of .. the Federal statute and the uniform State statute will put the United States in the forefront in this procedural reform.").

[179] Cohen made clear that because of this power, the commerce and admiralty powers are not needed by Congress to enact the statute. Joint Hearings, *supra* note 16, at 37.

> It has been suggested that the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress. This is not the fact.
>
> The statute...establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which congress is authorized to establish and control inferior Federal courts. *Id*.

made three additional "legal justification" points: (1) the statute would not infringe in any way upon the substantive rights of each State,[180] (2) a statute which declares arbitration agreements valid is nonetheless not a substantive law,[181] and (3) arbitration agreements have always been valid, but courts simply refused to specifically enforce them, although a damages remedy was available for breach.[182]

Having provided the legal justification for the FAA, Cohen, in the last four paragraphs of this section, raised the issue of the commerce and admiralty powers. Although recognizing the possibility that Congress had the power to make arbitration agreements connected with interstate commerce or admiralty transactions enforceable by the state courts,[183] Cohen concluded that even if Congress did not have this power, it would not matter for the purposes of the FAA.[184] "The primary purpose of the statute is to make enforceable in the federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."[185]

Cohen, knowing the FAA was modeled after the New York arbitration statute, and aware

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[180] *Id.* "A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws." *Id.*

[181] *Id.* at 38.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

of the challenges to the New York statute on state and federal constitutional grounds,[186] no doubt wanted the FAA to be able to withstand any constitutional challenge. As any well-trained lawyer, he proposed a fall-back position -- the commerce clause -- and pointed out that the power of the commerce clause is broad, even broad enough to cause arbitration clauses to be recognized in state courts. As Professor MacNeil suggested, this appears to be "lawyerly caution",[187] because Cohen had stated and continued to state clearly and repeatedly that the statute did not apply to the states and was merely a procedural statute to be applied in federal court.[188] Cohen's suggestion that the commerce clause was broad enough to give Congress power to apply the FAA to the states does not establish that this was Congress' intent. Rather, the available evidence points to the conclusion that Congress never considered applying the FAA to the states, but simply intended this procedural statute to enable arbitration agreements to be enforced in federal courts.[189]

The inadequacy of Chief Justice Burger's attempt to justify the application of the FAA to the states in *Southland* by reference to legislative history has been thoroughly documented

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[186] *See supra* notes 58-59 and accompanying text.

[187] MacNeil, *supra* note17 at 114, n. 61.

[188] *See supra* notes 179-180 and accompanying text. *See also e.g.* Joint Hearings, *supra* note 16 at 37 (where Cohen testified that Congress' power to make arbitration agreements enforceable "rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.")

[189] The House Report, *supra* note 66, states, for example, "Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by law court in which the proceeding if brought, and not one of substantive law...Before such contracts could be enforced in the *Federal Courts*, therefore, this law is essential. The bill declares that such agreements *shall be recognized and enforced by the courts of the United States." Emphasis added.*

elsewhere, in Ian Macneil's comprehensive book, American Arbitration Law: Reformation, Nationalization, Internationalization,[190] in Justice O'Connor's impassioned dissent in *Southland*,[191] in the amicus brief of twenty attorney generals who tried to persuade the Court to overrule *Southland* in a later case,[192] and in many fine scholarly articles.[193] *Southland* has been

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[190] *See supra* note 17.

[191] 465 U.S. at 25 ("One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts."). *Id.* (O'Connor, dissenting).

[192] Brief Amici Curiae of the State Attorneys General in Allied Bruce Terminix v. Dobson, 1993 U.S. Briefs 1001 (1994).

[193] *See e.g.* Carrington and Hagen, *supra* note 2 at 381 (referring to *Southland's* "bogus legislative history"); Schwartz, *supra,* note 68 (finding that *Southland* and its progeny are "the result of bad statutory interpretation and even worse federalism"); *cf.* Christopher Drahozal -- In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act, 78 Notre Dame L. Rev. 101 (2002) (arguing that despite weaknesses in the legislative history arguments made in *Southland,* "there are 'strong indications' that the drafters of the FAA intended it to apply in state court.") Professor Drahozal's arguments are carefully constructed, thoughtful and scholarly, but he may continue to swim upstream on this point without much scholarly company. Although he makes interesting points, one of the main arguments he puts forth, and cites repeatedly, is, in my view, unwarranted. He construes and relies heavily for support of his position on one sentence in Cohen's brief, "The primary purpose of the statute is to make enforcible in the Federal courts such agreements for arbitration,..."Joint Hearing, *supra* note 16 at 38. According to Professor Drahozal, this sentence implies that a secondary purpose is to make arbitration agreements enforceable in state courts. *See* Drahozal, *supra,* at 105, 133, 134, 150, 156, 163-64, 169. I submit that the only way this argument can even plausibly be made, is if one reads only the last four paragraphs in the section of Cohen's brief entitled Legal Justification and ignores the rest of the legislative history. At no point in the legislative history does anyone testify or write that the FAA should apply in state courts, and there are many specific statements that it does not. The drafters did have secondary purposes for the FAA, however, and these are clearly expressed. They are to reduce technicality and formality to a minimum (Joint Hearings, *supra* note16 at 35), to simplify the process and provide speedy justice (*Id.* at 27), to reduce the congestion of court calendars, and to reduce legal costs (*Id*. at 34). In my view, there is no difference in Cohen's statement that the primary purpose of the statute is to enforce arbitration agreements and Bernheimer's statement that "The fundamental conception underlying the law is to make arbitration agreements valid, irrevocable and enforceable."(1923 Hearings, *supra* note 39

strongly criticized as wrongly decided and as an example of very bad federalism.[194] To a great extent, however, the die was cast in *Prima Paint.* *Prima Paint* did not, of course, go the full distance toward misinterpreting the FAA to apply to states. As Justice Black noted in his *Prima Paint* dissent,

> The Court here does not hold...that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect – which the Court seems to leave up in the air – would flout the intention of the framers of the Act.[195]

However, the step in the wrong direction that the Court took in *Prima Paint* was large enough to inspire the *Moses H. Cone* dicta, which led the appellees in *Southland* to assume that the FAA applied to states, and to concede this point in their brief.[196] There was thus no vigorous advocacy on this point, and no amici participated.[197] From *Prima Paint* to *Moses H. Cone* to *Southland,* the descent down the slippery slope was steep and quick. The unfortunate result of the

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at 2). As for secondary purposes, or other conceptions underlying the law, the drafters made clear that simplifying procedures to obtain prompt and just resolution of disputes provided a subsidiary basis for promulgating the legislation. (Joint Hearings, *supra* note 16 at 27, 34, 35). The House Report, *supra* note 66, confirms this understanding: "The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. The procedure is very simple, reducing technicality, delay, and expense to a minimum and... safeguarding the rights of the parties."

[194] *See* Schwartz, *supra* note 68, at 37.

[195] 388 U.S. at 424 (dissenting opinion). *See also,* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 810 (3rd ed. 1988) (*Prima Paint* "carefully avoided any explicit endorsement of the view that the Arbitration Act embodied substantive policies that were to be applied to all contracts within its scope, whether sued in state or federal courts.")

[196] *See* Brief of Appellees in No. 82-500 (filed June 6, 1983) at 25, n. 30; Keating v. Superior Court, 645 P.2d 1192, 1203 (1982).

[197] *See* Brief Amici Curiae in *Allied Bruce*, *supra* note 192, text following note 3.

decision in *Prima Paint* was that later justices in *Moses H. Cone* and *Southland* did not observe the fine line maintained by the *Prima Paint* court, and stepped right over it into a major reconstruction of the FAA as a substantive statute that applied in state court and preempted state law. Once the Court decided to essentially cut itself free from the legislative history, it then could create an entirely different statute. It was not persuaded to rethink its actions even by amicus briefs of at least twenty attorneys general in two major cases, *Allied Bruce* [198] and *Circuit City,*[199] pointing out the errors of interpretation of the statute, and the resulting intrusion on state police powers. So despite the fact that, as Justice O'Connor noted, "[o]ne rarely finds a legislative history as unambiguous as the FAA's," [200] the Court repeatedly disregarded the legislative history in interpreting the statute.

But the Court also ignored or misused textualism. In its interpretive decisions, it repeatedly ignored critical textual indications that the statute was not substantive, but procedural. For example, the FAA is the only federal "substantive" statute in which there is no federal subject matter jurisdiction. The text of sections 3 and 4 make clear that a party cannot get into

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[198] *See id.*, at 3 ("*Southland's* extension of the FAA to state courts...is demonstrably incorrect and is in tension with important principles of judicial restraint and federalism...")

[199] Brief Amici Curiae of the State Attorneys General in Circuit City Stores, Inc. v. Saint Clair Adams, 2000 WL 1369472, at 7 (..."an interpretation of the FAA to apply to contracts of employment will seriously impair the States' ability to enact and enforce laws protective of employees by preempting a significant body of state law in an area traditionally within the States' police power.")

[200] *Southland,* 465 U.S. 1, 25 (1984) (O'Connor, dissenting). Justice O'Connor went on to explain that Ahistory establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts." *Id.*

federal court under the FAA; there must be another basis of federal jurisdiction.[201] The Court breezed past this problem, ignoring the obvious conclusion that there is no federal subject matter jurisdiction because Congress in 1925 thought it was enacting a procedural statute. [202]

The Court also ignored the textual indications that the statute was meant to apply only in federal court, as specifically stated in sections 3, 4, 7, 9, 10, and 11. Textualists assert that you should look to the text of the statute as a whole.[203] If the Court had considered the text of the FAA as a whole, all of the references to the "United States district court" or "the United States courts" should have made clear that the statute was meant to apply in federal court, not state court. The decision in *Southland*, according to Justice O'Connor, was "an exercise in judicial revisionism" that was "unfaithful to congressional intent."[204] This in turn, contributed to a number of other decisions straying even further from the statute as enacted.

IV. The Supreme Court's New Architecture for the FAA

Once the Court essentially severed the FAA from its historical context by declaring it to be a substantive statute applicable in both state and federal court, it rarely looked back at the

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[201] Section 3 provides in pertinent part, "If any suit...be brought in any of the courts of the United States...the court in which such suit is pending...[if satisfied that the suit is referrable to arbitration] shall..stay the trial of the action." Section 4 provides in pertinent part, "A party aggrieved by the alleged failure...of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order [compelling arbitration]."

[202] *See Allied Bruce Terminix*, 513 U.S. at 291 (Thomas, dissenting) ("[T]he reason that §2 does not give rise to federal question jurisdiction is that it was enacted as a purely procedural provision.")

[203] *See* Eskridge, *supra* note 143 at 42.

[204] 465 U.S. at 36 (O'Connor, dissenting).

legislative history. Moreover, the justices not only ignored the historic context, but also ignored or recast earlier precedent that was consistent with the intent of the enacting Congress.[205] Instead, the Court relied on its own recently created precedent to entirely rewrite the statute and create an edifice of its own design.[206]

A. Pre-emption of State Law

A major change in the architecture of the statute, and the most immediate impact of *Southland's* holding, was the pre-emption of state arbitration law by the FAA.[207] The various Court decisions pre-empting state law on a broad basis caused a seismic shift from the FAA as a simple procedural statute for enforcing arbitration agreements in federal court to a major intrusion upon the police powers of the states.[208] Initially, there was a question of how broadly the Court would apply such a doctrine. At first, it took a reasonably constrained view. In Volt Information Sciences v. Stanford,[209] the Court did not find that the FAA pre-empted a California procedural statute, even though that meant that the arbitration proceeding would be stayed

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[205] *See infra* notes 229-33, 290-92 and accompanying text.

[206] Justice Stevens noted in *Circuit City* that the Court itself had "endorsed a policy that strongly favors arbitration," then relied upon the strength of that policy preference to decide cases, so that "the Court is standing on its own shoulders when it points to those cases as the basis for its...construction..."532 U.S. at 132.

[207] In *Southland*, the Court held that the FAA pre-empted a provision of the California Franchise Investment Law required franchise disputes to be resolved in a judicial proceeding.

[208] *See* Brief Amici Curiae of the Attorneys General in *Allied Bruce, supra* note 192, at 6 (The control of state court dockets, including the right to a civil jury trial in the state courts...is a matter solely of state law and state concern.")

[209] 489 U.S. 468, 477 (1989).

pending litigation.[210] The Court acknowledged in *Volt* that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[211] The Court's reference to congressional intent is an understatement. Not only was there no congressional intent "to occupy the entire field of arbitration," but the statute's legislative history negated any intent at all to pre-empt state law. That history made clear that the statute was never intended to pre-empt state arbitration law, because it was a procedural statute[212] intended to apply only in federal court.[213]

Nonetheless, the Court in *Volt*, assuming pre-emption was proper, based on *Southland*, stated that the question was whether applying California law to stay arbitration "would undermine the goals and policies of the FAA."[214] It found in *Volt* that the state law would not do so, and was therefore not pre-empted by the FAA.[215] This initial reluctance to pre-empt state law

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[210] *Id.*

[211] *Id.*

[212] Joint Hearings, *supra* note 16 at 39-40. At the time, the law of remedies was considered procedural law, and the widely held view was that arbitral law, which provided a remedy, was a procedural law. *See* Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 290 (N.Y., 1921) (Cardozo, J.) ("Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow.")

[213] Julius Cohen noted in testimony before the Joint Subcommittee:

> Nor can it be said that the Congress of the United States, directing its own courts..., would infringe upon the provinces or prerogatives of the States...[T]he question of enforcement relates to the law of remedies and not to substantive law. Joint Hearings, *supra* note16 at 39-40.

[214] 489 U.S. at 477-78.

[215] *Id.*

was not, however, adhered to in later cases.

Whether or not a federal law pre-empts state law is largely a matter of Congressional intent.[216] One would not expect a broad application of the pre-emption doctrine when a particular statute, such as the FAA, lacks specific Congressional intent to pre-empt state law.[217] Moreover, pre-emption is particularly inappropriate when a core state function is involved.[218] A state's decisions about its legal processes, and how disputes are legally resolved within its jurisdiction, are classically a core state function. The Supreme Court has held that "'where... the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.'"[219] The 1925 Congress' intent for the FAA to supersede state laws not only was *not* clear and manifest; it was non-existent.

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[216] *See* 513 U.S. 265, 283 (O'Connor concurring) ("We have often said that the pre-emptive effect of a federal statute is fundamentally a question of congressional intent.") (citations omitted).

[217] In his separate decision in *Southland*, concurring in part and dissenting in part, Justice Stevens noted:

> [W]hile it is an understatement to say the "the legislative history of the...Act...reveals little awareness on the part of Congress that state law might be affected," it must surely be true that given the lack of a "clear mandate from Congress as to the extent to which state statutes and decisions are to be superseded, we must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states." 465 U.S. 18-19 (citations omitted).

[218] English v. General Elec. Co., 496 U.S. 72, 78-79. "Where . . . the field which congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest.'" Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), *quoting* Rice v. Santa Fe Elevator Corp., 331 U.S.218 (1947).

[219] English v. General Elec. Co., 496 U.S. 72, 78-79 (1990), *cited in* Allied Bruce Terminix v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, concurring).

Moreover, the "core principles of federalism" require that if federal statutes are ambiguous, they should not be read to displace state law.[220] Rather, the Court should be "'absolutely certain' that Congress intended such displacement before [giving] pre-emptive effect to a federal statute."[221] Since there was no clear and manifest intent in the FAA, and no absolute certainty about Congressional intent, one might expect the Court to tread lightly in the area of FAA pre-emption of state law. Instead, the Court has come down heavily in favor of pre-emption, leaving little room to the states to regulate in this area.

For example, in Dr.'s Associates v. Casarotto,[222] a Montana state law required that a notice that a contract was subject to arbitration "must be typed in underlined capital letters on the first page of the contract or the arbitration clause was not enforceable" [223] The Montana legislature had recently changed the law in Montana to make arbitration clauses enforceable, and the purpose of this notice requirement was to ensure that citizens knew that an arbitration clause was contained in the contract, because such a clause was no longer revocable at will.[224] The Montana Supreme Court found in *Dr.'s Associates* that the parties' dispute was not arbitrable because the required notice was not provided.[225] It also reasoned, based on the Supreme Court's decision in *Volt,* that the state statute was not pre-empted by the FAA, because the statute's

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[220] 513 U.S. at 292 (Thomas, dissenting).

[221] *Id., citing* Gregory v. Ashcroft, 510 U.S. 452, 460 (1991).

[222] 517 U.S. 681 (1996).

[223] *Id.* at 683.

[224] 28 Mont. 369, 382 (S.Ct. 1994).

[225] *Id.* at 684.

purpose was to ensure that the agreement to arbitrate was voluntary and knowing; that purpose did not undermine the goals and policies of the FAA.[226]

The U.S. Supreme Court disagreed. In holding that the Montana notice requirement was pre-empted by the FAA, it gave a very expansive interpretation of section 2 of the FAA. The text in question provides that written 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."[227] The Court's interpretation of this savings clause was that "any contract" really means "every contract" or "contracts generally," rather than, "any particular contract." As a result, in the Court's view, the only grounds for revoking an arbitration agreement are grounds that can be applied to contracts generally, such as fraud or unconscionability.[228] Thus, any state statute which attempts specifically to regulate how arbitration is carried out is likely to be pre-empted by the FAA.

A more logical reading of the text, which would put arbitration on the same footing as other contracts, would be that if any *particular* contract could be voided for a specific ground, such as not making a provision conspicuous, or violating a consumer protection statute, then an arbitration agreement should also be revocable on that ground. The Court's interpretation, however, that "any contract" means "contracts generally," has a particularly intrusive effect on state law applicable to arbitration agreements. If a state adopts any legislation that treats

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[226] *Id.* at 685, *quoting* 886 P.2d at 939.

[227] 9 U.S.C. §2.

[228] The court cited to precedent in *Southland*, Perry v. Thomas, 482 U.S. 483 (1984) and Allied Bruce Terminix v. Dobson, 513 U.S. 265 (1995).

arbitration separately – if, for example, it tries to regulate possible abuses of arbitration by legislation focusing specifically on arbitration, as the Montana statute did -- the FAA will pre-empt that state law. It matters not that the statute reflects a public policy established by the state, as the Montana Supreme Court found that the notice requirement did.

Although the Court's decision in *Dr.'s Associates* was logically consistent with some of its more recent prior decisions, the interpretation was not warranted by the text and certainly not by legislative history or by decisions pre-dating *Southland.* As noted above, the pre-emption doctrine was announced by the Court beginning with *Southland*. In Perry v. Thomas,[229] a post-*Southland* case cited as authority in *Dr.'s Associates*, the Court had difficulty explaining why the FAA pre-empted state law in that case, because on similar facts in a 1973 case, Merrill Lynch, Pierce, Fenner & Smith v. Ware,[230] pre-emption by the FAA was not even considered. In *Perry,* the Court held that the FAA pre-empted a California statute which provided that wage claims must be brought in a judicial forum.[231] However, in *Ware*, decided fourteen years earlier, the Court had held that the same California statute was not pre-empted by rules of the New York Stock Exchange, promulgated under the Securities and Exchange Act of 1934.[232] In *Ware*, the Court briefly mentioned the FAA in a footnote, but never considered whether it might pre-empt the California statute. In his dissent to *Perry*, Justice Stevens explained why the FAA was not held to pre-empt the California statute in *Ware* in 1973:

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[229] 482 U.S. 483 (1987).

[230] 414 U.S. 117 (1973).

[231] *Id*. at 484.

[232] *Id.* at 140.

> Even though the Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the Court nor the litigants even considered the possibility that the Act had pre-empted state-created rights. It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend.[233]

Dr.'s Associates, like *Perry,* is thus a continuation of the court's newly created architecture for the FAA. In finding pre-emption in *Dr.'s Associates*, the Court stated that one purpose of the FAA was that arbitration provisions be placed "upon the same footing as other contracts."[234] An arbitration agreement, however, is not the exact equivalent of "every contract", and placing arbitration agreements on the same footing as other contracts for enforcement purposes does not warrant artificially forcing them into a box that fits "contracts generally." First, the arbitration agreement is often a provision contained within a contract, so to some extent it is equivalent to various other clauses of the contract.[235] On the other hand, the arbitration clause is severable from the contract, and can be treated as a separate agreement, as indicated in *Prima Paint*, where the Court found that fraud in the inducement of the contract was not the same as fraud in the inducement of the arbitration clause.[236] So we are dealing with a concept that is not quite like the contract of which it is frequently a part, and not quite like any other clause in a contract, since it is treated as severable from that contract.

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[233] 482 U.S. at 493 (Stevens, dissenting).

[234] 517 U.S. at 687, *citing* Scherk v. Alberto-Culver, 417 U.S. 506, 511 (1974), which cites H.R. Rep. No. 96, 68th Cong. 1st Sess., 1 (1924).

[235] In Allied Bruce v. Terminix, 513 U.S. 265, 281 for example, Justice Breyer compared an arbitration clause with other clauses in the contract governing price, service and credit, stating, "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."

[236] 388 U.S. at 406.

Second, the arbitration clause is different from many other contracts and other contract clauses, because agreeing to arbitrate means a party has given up a constitutional right to a jury trial. For this reason, there are times when an arbitration clause should be treated differently from "contracts generally," in order to ensure a party's constitutional rights are protected.[237] If a state adopts legislation to make sure that a party is not unknowingly giving up its constitutional rights, such legislation should be entitled to deference from the Supreme Court as within a state's ability to set and enforce public policy. Certainly, a concern expressed by legislators in 1925 was that any agreement to arbitrate must be voluntary.[238]

Third, in holding that the FAA pre-empted the Montana law requiring a notice provision of an arbitration agreement, the Court failed to put the arbitration clause on the same footing as other contracts. States have frequently required certain types of provisions in contracts to be conspicuous. For example, an attempt to exclude the implied warranty of merchantability must be conspicuous.[239] If a state law cannot require that a provision containing an arbitration clause be conspicuous, it means the arbitration clause is not on the same footing as other provisions. In *Prima Paint*, the Court stated that "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."[240] Because an arbitration

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[237] *See* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 Ohio St. J. on Disp Resol. 669 (2001).

[238] *See supra* notes 50-57, 170-175 and accompanying text.

[239] U.C.C. 2-316 (2) (2004) ("To exclude...the implied warranty of merchantability... the language must mention merchantability and...must be conspicuous.")

[240] 388 U.S. 395, 404, n. 12. As one commentator has noted, the FAA should not "serve as a special national exemption from state contract law that applies to arbitration agreements but no other contracts." David S. Schwartz, *FAA Preemption: Does it Wipe Out State Contract Law?*

provision cannot be made conspicuous, while other contract provisions can be, arbitration provisions are thus *more* enforceable than other provisions, and therefore not on the same footing.[241]

According to Justice Stevens, the savings clause in section 2[242] should permit a state to declare an arbitration agreement void as a matter of public policy.[243] In *Southland*, he noted that "[a] contract which is deemed void is surely revocable at law or in equity."[244] If a state has adopted a regulatory statute that prohibits arbitration in certain circumstances, in Justice Stevens' view, the savings clause would permit that agreement to be revocable. He and Justice O'Connor have both noted that *Congress* can legislate that a particular issue cannot be subject to arbitration, but the Court has not explained why state legislatures should not be able to do the same.[245] According to these two justices, even though the Court has held that the FAA applies to the states, there is no basis in the savings clause for prohibiting states from regulating what they view as abuses of arbitration, or from protecting their citizens from potential abuses. Unfortunately, a majority of justices disagree.

The result of the Court's decisions in *Southland, Perry, Allied Bruce*, and *Dr's Associates*

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10 ABA Dispute Resolution Magazine 23, 24 (Spring 2004).

[241] *See* Margaret L. Moses, Privatized "Justice", 36 Loy. U. Chi. L. J. 535, 540-41 (2005).

[242] Written arbitration agreements "shall be valid irrevocable, and enforceable, save upon such grounds a exist at law or in equity for the revocation of any contract." 9.U.S.C. §2.

[243] *See Southland*, 465 U.S. at 19-20 (Stevens, concurring in part and dissenting in part).

[244] *Id.* at 20.

[245] *See* Perry v. Thomas, 482 U.S. at 494 (O'Connor dissenting) *citing* Justice Stevens in *Southland*, 465 U.S. at 21 (Stevens concurring in part and dissenting in part).

is a massive pre-emption of state contract law. Moreover, lower federal courts have sometimes gone beyond the Supreme Court's holding to pre-empt state law.[246] In Bradley v. Harris Research,[247] for example, the Ninth Circuit found that the FAA pre-empted a provision in the California Franchise Relations Act that provided that a franchise agreement could not require claims to be brought in a venue outside of California. This state law did not single out arbitration, because it applied to either litigated or arbitrated claims. Nonetheless, the Ninth Circuit stated that "[The California provision] applies only to forum selection clauses and only to franchise agreements; it therefore does not apply to 'any contract.'"[248] The court therefore found the provision pre-empted by the FAA. This result would presumably, however, not affect franchise agreements with no arbitration clause, since that would mean the parties intended to litigate disputes. The FAA would be inapplicable in litigation, so it could not pre-empt the same California law in the litigation context. Thus, California law could override a forum selection clause outside of California in a situation involving litigation, but not in a situation involving arbitration. It is difficult to see how this places arbitration contracts on "the same footing" as other contracts.

Bradley indicates how massively state contract law could be overridden in the name of the

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[246] *See e.g.* Bradley v. Harris Research 275 F.3d 884 (9th Cir. 2001) (FAA pre-empted state law prohibiting franchise claims to be brought outside of California); KKW Enters, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp., 184 F.3d 42 (1st Cir. 1999) (FAA pre-empted state law prohibiting franchise claims to be brought outside of Rhode Island); OPE Int'l LP v. Chet Morrison Contractors, Inc. 258 F.3d 443, 447 (5th Cir. 2001) (FAA pre-empted state law invalidating provision that required suit or arbitration proceeding to be brought outside of Louisiana).

[247] 275 F.3d 884 (2001).

[248] *Id*. at 890.

FAA. If the *Bradley* view were widely adopted, virtually any consumer protection legislation or anti-discrimination legislation could be pre-empted by the FAA, because it would not apply "to any contract." Even if other courts do not follow *Bradley*, however, the Supreme Court's view that arbitration agreements cannot be regulated by the states other than by using generally available contract defenses to revoke such agreements on grounds such as fraud, mistake or unconscionability, represents a major intrusion into the police powers of the state, and appears contrary to the Court's claim of respecting those rights in other contexts.[249]

B. Arbitrability of Statutory Claims

Another example of the new architecture of the FAA is the Court's holding in Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.[250] that the FAA applies not just to contract issues, but to issues arising out of statutory claims involving U.S. antitrust law.[251] This holding is difficult to support from either the Act's text or its legislative history. The text of the Act itself, not surprisingly, reads as though it applies to contract claims, not statutory claims. The pertinent language of §2 states, " A written provision in ... a contract evidencing a transaction involving

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[249] In recent times, the Supreme Court has intervened in a number of instances to prevent the federal government from, in its view, improperly intruding upon state powers. It has, for example, struck down provisions of the Violence Against Women Act (United States v. Morrison, 529 U.S. 598 (2002)); the Brady Act concerning state cooperation in federal gun control (Printz v. United States, 521 U.S. 898 (1997)); and the Gun Free School Zones Act (United State v. Lopez, 514 U.S. 549 (1995)). *Cf.* Gonzales v. Raich, 125 S.Ct. 2195 (2005) (holding federal law prohibiting marijuana manufacture and possession did not exceed Congress' commerce clause power in its pre-emption of California law permitting medical use of marijuana).

[250] 473 U.S. 614 (1985) (Supreme Court enforced arbitration clause providing for arbitration in Japan for Puerto Rican car dealership, and required arbitration in Japan of U.S. antitrust claims raised by car dealership).

[251] *Id*. at 637-38.

commerce to settle by arbitration a controversy thereafter arising out of such contract...or the refusal to perform the whole of any part thereof,...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [252] There is nothing in this language to suggest that it applies to claims which are based on an independent legal right outside of a contract.

Moreover, the FAA was never described in the legislative history as applying to any claims other than contract and maritime claims.[253] Nor is there evidence that anyone at the time believed the FAA made statutory claims arbitrable.[254] Additionally, until *Mitsubishi,* every federal court that considered the question of whether agreements to arbitrate antitrust issues were enforceable gave a strong and unequivocally negative answer.[255] There were significant policy reasons why the courts believed antitrust claims should not be arbitrated. The most basic was that antitrust laws are aimed at protecting not only individual parties, but the public at large. An

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[252] 9 U.S.C. §2.

[253] 473 U.S. at 646 (Stevens, dissenting) ("Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of statutory claims.")

[254] *See* Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A "Second Look" at International Commercial Arbitration*, 93 Nw. L. Rev. 453, 481 (1999) ("It is by no means evident...that mandatory law claims necessarily are within the scope of a statutory provision making irrevocable "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce... The absence of any evidence contemporaneous with the 1925 Federal Arbitration Act regarding the arbitrability of mandatory law claims also would seem to undermine the Supreme Court's conclusion, as would the abundant evidence contemporary with and subsequent to the FAA's passage of a universal assumption regarding the *inarbitrability* of mandatory law claims.") (citations omitted). *See also, supra* notes 75-76 and accompanying text.

[255] 473 U.S. at 655-56 (Stevens, dissenting), *citing* cases from First, Second, Fifth, Seventh, Eight and Ninth Circuits (citations omitted).

arbitrator's role, in contrast, is simply to effectuate the intent of individual parties.[256] Unlike a federal judge, the arbitrator "has no institutional obligation to enforce federal legislative policy."[257] An arbitrator might issue an award that resolved the individual dispute, but was detrimental to the larger public interest.[258] Moreover, the arbitral process itself is less suited to the resolution of complex antitrust disputes. Frequently, much of the information needed to prove that a monopolist is monopolizing is under the control of the monopolist. In arbitration, discovery is limited, making it much less likely that a victim of the monopoly will be able to establish his case, and protect the rights Congress intended him to have. In addition, an arbitral decision is virtually unreviewable, because the bases for vacating an award are limited to narrow statutory grounds essentially permitting review only for procedural issues or arbitrator misconduct, but not for an error of fact or law.[259] Even if a court were to review the arbitral proceedings, the record of the proceedings would most likely be inadequate for such review. It is also worth noting that Congress provided that antitrust cases can only be brought in Federal

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[256] *See* Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981).

[257] 473 U.S. at 614 (Stevens, dissenting).

[258] *Barrentine,* 450 US at 744. ("Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the [statute], thus depriving [a party] of protected statutory rights.") As Dean Philip J. McConnaughay has observed, *supra,* note 254, at 495,"[T]he very purpose of most mandatory economic regulatory legislation is to constrain private commercial activity in ways believed essential to the greater public good. Thus a legally incorrect arbitral resolution of a mandatory law claim is significantly more likely to affect interests beyond those of the disputing parties than is a legally incorrect arbitral resolution of a contractual or other elective law claim."

[259] 9 U.S.C. §10.

Court.[260] Therefore, it is not surprising that until *Mitsubishi*, federal courts were not willing to permit private arbitrators to assume a jurisdiction that Congress had denied to the courts of the sovereign states.[261]

What countervailing reasons and policies did the Court assert in *Mitsubishi* for applying the FAA to statutory claims, in the absence of support in the text of the FAA, the legislative history, and every pertinent lower court ruling? The Court essentially gave two reasons, each with a twist. First, it relied heavily on the assertion of a "liberal federal policy favoring arbitration agreements,"[262] asserting that the Court had no reason to depart from these policy "guidelines" when the claims were based on statutory rights rather than contract rights.[263] The "policy" of course, is a judicially-created policy, pulled from the labor law field, and not based on any preference expressed by Congress for arbitration over litigation.[264] Moreover, as noted above, Congress never expressed any intent for the FAA to enforce agreements to arbitrate statutory rights.[265] The "twist" added by the Court, was to assert that there was nothing in the FAA which

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[260] *See* the Sherman Act, 15 U.S.C. §15.

[261] *See* 473 U.S. at 654 (Stevens, dissenting) *citing* Judge Posner's comment in University Life Insurance Co. v. Unimark Ltd 699 F.2d 846, 850-51 (7th Cir. 1983), that federal antitrust issues are not arbitrable, because "[t]hey are considered to be at once too difficult to be decided competently by arbitrators – who are not judges, and often not even lawyers – and too important to be decided otherwise than by competent tribunals."

[262] 473 U.S. at 625, *citing Moses H. Cone.*

[263] *Id.* at 626.

[264] *See supra* notes 152-160 and accompanying text.

[265] *See supra* notes 252-255 and accompanying text.

supported a presumption *against* arbitration of statutory claims.[266] Lack of evidence of an intent *not* to arbitrate statutory claims, thus became for the Court a reason for the FAA to apply to statutory claims. This "twist" continued as the Court made a similar claim with respect to statutes, such as the antitrust statutes, where there is no evidence that Congress intended for the statutory rights to be arbitrated. The Court concluded from this lack of stated intent that Congress must have intended the opposite - that is, by not saying anything to the contrary, Congress must have intended for the rights conveyed by those statutes to be arbitrated.

"We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from the text or legislative history."[267] In other words, the court takes the lack of any evidence in the text or legislative history that the statutory rights are arbitrable, and turns this absence of evidence into a presumption that such rights should be arbitrated because nothing says they cannot be arbitrated.

The second reason the Court gave for finding the antitrust claims arbitrable was that this was an international dispute.[268] In 1974, in Scherk v. Alberto-Culver Co.,[269] the Court had found

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[266] 473 U.S. at 625 ("[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims."

[267] 473 U.S. at 628.

[268] 473 U.S. at 629 (..."[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.")

[269] 417 U.S. 506 (1974).

that claims under the Securities Exchange Act of 1934 were arbitrable,[270] despite its decision twenty years earlier in Wilko v. Swann[271] that such claims were not arbitrable under the Securities Act of 1933.[272] The Court in *Scherk* had distinguished *Wilko* primarily on the grounds that *Wilko* involved a domestic situation, whereas the transaction at issue in *Scherk* was international.[273] The *Mitsubishi* Court observed that

> [a]s in Scherk v. Alberto-Culver Co., we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[274]

To buttress its position, the Court pointed to another earlier case, The Bremen v. Zapata Off-Shore Co.,[275] where it had enforced a forum selection clause requiring London to be the forum for any litigation between an American company and a German company, on the grounds that if Americans wanted to do international business, they must abide by clauses they had agreed to in international contracts.[276] The decisions in both *Bremen* and *Scherk*, according to the Court, supported a presumption of enforcement that was "reinforced by the emphatic federal policy in

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[270] 417 U.S. at 513.

[271] 346 U.S. 427 (1953).

[272] *Id.* at 436-38.

[273] 417 U.S. at 515-516.

[274] 473 U.S at 629.

[275] 407 U.S. 1 (1972).

[276] *Id.,* at 9. The dissent pointed out that enforcement of the forum-selection clause would circumvent U.S. public policy, because certain exculpatory clauses in the contract would be valid in England, but against public policy in the U.S. *Id*. at 24.

favor of arbitral dispute resolution."[277] The policy has become even stronger, the Court declared - without citing to any text or legislative history -- because the U.S. accession to the New York Convention meant "that the federal policy applies with special force in the field of international commerce."[278]

In another twist, the Court found *The Bremen* highly relevant, because, as it had noted in *Scherk*, an arbitration agreement is in essence "a specialized kind of forum selection clause."[279] To make clear what it meant, the Court spelled out that

> [b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.[280]

By this twist, the Court proclaimed that arbitration was not outcome determinative after all, contrary to its earlier decision in *Bernhardt.* Substantive rights, according to the Court, are just as well protected in arbitration as in litigation. In reaching this conclusion, the Court ignored earlier views it had taken to the contrary, as well as reality. Arbitration does not provide the same ability to protect substantive rights, and to the extent a party cannot protect those rights, he forgoes them. And while parties of equal bargaining power who choose to arbitrate their contract disputes may properly understand and accept the trade-offs between arbitration and litigation, permitting parties to waive full statutory protection provided by Congress may impinge upon

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[277] 473 U.S. at 631.

[278] *Id.*

[279] 473 U.S. at 630, *citing Scherk*, 417 U.S. at 519.

[280] *Id.* at 628.

third party rights, or the rights of the public at large designed to be protected by regulatory statutes. Furthermore, in international cases, only a minority of nations permit the arbitration of mandatory law, so the Court's move in this direction creates uncertainties not only about whether arbitrators will properly resolve the claims, but also whether other nations will enforce arbitral awards based on claims arising under U.S. regulatory statutes, such as its antitrust laws and securities laws.[281]

Contrary views expressed by the Court in earlier times show a strong concern about the lack of protection of rights in an arbitration proceeding. In Wilko v. Swan,[282] for example, the Court refused to enforce an arbitration agreement as to claims brought under the1933 Securities Act, because protection of the buyer's rights would be "lessened in arbitration as compared to judicial proceedings."[283] In *Bernhardt,* the Court had found that "[t]he nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action"[284] such that "[t]he change from a court of law to an arbitration panel may make a radical difference in

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[281] *See* McConnaughay, *supra* note 254, at 480. ("Parties to international arbitrations ...are left guessing about whether nations other than the United States will recognize and enforce the arbitral resolution of claims arising under U.S. mandatory law.")

[282] 346 U.S. 427 (1953).

[283] *Id.* at 436. The Court considered the following language of 15 U.S.C. §77 (§14) : "Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void" and interpreted it to mean that a party could not waive judicial consideration of the claim. "As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended §14 to apply to waiver of judicial trial and review."*Id.* at 437.

[284] 350 U.S. at 203.

ultimate result."[285] The Court further noted that the elements likely to make a substantial difference were the lack of a jury trial right, the lack of a requirement for arbitrators to give reasons for their decision, incomplete records of the proceedings, and very limited opportunity for judicial review of the award.[286] In Alexander v. Gardner Denver Co.,[287] the Court noted that arbitral procedures, while "well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII,"[288] in part because "...resolution of statutory or constitutional issues is a primary responsibility of courts. "[289]

These concerns never surfaced again after *Mitsubishi*, as the Court continued to erect a larger, more expansive statutory edifice for the FAA's coverage. The Court fairly quickly dispensed with an international requirement for finding a statute arbitrable, claiming that *Wilko* and *Scherk* had turned not on the international context at all, but rather on the Court's judgment that arbitration in the circumstances of those cases was not an adequate substitute for judicial resolution.[290] Having recast the issue as one of arbitral adequacy, the Court in Shearson/American Express Inc. v. McMahon found that such concerns about adequacy "no

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[285] *Id.*

[286] *Id.*

[287] 315 U.S 36 (1974).

[288] *Id.* at 56.

[289] *Id.* at 57.

[290] Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 228-229 (1987).

longer hold true for arbitration procedures subject to the SEC's oversight authority."[291] Two years later, the Court officially overruled *Wilko*, concluding that "resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act."[292]

There are many good reasons why arbitration of statutory rights is simply wrong. Congress passed laws such as the antitrust laws, the securities laws and the discrimination laws to protect parties it thought needed protection, and to benefit the economy and the public at large. Arbitration does not provide the same level of protection as the courts, because, *inter alia*, there is less discovery, an inadequate record of the proceedings, and the awards are unreviewable on the merits. Moreover, because an arbitration award is confidential, it does not develop the law or serve as a deterrent to other potential violators. What seems most skewed, however, is that by giving arbitrators jurisdiction to decide claims under regulatory statutes, the Court is no longer simply approving the private adjudication of individual contractual agreements, but has delegated to arbitrators what is essentially the judicial power of the State. Such a delegation, if made at all, should be made by Congress, after debate and discussion, not by the courts.

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[291] *Id.* at 233. Current financial scandals among corporations subject to the SEC's oversight authority suggest that the Court's confidence in such oversight authority may have been naive.

[292] Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 486 (1989).

After *Mitsubishi,* however, the Court continued to add more new rooms to its FAA structure, holding other kinds of statutory rights to be arbitrable, including those under RICO,[293] the ADEA,[294] and COGSA.[295] It is unlikely that many statutes remain today that the Court would not find arbitrable.[296] Moreover, according to the Court, the FAA puts the burden on the party opposing arbitration to show that Congress intended the statute not to be arbitrable, or that a party's waiver of access to the court "inherently conflicts with the underlying purpose of the statute."[297] This burden is rarely met. The Court's interpretation of the FAA as imposing this burden is based, as you might expect, not on text, and not on legislative history, but on the "federal policy favoring arbitration,"[298] which in the Court's view, requires it to "rigorously enforce agreements to arbitrate."[299] What we have seen is that at significant points in the Court's development of the new structure of the FAA, it has repeatedly used its own judicially-created policy as a major justification for the enormous expansion of the original statute enacted by Congress in 1925. Because it could not point either to text, legislative history, or precedent in deciding, for example, that statutory claims were arbitrable, the Court relied heavily on its own judicially created policy that there was "a liberal federal policy favoring arbitration," and that

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[293] *McMahon,* 482 U.S. at 241-242.

[294] Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991).

[295] Vimar Seguros Y Reaseguros v. M/V Sky Reefer, 515 U.S. 528 (1995).

[296] *See Gilmer*, 500 U.S. at 26 ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.")

[297] 490 U.S. at 483, *citing McMahon,* 482 U.S. at 226-27.

[298] *McMahon*, 482 U.S. at 226.

[299] *Id.*

"doubts...should be resolved in favor of arbitration."[300]

Lower courts as well relied on that policy, and the Supreme Court then pointed to those lower court decisions as a basis for its own decisions.[301] By supporting its decisions with a policy of its own making, the Court was "standing on its own shoulders."[302] It then used that policy to shift the burden to parties opposing arbitration of statutory claims to demonstrate that such claims were not arbitrable. It thus made the assumption, without any justification in legislative history or in the text, that unless proven otherwise by statutory history or purpose, Congress intended all statutory claims to be arbitrable.[303] The Court thus used its own policy "favoring arbitration" to bootstrap an alleged intent by Congress for statutory claims to be arbitrable, without any demonstrable evidence that this in fact was Congress' intent. After *Moses H. Cone, Southland* and *Mitsubishi,* the FAA was no longer recognizable as the statute enacted by the 1925 Congress.

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[300] *Moses Cone*, 460 U.S. at 24.

[301] Justice Stevens characterized the attitude of the 1925 Congress toward arbitration as "neutral", but noted that "a number of this court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration. The strength of that policy preference has been echoed in the recent Court of Appeals opinion on which the Court relies." *Circuit City*, 532 U.S. at 131-132 (Stevens dissenting).

[302] *Id.* at 132 (Justice Stevens, dissenting).

[303] *See* Shearson/American Express v. McMahon, 482 U.S. at 227 ("The burden is on the party opposing arbitration...to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes.") (citations omitted).

C. Arbitrability of Employment Agreements

In Circuit City Stores, Inc. v. Adams,[304] the Supreme Court reached a high water mark of statutory misinterpretation. Despite clear indications in the legislative history that the FAA would not cover workers, the Court gave a cramped interpretation of exclusionary language contained in the Act, to find that the FAA applied to most employment agreements. The exclusion, found in section 1 of the Act, states that the Act shall not apply "to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."[305] Rather than finding a broad exclusion of employment agreements, the Court held that this language excluded from coverage only seamen, railroad employees, and *other workers in the transportation industry*. A look at how the Court reached this conclusion raises concerns about whether the textual approach used in *Circuit City* amounts to a misuse of the Court's authority.[306]

The historical context of the Act's passage is important to a proper understanding of the exclusionary clause. The only opposition to the Act had come from organized labor, which was concerned that if the FAA applied to workers, the disparity in bargaining power would permit employers to coerce potential employees to enter unfair employment agreements, which would then be enforced by the courts under the FAA.[307] The drafters, whose focus was on enforcement

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[304] 532 U.S. 105 (2001).

[305] 9 U.S.C. §1.

[306] Justice Stevens noted in his dissent, "[W]hen [the Court's] refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority."*Id.* at 132.

[307] 532 U.S. at 133 (Justice Stevens, dissenting). Justice Stevens quoted the President of the International Seamen's Union of America, who stated:

of arbitration agreements between merchants,[308] assured organized labor and Congress that "[i]t is not intended that this shall be an act referring to labor disputes, at all."[309] Herbert Hoover, then Secretary of Commerce, supported the amendment to exclude workers.[310] This amendment, which specifically excluded seamen, railroad workers, and other workers in interstate or foreign commerce, appeased organized labor. After the Act's passage in 1925, the American Federation of Labor explained to its members that it had withdrawn its opposition because the amendment excluded workers:

> Protests from the American Federation of Labor and the International Seamen's Union brought an amendment which provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." *This exempted labor from the provisions of the law*, although its sponsors denied there was any intention to include labor disputes.[311]

Thus, no one in 1925 – the drafters, the Secretary of Commerce, organized labor, or members of

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> "This bill provided for reintroduction of forced or involuntary labor, if the freemen through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the seaman, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in Interstate and Foreign Commerce." Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203 -204 (1923). *Id.* at 127.

[308] *See supra* notes 49, 79 and accompanying text.

[309] 1923 Hearings, *supra* note 39, testimony of W.H.H. Piatt, Chairman of the Committee of Commerce, Trade and Commercial Law of the American Bar Association, which was the committee responsible for drafting the FAA.

[310] *See supra* notes 39-48 and accompanying text.

[311] Proceedings of the 45th Annual Convention of the American Federation of Labor 52 (1925) cited in 532 U.S. at 127 (Justice Stevens, dissenting). *Emphasis added*.

Congress – believed that the FAA applied to employment contracts. Regular workers were understood to be excluded from coverage because the Act only applied to contracts in interstate commerce, and regular workers were not considered to be engaged in interstate commerce in 1925, unless they actually worked in industries such as shipping or railroads.[312] Any workers, such as seamen and railroad employees, as well as any other workers whose employment might conceivably be considered to be in interstate commerce, were specifically excluded by the amendment. Therefore, no workers were covered by the FAA.

So how did the Supreme Court conclude that the amendment only excluded seamen, railroad employees and other workers in the transportation industry? First, the Court stated that it had no need "to assess the legislative history of the exclusion provision", because the Court "[does] not resort to legislative history to cloud a statutory text that is clear."[313] Rather, it used a "textual" analysis, applying the maxim *ejusdem generis*, a canon of construction. Ironically, the Court has repeatedly asserted that canons of construction are to be used when a statute is *not* clear,[314] and that legislative history can overcome the use of canons of

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[312] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (Souter, dissenting) ("When the Act was passed (and the commerce power was closely confined) our case law indicated that the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce.") (citations omitted).

[313] 532 U.S. at 119, *citing* Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994). After claiming no need to "assess" the legislative history, the Court proceeded to debunk it as "quite sparse," as "problematic," and as representing the motives of a particular group that lobbied for or against a certain proposal, whose motives should not be attributed to Congress. 532 U.S. at 119-20.

[314] Garcia v. United States, 469 U.S. 70, 74-75 (1984); ("...[T]he rule of *ejusdem generis* ... is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty") *quoting* United States v. Powell, 423 U.S. 87, 91 (1975), *in turn quoting* Gooch v. United States, 297 U.S. 124, 128 (1936).

construction.[315] Here, the Court turned the methodology upside down, saying that *ejusdem generis* made the statute so clear that legislative history did not need to be assessed.[316]

Ejusdem generis requires that where there are specific terms followed by a general term, the general term is construed to include only objects similar to the specific terms. For example, if a bill of a sale for a farm included cows, sheep and other animals, "other animals" would probably be construed to mean other farm animals, but not the pet puppy of the farmer's child.[317] With respect to the exclusionary language of section 1 of the FAA, the Court thus said the residual clause (i.e., any other class of workers engaged in foreign or interstate commerce) "should be controlled and defined by reference to the enumerated categories of workers which are recited just before it" (i.e. seamen and railroad employees).[318] Therefore, "other workers" meant "transportation workers."[319]

But the court applied *ejusdem generis* incorrectly because it refused to consider the legislative history, and the context it provided for the clause. The common characteristic that the "other workers" in this clause shared with seamen and railroad employees in 1925 was that they

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[315] Watt v. Western Nuclear, Inc., 462 U.S. 36, 44, n. 5 (Application of *ejusdem generis* to apply to words "coal and other minerals" was inappropriate because "[t]he legal context in which the SRHA was enacted suggests that Congress specifically listed coal to make clear that coal was reserved even though existing law treated it differently from other minerals.")

[316] *See* 532 U.S. at 139, n.2 (Souter, dissenting).

[317] *See* Edwin W. Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833, 853-55 (1964).

[318] *Id.* at 115.

were all in interstate commerce, as expressly stated in the text, not that they were specifically transportation workers. If, in the farm sale, the provision had said "cows, sheep and other farm animals," there would be no need to apply *ejusdem generis* to figure out that the other animals meant farm animals and not the family pet. The court's strained interpretation is like declaring that *ejusdem generis* required that in the phrase "cows, sheep and other farm animals," "farm animals" meant only animals who could give milk. Nothing in the FAA text suggests that other workers should be limited to transportation workers, rather than, as the text clearly states, "any other class of workers engaged in interstate and foreign commerce."[320] The legislative history that the Court chose to ignore made it very clear that the intended meaning of the residual clause was that the other workers were workers who, like seamen and railroad workers, were in interstate commerce, and therefore were unlike most workers, who were not considered to be in interstate commerce. Specifically naming seamen and railroad workers was to assuage those groups most actively opposed to the bill.[321] The residual clause was to make sure that any worker who, like seamen and railroad workers, could be engaged in interstate commerce and therefore covered by the act, was excluded. The purpose of the amendment was to convince organized labor that all workers -- those who were in interstate commerce, as well as those who were not -- were excluded from the reach of the FAA. By refusing to "assess" the legislative history allegedly because the text was so clear, the Court essentially freed itself to follow its own preferences and

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[319] *Id.*

[320] 9 U.S.C. § 1.

[321] The Court asserted that if the residual clause were found to apply to all contracts in interstate commerce, it would make the specific mention of seamen and railroad workers pointless. 352 U.S. at 114. It is not pointless, however, "to adopt a clarifying amendment in order

policies as to the structure and application of the FAA, rather than to interpret the legislation actually enacted.

In his dissent to *Circuit City*, Justice Souter focused on the majority's anomalous interpretation of the words "engaged in commerce" of the residual clause. The majority had stated that even without applying *ejusdem generis*, it would not interpret "engaged in commerce" to mean exclusion of all employment contracts, because "engaged in commerce" was a narrower term than "affecting commerce" or "involving commerce."[322] Justice Souter made the point that it does not make sense to read the coverage language in section 2 (that a written arbitration agreement will be enforced in a contract evidencing a transaction *involving commerce*) as expanding with the expanded reach of the commerce clause, while reading the exemption language of section 1 (excluding workers *engaged in interstate commerce*) as "petrified." In 1925, contracts evidencing a transaction involving commerce did not include ordinary workers' contracts of employment.[323] To the extent that today the coverage language in section 2 broadly reaches workers under a twenty-first century concept of the commerce clause, the exemption language of section 1 should just as broadly exclude them. The increasing number of workers who fall under the expanded coverage of section 2 should fall out of coverage at the same rate by

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to eliminate opposition to a bill." 352 U.S. at 128 (Justice Stevens dissenting).

[322] *Id.* at 114-119.

[323] *See supra* note 312 and accompanying text. *See also* Bernhardt v. Polygraphic Company, 350 U.S. 198, 200-201 (1956) where Supreme Court determined that the employment contract at issue was not covered by section 2 of the FAA because an employment contract did not evidence "a transaction involving commerce" within the meaning of section 2.

means of a similarly expanded exemption in section 1.[324] This would be a coherent reading of the statute that would retain its purpose. Instead, workers now viewed as covered by section 2 get caught in the Court's web of statutory misconstruction.

The Court's view that all workers were intended to be covered by the Act, except railroad workers, seamen and transportation workers, makes little sense. According to the Court's interpretation in *Circuit City*, Congress excluded from coverage those contracts most clearly involving commerce, but it included those contracts viewed as having a much more uncertain connection to commerce. In other words, Congress, having declared that the FAA was only going to apply to contracts involving interstate commerce, meant to include all workers except those who were actually involved in interstate commerce. This interpretation is illogical, if not irrational. The purpose of the exclusion, made clear from the legislative history, is that the FAA did not apply to any employment contracts.

Justice Scalia has criticized the use of legislative history to interpret a statute on the grounds that it greatly increases a court's ability to make a decision "based on [its]policy preferences, rather on neutral principles of law."[325] Yet, in *Circuit City*, the Court's use of a textualist approach, while refusing to consider the legislative history of the FAA and the historical context which made it clear that workers were intended to be excluded from the statute's coverage, raises similar questions about whether the Court was making a decision based

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[324] *See* Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. Disp. Resol. 259, 263-79.

[325] Antonin Scalia, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW, at 26 (1997).

on neutral principles of law. By disconnecting the text of the statute from the purpose of the amendment intended to exclude workers, the Court freed itself to make a decision based on its policy preference rather than ascertaining the meaning Congress intended when it adopted the language excluding workers. Relying on text to the exclusion of purpose can undermine not only the particular legislation but also the democratic objective of the Constitution.[326] Scholars have opined that isolating the text from the intent behind the text simply means that the law disappears and is replaced by an exercise of power.[327]

The *Circuit City* decision occurred at what may have been a high point in the use of textualism by the Court. In the paragraph following the declaration that the Court did not need to assess legislative history because the text was so clear, it then proceeded to address the legislative history, setting out essentially a critical viewpoint not only toward the legislative history of the FAA, but toward legislative history generally. The Court noted that the legislative record on the section 1 exemption of workers was "quite sparse."[328] It then asserted that legislative history was

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[326] *See* Justice Stephen Breyer, ACTIVE LIBERTY, INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) at 98-99 ("[N]ear exclusive reliance upon canons and other linguistic interpretive aids in close cases can undermine the Constitution's democratic objective. Legislation in a delegated democracy is meant to embody the people's will...[A]n interpretation of a statute that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose...[A]n interpretation that undercuts the statute's objectives tends to undercut that constitutional objective."

[327] *See e.g.,* Stanley Fish, *Intentional Neglect,* The New York Times (July 19, 2005). *See also,* Fish, *There is No Textualist Position,* 42 San Diego Law Review 1, 21 (2005) ("A text means what its author intends. There is no meaning apart from intention. There is no textualist position because intention is prior to text; no intention, no text."). *Cf.* Miranda Oshige McGowan, *Against Interpretation,* 42 San Diego L. Rev 711, 732 (2005) ("Deciding a case entails... many other types of decisions besides the applicable law's meaning").

[328] 532 U.S. at 119.

problematic when inferences of intent were drawn from committees, but even more so when reference was made to interests groups, such as the International Seaman's Union, whose objections prompted the amendment adding the exemption.[329] The Court then stated, "we ought not to attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal, even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case."[330]

But the intent that the Court needed to ascertain was Congress' intent, made in response to the objections of the Seaman's Union, to help explain why a particular amendment was added to the bill. Textualists assert that legislative intent is virtually impossible to ascertain because most members of Congress may not even be aware of a particular issue, much less why it is resolved a certain way.[331] In more recent times, however, there has been somewhat of a resurgence in the Court's use of legislative history, and a deepening understanding, supported by scholars, of how the legislative process can contribute to and be understood as the collective intent of Congress.[332] Justice Stevens has contributed to this understanding, noting that,

> Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities. If a statute...has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. In such circumstances, since most Members are content to endorse the views of the responsible

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[329] *Id*. at 119-120.

[330] *Id.* at 120.

[331] *See* Scalia, *supra* note 325 at 32.

[332] *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 Wis. L. Rev. 205 (2000).

> committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.[333]

Moreover, scholars such as Professor Charles Tiefer have provided solid scholarly support from the fields of analytic philosophy of language and political science for using the history of the legislative process as a valid and reliable concept of collective intent.[334]

What the interpretive history of the FAA suggests is that both a close examination of the text of the statute and the legislative history should be used to give to the statute an application consistent with the intent of the enacting Congress, which remains faithful to the purpose of the legislation. And while some dynamic statutory interpretation may be warranted, for example, because the reach of the commerce clause is now broader than it was at the time of the enactment, the Court should endeavor to interpret the statute coherently and consistently to maintain the integrity of the statute's purpose. It should not, as it did in *Circuit City*, interpret the commerce clause broadly in one section for the purpose of including workers, and narrowly in another section for the purpose of excluding them, so that one purpose of the statute -- excluding employment agreements from coverage -- is completely rewritten by the Court.

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[333] Bank One Chicago v. Midwest Bank & Trust Co., 516 U.S 264, 276-77 (1996) (Stevens, concurring).

[334] *See* Tiefer, *supra* note 332.

D. Further Pre-emption of State Contract Law

In the recent Supreme Court decision in Buckeye Check Cashing v. Cardegna,[335] the question was whether an arbitrator or the court should decide a claim that a contract was illegal. The Florida Supreme Court had held that despite the presence of an arbitration clause in the contract, the court rather than an arbitrator should resolve the question of whether Buckeye Check Cashing was charging usurious interest rates in violation of various Florida Laws.[336] Based on Florida law, the state court held that an arbitration provision could not be separately enforced when a claim was pending in a Florida court that the contract itself was illegal and therefore void *ab initio.*[337]

Petitioners argued that *Prima Paint* controlled the decision in this case.[338] *Prima Paint* had held that in a claim of fraudulent inducement of the contract, the arbitration agreement was severable and enforceable because there was no claim that the fraud was directed specifically to the arbitration agreement.[339] Therefore, the arbitrator would decide the claim of fraudulent inducement. Respondents argued, however, that *Prima Paint* had been decided as a federal court case under Section 4 of the FAA, a section which the Courts have never applied to the states.[340] Further, section 2, the only section of the FAA that had been applied to the states, required as a

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[335] 546 U.S. ____ (2006).

[336] John Cardegna v. Buckeye Check Cashing, 894 So. 2d 860 (2005).

[337] *See id.* at 861.

[338] Brief for Petitioner, Buckeye Check Cashing v. Cardegna, at 13-16.

[339] 388 U.S. 395, 403-404.

[340] Brief for Respondents, Buckeye Check Cashing v. Cardegna, at 13-17. *See also,*

threshold question that the arbitration provision be included within a contract.[341] If the contract was void *ab initio*, then it simply did not exist. Therefore, the FAA could not apply, because the arbitration agreement then would not meet the threshold requirement of being contained within a contract.[342] Thus, the question, according to Respondents, was one of contract law, which is a core state function - one that should not be pre-empted by a federal statute that does not even define what a contract is.[343]

The Supreme Court, in a 7-1 decision,[344] thought otherwise. Justice Scalia asserted that *Prima Paint* did control, relying on *Southland* and *Prima Paint* to the effect that the FAA was substantive federal law, that an arbitration agreement was severable from the rest of the contract, that the law applied in state as well as federal courts, and that the difference between void and voidable contracts was "irrelevant."[345] Although avoiding any direct discussion of the pre-emption of state contract law by the federal statute, the Court provided a different and rather unusual reading of section 2 of the FAA. In response to the argument that when an agreement is void *ab initio* under state law, there is no written provision to which the FAA can apply, Justice Scalia opined that "contract" in section 2 can mean a void contract. According to Justice Scalia, the meaning of "contract" in the final clause, which permits non-enforceability "upon such

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Southland, 465 U.S. 1 at 16, n. 10.

[341] *Id.* at 20-22.

[342] *Id.* at 27-30.

[343] *Id.* at 30-32.

[344] Justice Alito did not participate. Justice Thomas write a brief dissent reiterating his position that the FAA "does not apply to proceedings in state courts." 546 U.S. at _____.

grounds as exist at law or in equity for the revocation of any *contract*,"[346] "must include contracts that later prove to be void."[347] Justice Scalia does not acknowledge the common law concept that a contract that does not exist because it is void *ab initio*, cannot be revoked.[348] A contract must first exist legally before revocation can occur. Nonetheless, once Justice Scalia decided that "contract" in the last phrase of section 2 can mean "void contract", he declared that the other three uses of "contract" in section 2 also include the meaning "void contract," stating that, "we will not read the same word earlier in the same sentence to have a more narrow meaning."[349] As a result, here is one way that Justice Scalia thinks the provision should be understood:

> "A written provision in... a [void] contract...to settle by arbitration a controversy thereafter arising out of such [void] contract...or an agreement in writing to submit to arbitration an existing controversy arising out of such a [void] contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any [void] contract.[350]

Justice Scalia appears to be saying that because the meaning of "contract" in section 2 includes the meaning of "void contract, " the federal statute pre-empts any state contract law which would consider a void contract as having no legal effect. The result in *Buckeye* is an even broader pre-emption of state contract law than in *Prima Paint* and *Southland,* and moves us yet

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[345] 546 U.S. at _____.

[346] 9 U.S.C. §2

[347] 546 U.S. at _____.

[348] See e.g. Stewart v. Stearns & Culver Lumber Co. 48 So. 19 (1908); Castro v. Sangles, 637 So..2d 989 (Fla. 3d DCA 1994).

[349] *Id.*

further away from the legislation enacted in 1925. *Buckeye* is another expression of judicial policy preferences to support businesses that seek to limit consumer access to the courts, and to restrict the ability of states to regulate contract law within their borders.

Conclusion

In creating a statute that goes far beyond the intended scope of the original statute, the Court has essentially legislated in favor of its own policy preferences, without the benefit of any input from Congress.[351] What are those preferences? As derived from the impact of the arbitration law on our legal system, certain conclusions seem obvious. The new FAA has substantially reduced access to the court system, particularly for consumers, workers and those with little economic power.[352] Any employer, hospital, bank, telecommunications company, transportation company and scores of other businesses can prevent those with less economic power from ever having access to court to hold them accountable. This means, of course, no right to a jury trial, limited discovery, frequently no right to a class action, and, because an

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[350] See 9 U.S.C.§2

[351] It could be argued, as Justice Kennedy did in *Allied Bruce*, that Congress, by not acting to retract the scope of the FAA, has in essence acquiesced to *Southland's* application of the FAA to the states. *See* 513 U.S. at 272. But legislative inaction arguments have been criticized by commentators, who note that such arguments must be evaluated in the context of political decision-making, and may be affected by dysfunctions in the process. For example, Professor Eskridge notes that "[o]ne dysfunction is that the interests of the 'haves' (business, unions, the state) tend to be developed at the expense of the 'have nots' (consumers, single-parent families, people with low incomes)" because the "haves" are better able to work the system. Another dysfunction, according to Professor Eskridge, is inertia: "it is much easier to block congressional action than it is to obtain such action." *See supra* note 143 at 250-51.

[352] *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitratio*n, 1997 Wis. L. Rev. 33, 37 (1997); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?* 57 Stan. L. Rev. 1631 (2005).

arbitration award is not reviewable on the merits, no supervision by our court system.[353] Moreover, regulatory statutes, enacted by Congress to protect investors and businesses, and to protect businesses from monopolists, are being privately resolved without any judicial review on the merits, and without any ability to know if the public interests are being protected as Congress intended.[354] The Court has thus brought to fruition the fears of earlier justices, prior to the enactment of the FAA, who did not want to enforce arbitration agreements. As Julius Cohen informed the Joint Hearings, these justices had fears that "the stronger would take advantage of the weaker, and the courts had to come in and protect them."[355] Justice Story had made this same point in 1845, that while courts have no wish to discourage arbitrations, and would enforce awards when lawfully made, they hesitated " to compel a reluctant party to submit [to arbitration] and to close against him the doors of the common courts of justice provided by the

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[353] Critics of the practice of compelling arbitration point to the lack of actual consent, the lack of procedural protections, the minimal amount of discovery available, the frequent presence of prohibitions on class actions or consolidations of claims, and the questionable neutrality of arbitrators, who may be more inclined to decide in favor of repeat players like the large companies, rather than the individual. *See e.g.*, Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World,* 56 U. Miami L. Rev. 831, 839 (2002); Richard Speidel, *Contract Theory and Securities Arbitration: Whither Consent?* 62 Brooklyn L. Rev. 1335, 1349-56 (1996); Janet Cooper Alexander, *Do the Merits Matter: A Study of Settlements in Securities Class Actions,* 43 Stan. L. Rev. 497, 499 (1991); Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum,* 13 Hofstra Lab. L. J. 381 (1996); Schwartz, *supra* note 352.

[354] *See* McConnaughay, *supra* note 254 at 495 ("[T]he value of legally correct outcomes often is greater in mandatory law [arbitrations]" because mandatory law claims "implicate the rights of unrepresented third parties or the public....[A] legally incorrect arbitral resolution of a mandatory law claim is significantly more likely to affect interests beyond those of the disputing parties....")

[355] Joint Hearings, *supra* note16, at 15.

Government to protect rights and to redress wrongs."[356]

Despite concerns expressed by Members of the 1925 Congress that arbitration not be imposed in a "take-it-or-leave-it" context, the Supreme Court since the 1980's has created a statute which permits businesses to do exactly that. Moreover, in finding that the FAA extensively pre-empts state law, the Court has substantially intruded on state police powers in two core areas typically within the province of the states: 1. contract law, including consumer protection, and 2. the resolution of legal disputes within the state or between its citizens. As a result, states are not permitted to protect their citizens from perceived abuses arising from a "take-it-or-leave-it" arbitration requirement. Any such legislation which requires, for example, that notice that a contract contains an arbitration clause be given on the first page of the contract, is invalid because it is pre-empted by the FAA.[357]

Other nations have made different choices than our Supreme Court. In the European Union, for example, most pre-dispute arbitration agreements with consumers are invalid under the E.U. Directive on Unfair Terms in Consumer Contracts.[358] European consumers generally do not engage in arbitration unless an agreement to arbitrate is reached after the dispute has arisen. The

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[356] Tobey v. County of Bristol, 23 F. Cas. 1313, at 1321.

[357] *See e.g.*, *Doctor's Associates,* 517 U.S. 681 (1996).

[358] Council Directive 93/13/EEC, 1993 O.J. (L 095) 29; *see also* Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States,* 28 N.C. J. Int'l L. & Com. Reg. 357 (2002) (discussing higher level of protection provided to consumers in the European Union, where consumers generally do not arbitrate a dispute unless agreement to do so is reached after the dispute arises); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World,* 56 U. Miami L. Rev. 831 (2002) (discussing the uniqueness of the U.S. approach of compelling consumers to arbitrate, and suggesting that compelled arbitration provides a method for corporations to control public policy).

Europeans apparently believe that consumers can only fairly weigh the differences between arbitration and litigation and make an informed choice once a dispute has actually arisen.[359] Outside the European Union and the United States, there appear to be no countries in which companies regularly require their customers to use pre-dispute arbitration agreements to resolve disputes.[360]

It is a matter of concern that in the U.S., policy choices concerning the appropriate use of arbitration have been made judicially, not legislatively. These judicial policy choices appear to reflect the interest of the courts in reducing the judicial caseload,[361] and also appear to reflect a preference for protecting stronger economic interests at the expense of the individual worker, consumer, investor, or small business, by providing large corporations with a method of limiting enforcement of legislation regulating discrimination in the workplace, competition practices, financial markets, and consumer rights.

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[359] *See* Sternlight, *supra* note 358 at 846, n.99.

[360] *See id.* at 850–851 (stating that the author has not been able to identify any such companies outside of the EU and the U.S.).

[361] In *The Hundred Year Decline of Trials and the Thirty Years War,* 57 Stan. L. Rev. 1255, 1264, 1270 (2005) Marc Galanter suggested that the striking decline in the number of trials, particularly in the last thirty years, has resulted from a "turn against the law," with recourse to tort reform and ADR as part of a wider wave of deregulation and privatization. He also discussed the decline as the "the result of a conjunction of a restricted supply of judicial resources" with courts' increasing efforts to "supply signals, markers, and sufficient background threats to induce resolution (or abandonment) of claims." *See also*, Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 753 (1981) (Chief Justice Burger, dissenting) ("This Court ought not to be oblivious to desperately needed changes to keep the federal courts from being inundated with disputes of a kind that can be handled more swiftly and more cheaply by other methods."); *Robert Lawrence*, 271 F.2d at 410 ("[A]ny doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration...to help ease the current congestion of court calendars.").

The statutory misconstruction of the FAA should make clear that there is no one method of statutory interpretation which can cabin judicial discretion or prevent judicial legislation. Over the last twenty-five years, the justices have shown an ability to misuse both legislative history and textualism to reach their desired result, rather than to interpret the statute that was enacted. This has been true of justices across the board, not simply those considered "liberal" or those considered "conservative."[362] All of the justices at various points in time lost sight of the purpose and scope of the legislation, or deferred to faulty precedent, and created a far different statute from the one enacted by Congress.[363]

Although theories of dynamic statutory interpretation favor interpreting statutes to meet the needs of the current era when a clear change in mores or understanding provide a basis for such an interpretation,[364] there is no change of mores or understanding that supports the extraordinary

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[362] The *Moses Cone* decision, in which the Court first announced in dicta that the FAA governs in both state and federal court, and proclaimed that the FAA requires a "liberal reading of arbitration agreements" and requires "a healthy regard for the federal policy favoring arbitration," was written by Justice Brennan, one of the most liberal justices on the Court at that time. 460 U.S. at 23-24. Dr.'s Associates v. Casarotto, which pre-empted Montana law requiring notice of arbitration, was authored by Justice Ginsburg. Two of the staunchest opponents of *Southland's* application of the FAA to the states, other than Justice O'Connor, have been Justices Scalia and Thomas. *See Allied-Bruce Terminix*, 513 U.S. at 284-85 (Scalia, dissenting); 513 U.S. at 285–297 (Thomas, dissenting). Yet, when the Court expanded the FAA to cover employment contracts in *Circuit City*, over the objections of 21 state Attorneys General that this was an unlawful encroachment on state police powers (*see supra* note 199 and accompanying text), Justices Scalia and Thomas joined with Justices Rehnquist, O'Connor and Kennedy in the majority opinion.

[363] Justice O'Connor, for example, who had so passionately opposed *Southland* and the Court's application of the FAA to the states, concurred in the *Allied Bruce* decision, which refused to overrule *Southland*, on *stare decisis* grounds, noting nonetheless that *Southland* had "laid a faulty foundation" for subsequent decisions. 513 U.S. at 284.

[364] William Eskridge describes how the Immigration Act of 1952, 8 U.S.C. §1182(a)(4), which provided that "[a]liens afflicted with pyschopathic personality, epilepsy, or a mental

rewriting of the FAA by the Supreme Court. Rather, the interpretation of the Court is one which leads back to the *Lochner* era, when state protective legislation intended to prevent exploitation of workers was struck down in the name of "freedom of contract," while federal protective legislation was found to be beyond the commerce powers of Congress. Today, there is wide-spread concern that protections of consumers, workers, investors and beneficiaries of statutory protections have eroded as a result of greatly reduced access to enforcement by the courts.[365]

The laissez-faire philosophy of the *Lochner* era, that neither state nor federal governments could restrict the market through protective legislation, came under attack in the mid-1930's. Legal realists asserted that the Court was simply making a political choice to favor employers and corporations over workers and consumers.[366] The end of the *Lochner* era was signaled by cases such as United States v. Carolene Products Co.,[367] which established that legislation governing commercial transaction should not be found unconstitutional so long as it rested upon some rational basis.[368] In "famous footnote four," however, the Court asserted that

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defect" could be denied entry to the U.S. was, in the 1950's and 1960's, interpreted to require exclusion of homosexuals. As society's views of homosexuals changed, however, so did the interpretation of the statute, so that by the 1980's the INS was no longer applying the provision to exclude homosexuals. *See supra*, note 143 at 50-55. The provision was repealed by the Immigration Act of 1990. Public Law No. 101-649 §601. *Id*. at 51, n.10.

[365] *See* Sternlight, *supra* note 352 at 1648-55, for a summary of both critics' and defenders' views of mandatory arbitration.

[366] *See* Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697 (1931). For the role of the legal realists in undercutting the *Lochner* philosophy, see Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (1993).

[367] 304 U.S. 144 (1938).

[368] *See id.* at 152-53.

legislation restricting the rights of individuals might need to be subjected to a more exacting judicial review.[369]

That concern for individual rights has not been apparent in the Court's interpretation of the FAA. In disregard of the concern for individual rights expressed in footnote four of *Carolene Products,* the Court has used various statutory interpretation techniques to reduce the protections legislated in the fields of federal antitrust, securities, and employment law, and has intruded upon state police powers to prevent states from enforcing legislation designed to protect their citizens against an unfair or unreasonable imposition of arbitration. FAA interpretation creates a statutory replication of the restriction of both state and federal protective legislation rejected in 1937.[370]

The Court's expansive interpretation of the FAA may appear inconsistent with recent decisions striking down the Gun Free School Zones Act (the *Lopez* case)[371] and certain provisions of the Violence Against Women Act (the *Morrison* case)[372] as beyond the scope of the commerce clause. Unlike the decisions interpreting the FAA, which have intruded on state police powers, in these decisions, the Court has claimed to be limiting Congress' power to intrude on state police powers. A closer look, however, suggests similar judicial policy preferences. In both kinds of cases, the present Court, like the *Lochner* Court, is limiting or

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[369] *See id.* at 152, n.4.

[370] The *Lochner* era is generally considered to have ended in 1937, with the decision in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (upholding constitutionality of National Labor Relations Act).

[371] U.S. v. Lopez, 514 U.S. 549 (1995).

[372] U.S. v. Morrison, 529 U.S. 598 (2000).

striking down regulatory statutes which protect individuals, using the Constitution for some, the FAA for others. Justice Souter commented, for example, in his dissent in *Morrison,* that the decision "can only be seen as a step toward recapturing the prior mistakes [of the *Lochner* era.]"[373] Similarly, in the FAA cases, the Court has undermined both federal and state regulatory statutes by requiring parties to arbitrate statutory rights, and by striking down state statutes intended to protect parties from abuses of arbitration. The Court's interpretation of the Federal Arbitration Act has led full circle back to the political choices made in the *Lochner* era - to undercut state and federal protective regulations, and to favor employers over employees, and corporations over consumers.

[373] 529 U.S. at 643.