1998

The Clash between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process

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The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process

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Of all mankind's adventure in search of peace and justice, arbitration is among the earliest.1

I. INTRODUCTION

The prevalence of arbitration clauses in contracts of adhesion has caused a backlash against arbitration.2 While the Supreme Court is continuing to expand the scope and reach of the Federal Arbitration Act ("FAA")3, some states, relying on their traditional police powers,

2. This Article discusses only contractual arbitration, when parties in a written agreement provide for arbitration as the means of resolving their existing or future controversies. In addition to the contract of the parties providing for arbitration, the "modern concept of arbitration" is characterized by two other elements: "the parties select a method of dispute resolution intended to obtain a fair decision by a neutral third party in less time and at less cost than would be expended in court and . . . the decision or award by the arbitrator is, with limited exceptions, final." *1 Ian R. MacNeil et al., Federal Arbitration Law* § 2.1.1 (1995).
are either attempting or have attempted to legislatively regulate the use of arbitration clauses in adhesion contracts. Some judges, too, are expressing suspicion of arbitration, reminiscent of the judiciary's attitude toward arbitration prior to the passage of the FAA in 1925 and commentators are denouncing arbitration when it is the product of an adhesion contract. Private arbitration service providers are even concerned. For example, the American Arbitration Association ("AAA") and JAMS/Endispute have crafted due process standards that must be followed in mandatory employment arbitrations.

The clash between the FAA and state arbitration law was most acute in Doctor's Associates, Inc. v. Casarotto, where the Supreme Court, reversing a decision by the Montana Supreme Court, held that a Montana law (since repealed) requiring conspicuous notice of a predispute arbitration clause in a contract was preempted by the FAA. That decision thwarted state legislatures in their effort to protect persons of unequal bargaining power from unknowingly agreeing

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4. See infra note 280 and accompanying text.
5. See infra notes 516-42 and accompanying text. But see Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1488 (D.C. Cir. 1997) ("For all of arbitration's shortcomings, the process, if fairly conducted, is not necessarily inferior to litigation. . . .").
7. See Arnold M. Zack, New Uses of the Due Process Protocol: The Expanding Role of ADR in the Workplace, 7 WORLD ARB. & MEDIATION REP. 178, 179 (1996); Briefs: Provider Opposes Compulsory ADR, 14 ALTERNATIVES TO HIGH COST LITIG. 65 (1996). The Due Process Protocol that JAMS/Endispute and the AAA incorporated into their rules was drafted by a task force composed of representatives from the AAA, the American Bar Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the National Employment Lawyers Association and the Society of Professionals in Dispute Resolution for resolving claims involving violations of the antidiscriminaton laws. See Arnold M. Zack & Michael T. Duffy, ADR and Employment Discrimination: A Massachusetts Agency Leads the Way, 51 DISP. RESOL. J. 28, 29 (1996).
9. A predispute arbitration clause is one that provides for the arbitration of any future controversy between the parties to the contract if one should arise.
to forego their right to resolve a controversy in a judicial forum.\textsuperscript{11} Although at first glance it is hard to believe that the Court would strike down a state law, the sole purpose of which was to insure that persons knowingly waive their right to a judicial forum, the decision was not remarkable or unexpected. Indeed, it clearly followed precedent\textsuperscript{12} and was the "correct" decision from that perspective.

What was remarkable about the Doctor's Associates case was the reaction of two of the Justices of the Montana Supreme Court to the opinion. Justices Trieweiler and Hunt dissented from the Montana Supreme Court's Order remanding the case for proceedings not inconsistent with the Supreme Court's opinion, on the basis that the Supreme Court's interpretation of the FAA was "legally unfounded, socially detrimental and philosophically misguided."\textsuperscript{13} Although a largely "symbolic protest,"\textsuperscript{14} the dissent by Justices Trieweiler and Hunt highlights the profound difference of opinion regarding the FAA and its application in state court proceedings and the federalism issues that have arisen due to the Supreme Court's expansive interpretation of the FAA. The Court's continued willingness to find that the FAA preempts state arbitration law is strikingly contrary to the deference the Court has otherwise shown to state sovereignty in other areas of the law.\textsuperscript{15}

It is beyond dispute that arbitration is playing a role today not envisioned by those who drafted the FAA.\textsuperscript{16} When the FAA was enacted,

\textsuperscript{11} See infra notes 65-68 and accompanying text discussing the purpose of the Montana law requiring conspicuous notice of the predispute arbitration clause.

\textsuperscript{12} "In light of Southland, Perry and Allied-Bruce Terminix, [the] outcome [in Doctor's Associates] was eminently foreseeable. . . ." Carrington & Haagen, supra note 3, at 385.

\textsuperscript{13} Order, Casarotto v. Lombardi, No. 93-488 (Mont. July 16, 1996)(on file with the author). Justices Trieweiler and Hunt are not alone in their criticism of the Supreme Court's interpretation of the FAA. See, e.g., infra note 421 and accompanying text.

\textsuperscript{14} Richard C. Reuben, Western Showdown, 82 A.B.A. J., 16, 16 (1996)(quoting Professor Erwin Chemerinsky).


\textsuperscript{16} The commentary is overwhelmingly in agreement that arbitration and the law of arbitration has clearly gone beyond what was expected and intended by the 68th Congress that passed the FAA. See, e.g., Cain, supra note 3, at 12-13; Carboneau, Arbitral Justice, supra note 3, at 1950-51; Richard E. Speidel, Consumer Arbitration of Statutory Claims: Has Pre-dispute (Mandatory) Arbitration Outlived Its Welcome?, 40 Ariz. L. Rev. 1069, 1092 (1998); Sternlight, supra note 3, at 645-47. Professor Strickland stated:

Congress enacted the FAA in 1925, apparently expecting it would apply only in federal court. Consumer disputes (and other disputes that are
arbitration was occurring primarily in the commercial context between business persons of equal bargaining power. In fact, such commercial interests lobbied for passage of the FAA. Arbitration was the mutually chosen method of dispute resolution in this context because of its perceived advantages over traditional judicial litigation. It was believed to be more efficient than litigation, less costly and a better process for parties with continuing business relationships. Arbitration today, however, is not limited to the same commercial context. Indeed, provisions providing for arbitration of disputes can be found in a variety of contracts, many of which are adhesion contracts. Predispute arbitration clauses can be found in contracts between investors and broker-dealers, employment contracts, franchise
agreements,\textsuperscript{22} health care contracts,\textsuperscript{23} and in a whole array of other consumer contracts,\textsuperscript{24} ranging from contracts for termite services\textsuperscript{25} to contracts between depositors and credit card holders and banks.\textsuperscript{26} Arbitration provisions have been upheld in cases involving breach of contract claims to cases involving violation of statutory rights, including rights based on the federal securities laws, antitrust laws, and antidiscrimination laws.\textsuperscript{27}

It is the Supreme Court's expansive interpretation of the FAA that has fueled the widespread use of predispute arbitration clauses. There are few limits on the use of such clauses. The FAA, which makes predispute arbitration provisions specifically enforceable, requires only that the clause be in writing and that the transaction be in interstate or maritime commerce for the clause to be enforceable.\textsuperscript{28} The Court has further narrowed the possible restrictions on the use of such provisions by finding that the FAA preempts state laws that prohibit arbitration of certain categories of claims or, like the law in Doctor's Associates, regulate the procedures by which arbitration

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\item \textsuperscript{22} \textit{See}, \textit{e.g.}, Dennis D. Palmer, \textit{Franchises: Statutory and Common Law Causes of Action in Missouri Revisited}, 62 UMCO L. Rev. 471 (1994).
\item \textsuperscript{23} \textit{See}, \textit{e.g.}, Alan Bloom et al., \textit{Alternative Dispute Resolution in Health Care}, 16 Whittier L. Rev. 61 (1995); Michael Daly, \textit{Attacking Defensive Medicine Through the Utilization of Practice Parameters}, 16 J. Legal Med. 101 (1995); Amy E. Elliott, \textit{Arbitration and Managed Care: Will Consumers Suffer if the Two are Combined?}, 10 Ohio St. J. on Disp. Resol. 417 (1995).
\item \textsuperscript{28} \textit{See} 9 U.S.C. \textsuperscript{2} § 2 (1994); \textit{see also} infra notes 257-59 and accompanying text.
\end{itemize}
agreements are formed.\textsuperscript{29} Indeed, the Court has stated, time and time again, that the FAA was enacted precisely to prevent state legislative and judicial attempts to undercut the enforceability of predispute arbitration agreements.\textsuperscript{30} The Court's interpretation of the FAA and the corresponding weakening of state authority\textsuperscript{31} have empowered those with superior bargaining strength to insist on the inclusion of a predispute arbitration clause in adhesion contracts.

Such insistence has had the unfortunate consequence of reviving hostility to the arbitral process itself. While inclusion of a predispute arbitration clause in an adhesion contract is antithetical to the very concept of arbitration, the process itself, when viewed realistically, can be beneficial to both parties to the agreement, including the party with lesser bargaining power. However, until arbitration is mutually agreed upon by both parties to a transaction, arbitration will continue to be viewed with suspicion, compared as inferior to litigation\textsuperscript{32} and fought every step of the way. Judges and state legislatures will continue to look for ways to protect parties from arbitration and predispute arbitration clauses, and the arbitration process will be further undermined. Those compelled to arbitrate will continue to view it as a cover for the interests of the stronger party\textsuperscript{33} and the benefits of arbitration will be largely ignored, deemed irrelevant or belittled.

In Part II of this Article, I will discuss in detail the \textit{Doctor's Associates} case. I use that case because it so aptly represents the clash between federal and state arbitration law. I will describe and critique the reasoning of the Montana Supreme Court when it refused to stay a state court proceeding pending arbitration because the predispute arbitration clause failed to comply with Montana law which required conspicuous notice of the clause. Special emphasis will be given to the concurring opinion of Justice Trieweiler for the insight it provides into his view of the arbitral process. I will argue that Supreme Court precedent existing at the time of that decision clearly called for the conclusion that the Montana law was preempted by the FAA. The impact of \textit{Allied-Bruce Terminix Cos. v. Dobson}\textsuperscript{34} on the Montana court's decision will then be analyzed. The \textit{Dobson} decision called into question the Montana Supreme Court's decision. However, the Montana

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\textsuperscript{29} See infra notes 461-68 and accompanying text.
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\textsuperscript{31} As will be demonstrated, states are not totally powerless to regulate arbitration agreements. The FAA does not displace general state contract law. Thus, the proper avenue of regulation is not through the use of state arbitration law that singles out arbitration clauses for disparate treatment, but, rather, state contract law that is applicable to all types of agreements, including predispute arbitration clauses. See infra notes 482-494 and accompanying text.
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\textsuperscript{32} As used in this Article, the term litigation refers to litigation in a judicial forum.
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\textsuperscript{34} 513 U.S. 265 (1995).
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Supreme Court blindly adhered to its earlier decision upholding the Montana law. Rather than objectively reviewing the Dobson decision, the Montana court narrowly interpreted the case so that it would not have to reverse itself and enforce the arbitration provision. The Montana Supreme Court's treatment of Dobson demonstrates the length to which it would go to preserve some state power over arbitration law and to protect the franchisee from the arbitral process—a process it plainly considered inferior to litigation. I will conclude Part II with a critique of the United States Supreme Court's expected reversal of the Montana Supreme Court. The unprecedented and heartfelt dissent by two of the Justices on the Montana Supreme Court to the Supreme Court's order reversing and remanding the case will be highlighted. This dissent demonstrates not only the tension between the federal and state judiciary as to the role of the states in regulating arbitration agreements but also the difference of opinion that exists as to the adequacy of arbitration.

The federalism issues that have arisen due to the FAA and the Supreme Court's expansive interpretation of it will be analyzed in Part III. The status and history of the law prior to enactment of the FAA, which reflected some hostility to arbitration, and the campaign to obtain passage of the FAA will be provided to aid in the analysis of the Supreme Court's subsequent treatment of the FAA and the current clash between state and federal law. The origins of the clash will be traced to demonstrate the choices the Court had in its interpretation of the FAA and its applicability to state court proceedings. The consequences to state arbitration law of the Court's choice and the role of state law in protecting persons from compulsory arbitration clauses will be examined. Finally, I will address in Part IV the issue that is ultimately raised by the clash: the appropriateness of arbitration as a dispute resolution process. I will argue that the prevalent use of arbitration clauses in contracts of adhesion has undermined the arbitral process and has revived judicial hostility to arbitration. I will demonstrate how the Montana Supreme Court reduced arbitration to a second-rate dispute resolution process by its simple comparison of it to the court adjudication process. In reviewing arbitration, the court only considered the procedures that are absent in the arbitral process; the court did not evaluate arbitration for what it offers to litigants. Too often arbitration is simply compared to litigation and found inadequate. That kind of comparison, which involves counting the procedural “safeguards” in each process, is a particularly destructive way to evaluate a dispute resolution process. In this section, I attempt to provide a more balanced view of arbitration, one that asserts that although arbitration, like any other dispute resolution process, is not without its flaws, it is still a viable and sensible process for many litigants with certain types of disputes. The benefits to arbitration will
be detailed as will some of the drawbacks to litigation. I do not argue or suggest that because arbitration may be a good dispute resolution process for some, that arbitration clauses in adhesion contracts should be upheld. Rather, I demonstrate how two distinct issues (i) whether arbitration clauses should be held enforceable in contracts of adhesion, and (ii) whether arbitration is an appropriate dispute resolution process, have been collapsed by both courts and commentators in their evaluation of arbitration. Concern and disagreement over upholding compulsory arbitration clauses have led some to conclude that arbitration is an inferior dispute resolution process. These two issues, I maintain, must remain distinct or else arbitration will be undervalued and litigation will be overvalued.

II. DOCTOR'S ASSOCIATES, INC. v. CASAROTTO

A. The Facts

On April 25, 1988, Paul and Pamela Casarotto executed a franchise agreement with Doctor's Associates, Inc. ("Doctor's Associates") to open a Subway sandwich shop in Great Falls, Montana, where they resided. Doctor's Associates, a Connecticut corporation with its principal place of business in Connecticut, is the national and international franchisor of Subway shops. The franchise agreement was the first and only franchise agreement the Casarottos had ever signed. After the agreement was signed, the Casarottos were told by Doctor's Associates' development agent, Nick Lombardi, that their desired location for the Subway franchise was unavailable. Based on Lombardi's oral promise that the Casarottos would be given the exclusive right to their desired location once it became available, the Casarottos agreed to open the shop at a less desirable location. When the desired location became available, Lombardi and Doctor's Associates awarded the location to another franchisee. This decision apparently caused the loss of the Casarottos' business.

36. See Brief for Petitioners at 3, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (No. 95-559) [hereinafter Brief for Petitioners]. At the time Doctor's Associates filed its brief, it was the franchisor of 10,000 Subway shops nationally. See id.
37. See Brief for Respondents at 5, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (No. 95-559) [hereinafter Brief for Respondents].
38. See id. at 7.
39. See id.
41. See Brief for Respondents, supra note 37, at 7.
The Casarottos brought suit in the Montana state court against, among others, Doctor's Associates and Lombardi, claiming that defendants, inter alia, breached the franchise agreement, defrauded them, breached the covenant of good faith and fair dealing, and tortiously interfered with their business. Doctor's Associates moved to dismiss the action or, alternatively, for a stay of the litigation pending arbitration of the Casarottos' claims, pursuant to section 3 of the FAA. The Montana District Court granted the motion to stay finding that the agreement involved interstate commerce pursuant to the FAA, a conclusion that was not disturbed on appeal by the Montana Supreme Court.

The arbitration clause, located on page 9 of the eleven page agreement and in ordinary typeface, provided as follows:

Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

Although he admitted that he had read the franchise agreement, Paul Casarotto alleged that no one had told him that the agreement contained an arbitration clause and that, by signing the agreement, he was relinquishing his right to sue Doctor's Associates in Montana state court. The agreement was a standard form franchise agree-

42. See Casarotto v. Lombardi, 886 P.2d at 933.
43. See id. Section 3 of the FAA provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

44. See Casarotto v. Lombardi, 886 P.2d at 933.
46. See Casarotto v. Lombardi, 886 P.2d at 933. The Franchise Offering Circular given to the Casarottos also identified the existence of the arbitration clause and suggested to franchisees that they obtain legal advice. See Brief for Petitioners, supra note 36, at 4 n.3.
48. Brief for Petitioners, supra note 36, at 4 n.2.
49. See id. at 4 n.3.
50. See Brief for Respondents, supra note 37, at 6.
ment Doctor's Associates used with all of its franchisees throughout the United States. The agreement also contained a choice of law clause providing that the agreement would be "governed by and construed in accordance with the laws of the State of Connecticut" and a provision, located above the signature line, stating that each party had read and understood the agreement.

The Casarottos appealed the decision of the district court on the basis that the franchise agreement failed to comply with Montana law. Montana law provides that "a written agreement to submit to arbitration any controversy arising between the parties after the agreement is made is valid and enforceable except upon grounds that exist at law or in equity for the revocation of a contract." However, a contract containing an arbitration clause was not valid under Montana law if notice that the contract contained an arbitration clause was not "typed in underlined capital letters on the first page of the contract . . . ." The franchise agreement clearly failed to meet this requirement inasmuch as it was placed on page 9 of the contract and was in ordinary type. Doctor's Associates argued that Connecticut law applied pursuant to the contract and that the contract was in compliance with the requirements of Connecticut law and, in the event Montana law applied, Montana law was preempted by the FAA.

B. Montana Uniform Arbitration Act

In 1985 Montana adopted a Uniform Arbitration Act ("Arbitration Act") based on the Uniform Arbitration Act ("UAA") promulgated by the National Conference of Commissioners on Uniform State Laws. The purpose of the Montana Arbitration Act is to "validate arbitration agreements, make the arbitration process effective, provide necessary safeguards and provide an efficient procedure when judicial assistance

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52. See Brief for Petitioners, supra note 36, at 3. Arbitration clauses in franchise agreements providing for arbitration at the AAA are not uncommon. See Brief for the International Franchise Association and the Securities Industry Association, as Amici Curiae Supporting Petitioners at 1-2, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (No. 95-559).
54. See Brief for Petitioners, supra note 36, at 4.
59. See Montana State Senate Judiciary Committee Minutes of the Meeting Held on January 21, 1985, at 6 (statement of Senator Mazurek) [hereinafter Committee Minutes]. The UAA can be found at 7 U.L.A. §§ 1 - 25 (West 1997).
is necessary."\textsuperscript{60} Prior to the adoption of the Arbitration Act, predispute arbitration clauses were considered void pursuant to a Montana statute that invalidates any contractual provision whereby a party "is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals . . . .\textsuperscript{61} Montana amended that statute to specifically exempt from its application the Arbitration Act.\textsuperscript{62} Montana's adoption of a modern arbitration statute\textsuperscript{63} followed on the heels of the Supreme Court's decision in \textit{Southland Corp. v. Keating},\textsuperscript{64} where the Court found the FAA applicable to state court proceedings.

Montana's notice provision, absent from both the FAA and the UAA, was enacted in response to concerns raised about adhesion contracts.\textsuperscript{65} Its purpose was to ensure that Montana residents did not unknowingly waive their right to access to Montana courts and that Montanans not be compelled to arbitrate disputes at distant locations.\textsuperscript{66} The inclusion of the notice provision seems to have been an attempt by Montana to equalize to some extent the power imbalances inherent in adhesion contracts.\textsuperscript{67} A notice provision is a "specific form of a larger category of legislative intrusions on freedom of contract to assure that parties to adhesion contracts know and understand the terms to which they are formally assenting."\textsuperscript{68} However, as the Supreme Court made clear, the FAA does not tolerate such an intrusion, and the Montana legislature has responded to that intolerance by repealing the notice provision.

\textsuperscript{60} MONT. CODE ANN. §§ 27-5-114 to -324, COMMISSIONERS' PREFATORY NOTE (West 1997).

\textsuperscript{61} MONT. CODE ANN. § 28-2-708 (1997); see also Brief for Respondents, supra note 37, at 2; Smith v. Zepp, 567 P.2d 923, 929 (Mont. 1977)(court refused to enforce predispute arbitration clause "[although arbitration may be the most speedy and economical means available to parties for a binding resolution of their disputes.").


\textsuperscript{63} \textit{See infra} note 222 defining a modern arbitration statute.

\textsuperscript{64} 465 U.S. 1 (1984); see also Brief for Respondents, supra note 37, at 2-3.

\textsuperscript{65} \textit{See} Brief for Petitioners, supra note 36, at 7; see also Committee Minutes, supra note 59, at 8.

\textsuperscript{66} \textit{See} Casarotto v. Lombardi, 886 P.2d at 933.


\textsuperscript{68} Carrington & Haagen, supra note 3, at 386.
C. Casarotto v. Lombardi (Casarotto I)\textsuperscript{69}—Judicial Hostility To Arbitration Revisited

1. The Majority Opinion

The Montana Supreme Court reversed the district court’s order staying the lawsuit pending arbitration.\textsuperscript{70} The court first determined that, contrary to the plain language of the choice of law clause contained in the franchise agreement, it would apply Montana law.\textsuperscript{71} It then held that Montana law was not preempted by the FAA and that the agreement was unenforceable due to its failure to provide notice of the arbitration clause in accordance with Montana law.\textsuperscript{72} As the following demonstrates, the court seemed determined to invalidate the arbitration clause due to its suspicion of and hostility to arbitration when it is foisted upon a party in an adhesion contract.

In order to invalidate the arbitration provision, the court first needed to find a way around the choice of law clause\textsuperscript{73} and a way to make Montana arbitration law applicable. The court used its conflict of laws principles as its avenue. The court first determined that, absent the choice of law clause, Montana’s conflict of laws principles would dictate that Montana law would apply because Montana had a greater interest in the controversy than Connecticut.\textsuperscript{74} The court next determined whether the choice of law clause in the franchise agreement was effective so as to override that conclusion. The court found that the clause was invalid and ineffective because it was contrary to Montana’s public policy insofar as it did not require conspicuous notice of the predispute arbitration clause.\textsuperscript{75} Accordingly, Montana law,

\begin{itemize}
\item \textsuperscript{70} See id. at 932.
\item \textsuperscript{71} See id. at 933-36.
\item \textsuperscript{72} See id. at 936-39.
\item \textsuperscript{73} The court assumed that the choice of law provision incorporated Connecticut’s arbitration rules as well as the substantive law of Connecticut. While that may indeed be the case, courts can no longer make that assumption. Instead, a court must determine whether the parties intended with its choice of law clause to incorporate the state’s arbitration law. In Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), the Supreme Court specifically reviewed a choice of law clause not unlike the one contained in the franchise agreement the Cassarottos signed, and declined to find that the parties intended to incorporate into their agreement New York’s arbitration law regarding the power of arbitrators to award punitive damages. See also Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989)(choice of law clause included state arbitration laws); see infra note 89 and accompanying text.
\item \textsuperscript{74} See Casarotto v. Lombardi, 886 P.2d at 934-35.
\item \textsuperscript{75} See id. at 936. The Montana’s Supreme Court’s holding with respect to the validity of the choice of law clause was not appealed to the United States Supreme Court. See Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996).
\end{itemize}
including its arbitration rules, would apply to the contract, unless pre-empted by the FAA.

The court scrutinized the arbitration clause in the franchise agreement and the process of arbitration itself to find that Connecticut law violated Montana's public policy that an agreement to arbitrate a future controversy be knowingly made. The court relied on the fact that the clause required arbitration to take place in Connecticut, thousands of miles from Great Falls, Montana, and that the costs of arbitration, which the court stated could be substantial, would be borne equally by the parties. The arbitral process itself, the court found, was devoid of the procedural safeguards established by the Montana legislature to assure the reliability of the outcome of a dispute. The court pointed out that pretrial discovery was within the sole discretion of the arbitrator, that the rules of evidence were not applicable in the arbitral proceeding, and that the arbitrator did not have to follow the law or have a factual basis for his or her decision. The court concluded:

Based upon the determination by the Legislature of this State that the citizens of this State are at least entitled to notice before entering into an agreement which will limit their future resolution of disputes to a procedure as potentially inconvenient, expensive, and devoid of procedural safeguards as the one provided for by the rules of the American Arbitration Association, and the terms of this contract, we conclude that the notice requirement of § 27-5-114, MCA, does establish a fundamental public policy in Montana, and that the application of Connecticut law would be contrary to that policy.

The court next determined that Montana's notice requirement was not pre-empted by the FAA even though such a result voided an otherwise enforceable arbitration agreement. While recognizing that the Supreme Court in Southland Corp. v. Keating and in Perry v. Thomas had invalidated California's Franchise Investment Law and Labor Code, respectively, because both laws invalidated predispute arbitration clauses, the court nevertheless upheld Montana's law on the basis of the Supreme Court's decision in Volt Information Sciences, Inc. v. Board of Trustees, which the court believed qualified the preemptive force of the FAA. Relying on Volt, the Montana court found that its notice requirement did not undermine the goals and policies of the FAA, which do not require parties to arbitrate claims they have

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76. See Casarotto v. Lombardi, 886 P.2d at 936.
77. See id. at 935.
78. See id. at 935-36.
79. See id. at 936; see also infra notes 516-42 and accompanying text critiquing the court's analysis of the arbitration clause and the arbitral process.
not agreed to arbitrate. Accordingly, the Montana court concluded that the United States Supreme Court would not find it a threat to the policies of the Federal Arbitration Act for a state to require that before arbitration agreements are enforceable, they be entered knowingly. To hold otherwise would be to infer that arbitration is so onerous as a means of dispute resolution that it can only be foisted upon the uninformed. That would be inconsistent with the conclusion that the parties to the contract are free to decide how their disputes should be resolved. Because Montana did not preclude parties from knowingly agreeing to arbitrate and because the Montana courts will enforce arbitration agreements knowingly entered, the Montana statute was not preempted by the FAA.

The court's reliance on Volt is problematic for a number of reasons. In Volt, the Supreme Court upheld application of a state arbitration rule that permitted a court to stay arbitration of a dispute pending the outcome of related litigation in state court between the parties to the arbitration clause and third parties not bound by the arbitration clause. The parties had included a choice of law clause in the contract containing the arbitration provision providing that the law of the place where the project was located—California—would govern the contract. The Supreme Court held that the FAA did not preempt application of California law in this instance because the parties had agreed that their arbitration agreement would be governed by the law of California, including its arbitration rules.

85. Id. at 939.
86. See id.
88. See id. at 470.
89. See id. at 478-79. The Supreme Court refused to set aside the California Court of Appeal's interpretation that the choice of law clause was intended by the parties to incorporate the California rules of arbitration because interpretation of private contracts is a question of state law, which it does not review. See id. at 474. Nonetheless, the Court did not find that the California court's interpretation caused the appellant to waive its "federally guaranteed right to compel arbitration" because appellant never had the right in the first instance insofar as the parties' contract did not require arbitration to proceed when there was related litigation pending in state court with nonparties to the arbitration clause. See id. at 474-75.

The Court also did not find the California Court of Appeal's interpretation to be contrary to the principles articulated in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), which held that interpretation of an agreement to arbitrate shall be made with due regard to the federal policy favoring arbitration and that all ambiguities as to the scope of the arbitration clause shall be resolved in favor of arbitration. The Volt Court indicated that the federal policy embodied in the FAA was to ensure the enforceability, according to their terms, of private agreements to arbitrate; there was no federal policy favoring arbitration under a certain set of procedural rules. See 489 U.S. 468, 472 (1989).

The dissent criticized the majority's refusal to review the state court's interpretation of the choice of law clause, finding that the interpretation was based on
In discussing the preemptive effect of the FAA, the Volt Court first pointed out the obvious—that the FAA does not contain an express preemptive provision. Nor does the FAA, the Court continued, relying on an earlier case, reflect a congressional intent to occupy the entire field of arbitration. State laws, however, that actually conflict with the FAA, those that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the] Congress," are indeed preempted by the FAA, even absent an express preemptive provision or a congressional intent to entirely displace state law. The Court thus made a distinction between state laws that bar enforcement of arbitration agreements which are preempted, and state laws that govern the conduct of the arbitration, which are not preempted when the parties have provided for their application in their contract. Inasmuch as the primary purpose of the FAA was to ensure that agreements to arbitrate were enforced according to their terms, application of the California rule did not undermine the goals and policies of the FAA. The Court reached this conclusion even though it was contrary to the result that would have been reached if the FAA had applied.

The most obvious problem with the Montana Supreme Court's reliance on Volt is that the holding in Volt rested upon the existence of the choice of law clause, interpreted to include state arbitration rules. The Montana Supreme Court, of course, had invalidated the choice of

91. The Court relied on Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956), which upheld application of state arbitration law to an arbitration provision not covered by the FAA because the transaction was not one affecting interstate commerce. See infra notes 296-303 and accompanying text.
93. Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
94. State laws that barred enforcement of arbitration provisions were found preempted in Southland Corp. v. Keating, 465 U.S. 1 (1984)(California law which made arbitration provision contained in franchise agreements unenforceable precluded) and in Perry v. Thomas, 482 U.S. 483 (1987)(California law which made agreements to arbitrate wage collection claims unenforceable preempts).
96. See id. at 479.
law clause contained in the franchise agreement. The court was not dissuaded that the absence of the choice of law clause rendered Volt inapplicable or less than controlling. Rather, the court relied on the Volt Court's general discussion of the preemptive effect of the FAA and seized upon the Court's statement that Congress did not intend to occupy the entire field of arbitration\textsuperscript{98} to justify its result that Montana law did not undermine the goals and policies of the FAA. However, when the Supreme Court reached the similar conclusion in Volt, it did so because the parties had specifically included the choice of law clause in their contract. The Supreme Court could not have been clearer in this regard: "application of the California statute is not preempted by the [FAA] . . . in a case where the parties have agreed that their arbitration agreement will be governed by the law of California.\textsuperscript{99} Thus, the Supreme Court did not find preemption precisely because the parties had agreed to be bound by state rather than federal law in the conduct of the arbitration. The Court did not address whether the result it reached would have been the same absent the choice of law clause. The Court did not have to address that issue because it had done so on two previous occasions. In Southland and again in Perry, the Supreme Court had found that the FAA preempted state laws that actually conflicted with it.\textsuperscript{100} The Montana Supreme Court did not see the obvious conflict between the result it reached, finding the arbitration clause unenforceable, and the holdings in Southland and in Perry.\textsuperscript{101}

2. Justice Trieweiler's Concurrence\textsuperscript{102}

Justice Trieweiler wrote specially to "explain a few things" to the "federal judges who consider forced arbitration as the panacea for

\textsuperscript{98} The Montana Supreme Court did not, of course, need to rely on Volt for the proposition that Congress did not occupy the entire field of arbitration law when it enacted the FAA inasmuch as the Supreme Court had intimated that conclusion thirty-four years earlier in Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956). \textit{See infra} notes 296-303 and accompanying text discussing Bernhardt.


\textsuperscript{100} \textit{See infra} notes 418-62 and accompanying text.

\textsuperscript{101} While the Montana Supreme Court did address those two cases, it merely reiterated their facts and holdings and failed to analyze their significance to the issue at hand. The court relieved itself of this obligation because it found that Southland and Perry had to be considered in light of Volt. \textit{See} Casarotto v. Lombardi, 886 P.2d 931, 933 (Mont. 1994), \textit{cert. granted and judgment vacated sub nom. Doctor's Assocs., Inc. v. Casarotto, 515 U.S. 1129 (1995), on remand to Casarotto v. Lombardi, 901 P.2d 596 (Mont. 1995), rev'd sub nom. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996).}

The court also largely ignored decisions by lower federal courts and other state courts that had found similar notice provisions preempted by the FAA because those decisions either preceded Volt or contained little or no reference to it. \textit{See id. at 938; see also infra} notes 117-18 and accompanying text.

\textsuperscript{102} \textit{See infra} notes 516-42 for a critique of Justice Trieweiler's concurring opinion.
their 'heavy case loads' and who consider the reluctance of state courts
to buy into the arbitration program as a sign of intellectual inade-
quacy."103 It was his opinion that the federal bench's misinterpreta-
tion of the FAA and their "naive assumption that arbitration
provisions and choice of law provisions are knowingly bargained for"
have made it easy for a party with superior bargaining power to avoid
Montana's procedural safeguards and substantive laws.104 He gave a
detailed account of Montana's sophisticated system of justice, devel-
oped to assure fairness and access to its users. He specifically dis-
cussed the rules of evidence, the standards for appellate review, the
belief in the rule of law, venue and jurisdictional requirements, liberal
rules of discovery, and the existence of contract and tort laws enacted
to protect Montana citizens from "bad faith, fraud, unfair business
practices, and oppression . . . ."105 Justice Trieweiler highlighted the
fact that Montana courts are provided at public expense to guarantee
access to everyone "regardless of their economic status, or their social
importance."106 These procedures and substantive laws, he asserted,
were "either inapplicable or unenforceable" in arbitration.107

He took particular issue with federal judges who view compulsory
arbitration as a means for reducing overcrowded dockets.108 He found
that federal judges, too preoccupied with their own case loads, disre-
gard "the total lack of procedural safeguards inherent in the arbitra-
tion process . . . " or the "financial hardship that contracts, like the one
in this case, impose on people who simply cannot afford to enforce
their rights by the process that has been forced upon them."109 He
criticized federal judges who believe that arbitration clauses are
knowingly and voluntarily entered; he asserted there is no mutuality
in a franchise agreement, and he claimed that such clauses which are
approved and encouraged by the federal judiciary "subvert our system
of justice."110

104. See id. at 940.
105. Id. at 939-40.
106. Id. at 939.
108. See id. He focused specifically on remarks made by Judge Selya of the First Cir-
cuit in Securities Industry Association v. Connolly, 883 F.2d 1114 (1st Cir. 1989),
who referred to arbitration as a "contractual device that relieves some of the or-
ganic pressure [of already swollen court calendars] by operating as a shunt, al-
lowing parties to resolve disputes outside of the legal system" and who suggested
that the FAA was enacted to overcome state court anachronistic preference to
resolve disputes according to traditional notions of fairness. See 886 P.2d 931,
940 (Mont. 1994)(Trieweiler, J., concurring).
109. Id. at 940.
110. Id. at 941.
It is Justice Trieweiler's view that an expansive interpretation of the FAA "presents a serious issue regarding separation of powers" and permit a few major corporations to draft contracts regarding their relationship with others that immunizes them from accountability under the laws of the states where they do business, and by the courts in those states. With a legislative act, the Congress, according to some federal decisions, has written state and federal courts out of business as far as these corporations are concerned. They are not subject to California's labor laws or franchise laws, they are not subject to our contract laws or tort laws. They are, in effect, above the law.

These federal decisions have ultimately "perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up."

3. The Dissents

Justice Weber, joined by Justice Turnage, dissented on both issues resolved by the majority. Relying on the language of the notice provision, Justice Weber first found that Montana law was inapplicable to the contract. The statute requires conspicuous notice only if the contract is subject to arbitration pursuant to the Montana Uniform Arbitration Act. Because the parties clearly provided for arbitration in accordance with the rules of the AAA and Connecticut law, the contract was not subject to arbitration pursuant to Montana law.

With respect to the second issue, the preemption of Montana law by the FAA, Justice Weber disagreed with the majority's analysis of Volt. Volt, Justice Weber explained, required the court to enforce the arbitration agreement according to its terms, which, if followed, would require application of the rules of the AAA as well as the law of Connecticut. Unlike the majority, the dissent was persuaded by the holdings in David L. Threlkeld & Co. v. Metallgesellschaft Ltd. and in Bunge Corp. v. Perryville Feed and Produce, that preempted notice provisions similar to Montana's notice provision. The dissent

111. Id.
113. Id.
115. See id.
116. See id. at 944.
117. 923 F.2d 245 (2d Cir. 1991)(the FAA preempted a Vermont law that required that an agreement to arbitrate be displayed prominently in the contract and signed by the parties).
118. 685 S.W.2d 837 (Mo. 1985)(the FAA preempted a Missouri law that required inclusion of a statement in ten point capital letters that the contract contained an arbitration provision).
found both cases to be "clear authority that the Montana statute directly conflicts with the Federal Arbitration Act."119

Justice Gray wrote a separate dissent, also joined by Justice Turnage. Justice Gray similarly dissented on both issues reached by the majority. Like Justice Weber, Justice Gray found that the actual language of Montana's notice requirement belied the conclusion that Montana law applied. By its terms, Justice Gray explained, the franchise agreement was subject to Connecticut law, not the law of "this chapter"—the Montana Uniform Arbitration Act.120 Justice Gray criticized the majority for its failure to discuss the specific language of the statute and its sole reliance on generalized legislative history regarding the public policy of the state. He found that because the Montana statute was inapplicable by its terms, it could not "form the basis of a public policy broad enough to negate the parties' choice of Connecticut law."121

Assuming the majority was correct that Montana law applied to the contract, Justice Gray found that law preempted by the FAA. The majority was wrong in its analysis of Volt, which Justice Gray stated was not a departure from Southland and Perry, but rather was entirely consistent with those opinions; the issue in each case was whether the state law would undermine the goals and policies of the FAA.122 The United States Supreme Court did not find that the stay provision undermined the goals of the FAA in Volt, because, unlike the California laws at issue in Southland and Perry, the right to arbitrate remained.123 The arbitration agreement was not rendered unenforceable; the process of arbitration was merely stayed.

Justice Gray next discussed two important differences between Volt and the case at hand, two differences the majority failed or refused to recognize. The first was that the Volt Court's holding relied heavily on the parties' affirmative choice of California law to govern their agreement.124 Second, unlike the stay provision at issue in Volt, which Justice Gray characterized as "merely a procedural matter," the Montana law rendered the parties arbitration agreement unenforceable, which completely undermined the purposes of the FAA.125 As will be shown below, the United States Supreme Court's decision reflects much of the same reasoning set forth by Justice Gray.

120. See id. at 945 (Gray, J., dissenting).
121. Id.
122. See id. at 946.
123. See Casarotto v. Lombardi, 886 P.2d at 946.
124. See id.
125. See id. at 947.
D. The Supreme Court's Remand

The Supreme Court granted Doctor's Associates' petition for writ of certiorari. The Court vacated the judgment of the Montana Supreme Court and remanded the case to that court for further consideration in light of Allied-Bruce Terminix Cos. v. Dobson, decided by the Supreme Court six months earlier.

In Dobson, the Supreme Court was called upon to interpret the meaning of the clause in section 2 of the FAA which makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce." The Supreme Court, contrary to the decision of the Supreme Court of Alabama, interpreted the clause broadly, as reaching the limits of Congress' Commerce Clause power. The Supreme Court of Alabama, as well as other courts, had interpreted the phrase to require that the parties to a contract have contemplated an interstate commerce connection. Because the Alabama Supreme Court found that the parties before it had not contemplated an interstate transaction, despite some interstate activities, the court concluded that the FAA did not apply. Accordingly, the court refused to enforce an arbitration provision contained in a termite service contract on the basis of a state statute which made predispute arbitration clauses unenforceable. The United States Supreme Court rejected this "contemplation of the parties" test and found that because the parties did not contest that the transaction in fact involved interstate commerce, the FAA was applicable and preempted Alabama's conflicting state statute.

127. See id.
135. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 279-81 (1995). The Dobson case was extremely significant; predispute arbitration clauses in Alabama would no longer be rendered "meaningless" but would now be specifically enforceable if the agreements affected interstate commerce. See Henry C. Strickland, Allied Bruce Terminix, Inc. v. Dobson: Widespread Enforcement of Arbitration Agreements Arrives in Alabama, 56 Ala. Law. 238, 238-39 (1995). One commentator stated that the Dobson case "represents . . . the last nail which once and for all seals the coffin containing the ancient corpus of law espousing deeply rooted hostility to arbitration contracts." Donald E. Johnson, Has Allied-Bruce
Before reaching its decision to give the "involving commerce" clause a broad interpretation, the Supreme Court first discussed three principles of arbitration law previously decided by the Court. First, citing Volt, among other cases, the basic purpose of the FAA is to overcome the refusal by courts to specifically enforce arbitration agreements. Second, citing Prima Paint Corp. v. Flood & Conklin Manufacturing Co., the FAA establishes substantive law applicable in diversity cases because Congress enacted the FAA pursuant to its power over interstate commerce and admiralty. The third principle, citing Southland, is that the FAA is applicable in state court proceedings as well as in federal court proceedings and it preempts conflicting state anti-arbitration laws. With these three principles set forth, the Court next declined the invitation by the Dobsons, supported by twenty State Attorneys General, to overrule Southland, which would have allowed Alabama to apply its anti-arbitration statute to the termite service contract. The Court declined the invitation for a variety of reasons. The Court had previously considered and rejected the arguments raised by the Dobsons and amici when it decided Southland and nothing significant had changed in the ten years subsequent to Southland to require the Court to revisit the arguments: "[N]o later cases [had] eroded Southland’s authority and no unforeseen practical problems [had] arisen." In addition, parties had likely relied on Southland in drafting their written agreements and Congress, since Southland, had extended, not restricted, the scope of arbitration. Accordingly, the Court found it inappropriate to reconsider Southland.

The Court next considered whether the "involving commerce" clause in section 2 of the FAA "limits the Act’s application, thereby carving out an important statutory niche in which a State remains free to apply its antiarbitration law or policy." It examined the FAA’s language, background and structure and concluded that the word "involving" is broad, i.e. the functional equivalent of "affecting" commerce, and that the FAA thus applies when there is interstate commerce in fact. The Court, in addition to rejecting the contem-
plation of the parties test, also rejected the reasonable person or objective version of the contemplation of the parties test, urged by an amicus curiae. It was argued by the amicus curiae that the objective test would better protect consumers asked to sign form contacts containing arbitration clauses.\textsuperscript{145} The Court was uncertain how the objective version would help consumers inasmuch as it would permit a business to "disavow" an arbitration provision, "thereby leaving the typical consumer who has only a small damages claim . . . without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."\textsuperscript{146}

The Court then reminded the parties that the FAA in § 2 gives States a way to protect consumers from "unfair pressure" to agree to an unwanted arbitration provision. The Court stated:

States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." . . . 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. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing" directly contrary to the Act's language and Congress' intent.\textsuperscript{147}

Unlike Justices Scalia and Thomas, who dissented and advocated the overruling of \textit{Southland},\textsuperscript{148} Justice O'Connor, in a surprising concurrence, agreed with the Court's decision not to overrule \textit{Southland}\textsuperscript{149} and in its interpretation of the "involving commerce" language

\textsuperscript{145} The Court, citing the following legislative history of the FAA, agreed with the amicus curiae that the drafters of the FAA had considered consumers' needs: "[t]he Act, by avoiding 'the delay and expense of litigation, will appeal to 'big business' and little business alike . . . corporate interests [and] individuals." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1996) (citing S. REP. No. 536, 68th Cong., 1st Sess., 3 (1924)).

\textsuperscript{146} \textit{Id.} at 281.

\textsuperscript{147} \textit{Id.} (citing Volt Info. Sciences, Inc. v Board of Trustees, 489 U.S. 463 (1989)).


\textsuperscript{149} Justice O'Connor's concurrence is surprising and unexpected inasmuch as she vehemently disagreed with the decision in \textit{Southland} to make the FAA applicable in state court. There, she asserted that the FAA is a procedural statute applicable in federal court only. See Southland Corp. v. Keating, 465 U.S. 1, 16 (1984)(O'Connor, J., dissenting). In \textit{Dobson}, although finding that the Court had, "over the past decade . . . abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation," Justice O'Connor agreed not to overrule \textit{Southland}, persuaded by considerations of \textit{stare decisis}. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995)(O'Connor, J., concurring). She stated:

Though wrong, \textit{Southland} has not proved unworkable and, as always, "Congress remains free to alter what we have done." . . . Today's decision caps this Court's efforts to expand the Federal Arbitration Act. Although each decision has built logically upon the decisions preceding it, the initial building block in \textit{Southland} laid a faulty foundation. I acquiesce in
of section 2. Significantly, she expressly recognized that the broad reading given to section 2 would displace many state statutes "carefully calibrated to protect consumers" and state procedural requirements "aimed at ensuring knowing and voluntary consent."151

E. Casarotto v. Lombardi (Casarotto II)152—The First Remand

Without giving the parties an opportunity to address or brief the applicability and relevance of the Dobson decision,153 the Montana Supreme Court on remand reaffirmed its prior opinion after considering it in light of Dobson.154 The majority, in an opinion by Justice Trieweiler,155 found "nothing in the Dobson decision which relates to the issues presented to this Court in this case."156 Casarotto I, unlike Dobson, did not involve a state law which made arbitration agreements invalid and unenforceable and the decision did not involve any analysis of how the "involving commerce" clause should be interpreted. Moreover, Dobson did not modify any of the principles of Volt relied upon by the Montana Supreme Court in its earlier opinion.157 Although recognizing that some of the language in Dobson concerning the benefits of arbitration was at odds with Justice Trieweiler's concurring opinion, such difference was irrelevant inasmuch as the con-

today's judgment because there is no "special justification" to overrule Southland. . . . It remains now for Congress to correct this interpretation if it wishes to preserve state autonomy in state courts.  

Id. at 284 (citations omitted). Commentators have also called upon Congress to amend the FAA to make it inapplicable in state court. See, e.g., Cain, supra note 3, at 18-19; Carbonneau, A Plea for Statutory Reform, supra note 3, at 1952; Sternlight, supra note 3, at 642.


153. Counsel for the defendants requested the opportunity to brief and be heard on the issues raised by the remand. The majority issued its opinion without expressly responding to the defendants' request. See id. at 599-600.


155. Justice Leaphart, who replaced retired Justice Harrison, a member of the majority in Casarotto I, specially concurred to state that he had reviewed Casarotto I, and was in agreement with it and the present opinion finding that Dobson did not affect the Casarotto I decision. See id. at 599.

156. Id. at 598.

157. See id. at 598-99.
curring opinion was not the basis of the court’s decision in _Casarotto I_.

In its extremely narrow and superficial reading of _Dobson_, the majority decision seems to almost willfully ignore the three legal principles of arbitration law set forth in _Dobson_ by the United States Supreme Court. As Justice Gray’s dissent pointed out, the “early language” in _Dobson_ was extremely significant to the issues the court was deciding. In declining to overrule _Southland_, the Supreme Court in _Dobson_ expressly stated that “no later cases [had] eroded _Southland_’s authority.” Accordingly, _Dobson_ made it clear that the Montana Supreme Court was plainly wrong in its conclusion in _Casarotto I_ that _Southland_ was somehow qualified by _Volt_.

The Montana Supreme Court also failed to address the significance of Justice O’Connor’s statement that the decision in _Dobson_ would displace state notice statutes. The South Carolina statute cited by Justice O’Connor is nearly identical to the Montana statute. Like the Montana statute, it too invalidated arbitration agreements only if the notice provision was violated. Justice O’Connor concluded that such a statute would be preempted by the FAA and Justice Trieweiler’s opinion ignored entirely the obvious conclusion that the Montana law requiring conspicuous notice would be preempted as well.

Lastly, the Montana Supreme Court also disregarded the Supreme Court’s admonition that if a state seeks to regulate arbitration or invalidate an arbitration clause, that it do so “upon such grounds as exist at law or in equity for the revocation of any contract.” Montana’s statute did what the Supreme Court expressly said it could not—by making the arbitration clause in the franchise agreement in-
valid, it placed that clause on unequal footing with the other terms and conditions of the franchise agreement. Instead of relying on contractual defenses applicable to any contract, such as fraud, duress or unconscionability to invalidate the arbitration clause, the Montana statute singled out the arbitration clause for disparate treatment. The means used by Montana to regulate the waiver of a judicial forum were clearly in contravention of the FAA and the Supreme Court’s interpretation of it.

F. The Supreme Court’s Opinion in Doctor’s Associates, Inc. v. Casarotto

In a rather short 8-1 opinion by Justice Ginsburg, the United States Supreme Court reversed the Montana’s Supreme Court’s decision in Casarotto II. After restating the principle that “[b]y enacting § 2 [of the FAA], ... Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed ‘upon the same footing as other contracts,’” the Court found that Montana’s statute directly conflicted with section 2 because the “[s]tate’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.” Like Justice Gray, the Court found that the Montana Supreme Court had misread Volt, which involved an arbitration agreement that had incorporated state procedural rules which did not affect the enforceability of the arbitration agreement itself, but rather affected only the order of proceedings.

As mentioned, the Supreme Court’s opinion was not unexpected—Southland and Perry clearly provided the foundation for it and the Supreme Court’s affirmation of Southland in Dobson quelled any

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168. As aptly stated by Professor Sternlight: “[The Court’s decision in Doctor’s Associates is] so brief as to imply that no reasonable person could question the Court’s ruling.” Sternlight, supra note 3, at 700-01.
170. Id. The Court declined to adopt a broader view of the Montana statute, urged upon it by counsel for Casarotto at oral argument, that the statute represented an “illustration of a cross-the-board rule: unexpected provisions in adhesion contracts must be conspicuous.” Id. at 687 n.3. The Court reviewed only the disposition of the Montana Supreme Court which did not rest on this rule but rather rested on the particular statute which set out a “precise, arbitration-specific limitation.” Id. at 687. However, the Court again reiterated that a “court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable for this would enable the court to effect what ... the state legislature cannot.” Id. (citing Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)).
171. See id. at 688. Regardless of the court’s assertion, the decision in Volt, while it may not have rendered the arbitration clause invalid, nevertheless, resulted in a finding that arbitration did not have to proceed. See infra note 177.
doubt as to the continuing validity of Southland. The Court made it clear that Volt should not be read too broadly and was applicable only when the state procedural rules incorporated into an arbitration agreements did not render arbitration clauses unenforceable.\footnote{172} The Court came to this conclusion even in the absence of a provision designating Montana law as the law governing the agreement. The Court did, however, seem to insinuate that if the parties had in fact expressly chosen Montana law as the choice of law to govern their agreement, Montana law would nevertheless have been preempted.\footnote{173}

While the actual result in Doctor's Associates seems objectionable because the Montana state legislature was attempting to protect consumers and others from unknowingly waiving important rights, the Supreme Court had no choice, if it were to follow precedent, but to find the statute preempted.\footnote{174} The only thing the Court could have done,\footnote{175} short of overruling Southland, which it clearly was unwilling to do, would have been to agree with the Montana Supreme Court's assertion that imposing conditions on the enforceability of a predispute arbitration clause does not render such clauses unenforceable or invalid.\footnote{176} Adoption by the Court of that specious interpretation of the statute, although it would have had the salutary result of ensuring that arbitration agreements were knowingly entered, would have been disingenuous; the Montana statute expressly refused to enforce predispute arbitration clauses that did not comply with the special notice requirement. In rejecting the Montana's court interpretation, the Court looked at the actual effect of the statute and was unwilling to elevate form over substance in its interpretation of it.\footnote{177}
Thus, while the Supreme Court came to the inevitable conclusion based on precedent and a reasonable and pragmatic interpretation of the Montana statute, the result in *Doctor's Associates* is disturbing because it frustrates a state's attempt to protect its citizens from unknowingly agreeing to arbitrate a claim. Neither the majority nor the dissent appeared at all concerned with this result. The majority repeatedly asserted that states can protect citizens and invalidate arbitration clauses under "generally applicable" contract defenses and Justice Thomas dissented on the ground that the FAA was not applicable to state court proceedings.

178. Professor Sternlight argues that the Supreme Court was wrong in reversing the Montana Supreme Court because the Montana law was consistent with the purposes of the FAA. See Sternlight *supra* note 3, at 705-09. The purpose Professor Sternlight focuses on is the FAA's desire to enforce voluntary agreements to arbitrate. While the FAA was enacted to require enforcement of voluntary agreements to arbitrate, the drafters were particularly concerned that such enforcement be on the same basis as other contracts. See H.R. Rep. No. 68-96, at 1 (1924) ("An arbitration agreement is placed upon the same footing as other contracts, where it belongs."). This purpose is furthered by the FAA when it permits enforceability of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994). Thus, the issue of voluntary consent with respect to arbitration agreements can be addressed or regulated by the states but the FAA requires that such regulation apply evenhandedly - to "any contract." Because the Montana statute plainly applied only to arbitration agreements, it clearly contravened the means chosen by the drafters of the FAA to further the FAA's purposes.

179. Not only was Montana frustrated, but so are other states who have similar notice provisions. See infra note 280 and accompanying text.

180. The effect of the *Doctor's Associates* decision is compounded by the broad reading the Court gave to the "involving commerce" language of section 2 in *Dobson*. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995). Based on that interpretation, more transactions will be found to involve interstate commerce, thereby making the FAA applicable. See, e.g., Sternlight, *supra* note 3, at 666 ("[I]t is now quite difficult to conjure up many transactions that would not be regulated by the FAA.").


G. Casarotto v. Lombardi (Casarotto III)—The Second Remand

The Supreme Court of Montana remanded the case to the district court for entry of a judgment consistent with the Supreme Court's opinion. However, Justices Trieweiler and Hunt dissented from the remand. They stated:

We cannot in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the United State (sic) Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act. Therefore, we respectfully decline to sign the Court's order.\footnote{Id. at 2.}

The dissent epitomizes the tension the Supreme Court's interpretation of the FAA has created between state and federal courts and legislatures. The Court's broad interpretation of the FAA has challenged the role of the states in regulating a specific kind of contract, arbitration agreements, a field traditionally handled by the states. This tension ultimately reflects serious differences of opinion as to the appropriateness of arbitration as a dispute resolution process. Each of these issues will be discussed below.

III. FEDERALISM ISSUES AND THE FAA

A. Background of the Passage of the FAA

The background of the law prior to the passage of the FAA and the steps taken to reform the law at both the state and federal level are essential to understanding the current clash between federal and state law regarding arbitration. The foregoing history provides the views of the drafters and others regarding arbitration at the time the federal act was passed, and the reason why the drafters perceived a need for the enactment of a federal law changing prior law to make arbitration agreements enforceable.

1. Law in the United States Prior to the Enactment of the FAA—The Revocability Doctrine

Although arbitration was commonly practiced in the United States since the colonial period, federal and state courts, follow-

\footnote{Order, Casarotto v. Lombardi, No. 93-488 (Mont. July 16, 1996)(on file with the author).}
neering common law inherited from England, refused to specifically enforce agreements to arbitrate, regardless of whether the agreement concerned arbitration of an existing controversy or of a dispute that arose after execution of the agreement to arbitrate.\textsuperscript{187} This meant that a party could revoke, up until the time of the decision by the arbitrator, his or her agreement to submit the controversy to arbitration.\textsuperscript{188} Statutory law, either federal or state, requiring the enforcement of such agreements did not exist, even in those states that had arbitration statutes that were otherwise supportive of arbitration.\textsuperscript{189} Although American courts, like their English counterparts, would not order specific performance of the agreement to arbitrate, damages were available for breach of the arbitration agree-


\textsuperscript{188} This practice, of course, led to abuse; a party would participate in the arbitration, but if the party believed that the arbitrator was going to rule against him or her, the party revoked his or her agreement to arbitrate. See, e.g., Bills to Make Valid and Enforceable Written Provisions or Agreements For Arbitration of Disputes Arising Out of Contracts, Maritime Transactions or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong., 1st Sess. 14-15 (1924)[hereinafter Joint Hearings](statement of Julius Henry Cohen, Member of the Committee on Commerce, Trade and Commercial Law of the American Bar Association and General Counsel for the New York State Chamber of Commerce); Jones, supra note 186, at 245.

\textsuperscript{189} See MACNEIL, AMERICAN ARBITRATION LAW, supra note 17, at 20. Professor Macneil examined an Illinois arbitration statute, dating back to 1873, as an example of state statutory law that was largely supportive of arbitration but which, like all state statutes at the time, contained the weakness of refusing to enforce arbitration agreements before an award was made. See id. at 17-20; see also Kent, supra note 186, at 503 (describing an 1861 New York law that made the decisions of the New York Chamber of Commerce's Arbitration Committee binding and established them as bases for judgments in a Court of Record).
ment. However, such damages were usually nominal or ineffective to induce parties to perform their agreements to arbitrate.\[191\]

The doctrine of revocability is said to have come from Vynior's Case,\[192\] a 1609 English case involving recovery on a penal bond securing performance of an agreement to arbitrate.\[193\] In that case, the court permitted recovery on the bond for the revocation, in an amount that probably exceeded "any fair recovery on the cause of action itself."\[194\] Although Vynior's Case itself involved only recovery on the penal bond, it is cited as the controlling authority for the revocability doctrine because of dictum used by the court: "If I submit myself to an [arbitration] ... yet I may revoke it for my act, or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable."\[195\] While this dictum was apparently unnecessary to the holding of the case,\[196\] it was, according to one view, a correct representation of the common law at that time on the revocability of arbitration agreements.\[197\] That common law was based, the theory continues, not on hostility to arbitration, as some have suggested, but rather on the notion that "the authority of the arbitrator was based upon the submission [by the parties to arbitration] and since this was a purely private contract ... such submission could be revoked like powers generally."\[198\] Indeed, if the court had in fact been hostile to arbitration, it is unlikely that it would have permitted forfeiture of the bond; rather, it could have voided the bond on a public policy basis.\[199\] Given the use of penal bonds to secure performance of the agreement to arbitrate, the dictum in Vynior's Case did not materially affect the enforceability of arbitration agreements.

It has also been asserted that the courts permitted revocation so that they could safeguard their jurisdiction; courts would not enforce an arbitration agreement because, to do so, would oust them of their

190. See MacNeil, American Arbitration Law, supra note 17, at 20; Cohen & Dayton, supra note 185, at 276 (citing cases holding that damages were available for breach of an arbitration agreement); Sayre, supra note 187, at 598.

191. See MacNeil, American Arbitration Law, supra note 17, at 185 n.39 (stating that expectation damages were virtually impossible to prove); Sayre, supra note 187, at 598, 604-05 (stating that damages were nominal because the court did not believe actual injury was suffered by forcing parties to litigate in the King's courts of justice; such litigation was assumed to be a privilege and an advantage).

192. 8 Coke Rep. 80a and 81b (1609).

193. See Sayre, supra note 187, at 602 ("In modern times, Vynior's Case has generally been regarded as the original and controlling authority for revocability."); see also United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1008 (S.D.N.Y. 1915) (doctrine of revocability seems to rest on Vynior's Case).

194. Sayre, supra note 187, at 603.

195. 8 Coke Rep. 80a and 81b at 81b. Wolaver, supra note 185, at 138.

196. See Wolaver, supra note 185, at 138.

197. See Sayre, supra note 187, at 602.

198. Id. at 600.

199. See id. at 603; see also Wolaver, supra note 185, at 139.
jurisdiction. That rationale was stated in a 1746 case, *Kill v. Hollister.*\(^2\) No authority was cited for that assertion and no reason was provided.\(^2\) Some have hypothesized that the court made the statement in response to changes that had occurred in English law regarding the use of penal bonds.\(^2\)

Prior to the change in the law, many parties required execution of a penal bond to secure performance of the agreement to arbitrate.\(^2\) The amount of the bond was excessive so as to induce the party to comply with the agreement. If the parties failed to comply, as we saw in *Vynior's Case,* the aggrieved party was entitled to collect the full amount of the bond.\(^2\) The Statute of Fines and Penalties, enacted in 1687, changed the law and only entitled the aggrieved party to actual damages, not the full sum of the bond.\(^2\) Because actual damages were difficult to prove for breach of the arbitration agreement,\(^2\) the penal bond was no longer a viable way to secure performance of the agreement. This caused the dictum in *Vynior's Case* to take on a "new significance."\(^2\) Because parties could no longer effectively sue on their bonds and because only nominal damages were available for revocation, "it was felt that some added reason must be given to maintain the doctrine of revocability, since it could no longer be avoided by the use of bonds."\(^2\) That added reason was the creation of the ousting of jurisdiction doctrine. It has also been theorized that the real basis for the creation of that doctrine was the judiciary's desire to preserve their salaries inasmuch as judges' salaries were based upon the number of cases handled by the court.\(^2\)

Professor Carbonneau suggests that arbitration agreements were made revocable in order to preserve the role of the courts in society:

> [The movement to establish functional national legal institutions precipitated a reaction against informal, nonlegal, and nonjudicial forms of adjudication. If courts were to function as the national oracles of normative law and procedural justice, there was little room for makeshift, party-confected modes of dispute resolution. The courts were a central organ of the state and an]

\(^{200}\) I Wilson 129 (K.B. 1746); Wolaver, *supra* note 185, at 139.

\(^{201}\) See Wolaver, *supra* note 185, at 139.


\(^{204}\) See *id.*

\(^{205}\) See *id.* at 604.

\(^{206}\) See *supra* note 191 and accompanying text.

\(^{207}\) Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942). The court's treatment of the historical background of arbitration law has been characterized as "pop history." 1 MacNeil, *Federal Arbitration Law,* *supra* note 2, at § 9.2.3.3 (Supp. 1996).

\(^{208}\) Sayre, *supra* note 187, at 605; *see also* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942).

\(^{209}\) See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942)(citing Scott v. Avery, 25 L.J.Ex. 308, 313 (1855)); *see also* Joint Hearings, *supra* note 188, at 15.
instrument for implementing the dictates of society's juridical creed. The mission of achieving justice required public investiture and accountability. Judicial responsibilities, therefore, were too august and serious to be exercised by just anyone.\textsuperscript{210}

Thus, arbitration was "viewed as a process that functioned in derogation of legality."\textsuperscript{211} Because of this stigma, legal systems were unwilling to enforce agreements to arbitrate future disputes and permitted a party to revoke his or her agreement up until the time of the award.\textsuperscript{212}

Finally, some have asserted that the real reason for the revocability doctrine was to protect parties from arbitration,\textsuperscript{213} although this theory too has been questioned because it is possible that the courts' desire to retain jurisdiction had "much to do with inspiring the fear that arbitration tribunals could not do justice between the parties."\textsuperscript{214}

Whatever the reason, the revocability doctrine remained the law in England for nearly 300 years, although it was somewhat weakened in \textit{Scott v. Avery},\textsuperscript{215} where the court held that parties could make arbitration a condition precedent to bringing any action in court for breach of the underlying contract.\textsuperscript{216} The final blow to the revocability doctrine in England came with the enactment of the Arbitration Act of 1889.\textsuperscript{217} That law provided for, among other things, the irrevocability of arbitration agreements.

The change in English law is said to be one of the reasons behind the movement in the United States to reform arbitration law, although the "actual practice of arbitration" was probably the primary reason.\textsuperscript{218} One thing became clear to those seeking to have arbitra-

\textsuperscript{210} Carbonneau, \textit{Arbitral Justice}, supra note 3, at 1947.
\textsuperscript{211} Id.
\textsuperscript{212} See id. Professor Carbonneau explained that legal systems were willing to enforce agreements to arbitrate an existing controversy and arbitration awards because the presence of arbitration was "too substantial in legal history and in romanist practices" to allow the legal systems to completely repudiate the arbitration agreement. Instead, the law made arbitration functionally impotent. See id. at 1947-48.
\textsuperscript{213} See, e.g., \textit{Joint Hearings}, supra note 188, at 15; Sayre, supra note 187, at 610;.
\textsuperscript{214} S. REP. No. 68-536, at 2-3 (1924). The Second Circuit has questioned whether the basis of the revocability doctrine was the courts' desire to protect parties from arbitration inasmuch as those same courts were willing to enforce arbitration awards. See Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 976, 983 (2d Cir. 1942).
\textsuperscript{215} 10 E.R. 1121 (1855-56).
\textsuperscript{216} Interestingly, American courts did not adopt the "promising route" suggested in \textit{Scott}. See \textit{MacNeil, American Arbitration Law}, supra note 17, at 20.
\textsuperscript{217} See id. at 27.
\textsuperscript{218} See \textit{MacNeil, American Arbitration Law}, supra note 17, at 27. The practice of arbitration, was "truly an internal, grass-roots movement, not of 'the people' but of the commercial interests using arbitration." Id. at 26. By the early 1800s, arbitration had spread from chambers of commerce to trade associations, who were powerful enough to use disciplinary measures to induce their members to comply with their arbitration agreements. See Kent, supra note 186, at 502-503.
tion agreements held irrevocable: as in England, the change would have to come from the legislature because American courts appeared unwilling to make so dramatic a change in the law.

2. The Demise of the Revocability Doctrine

As early as 1911, lobbying efforts began to change American arbitration law to make arbitration agreements, including predispute arbitration clauses, enforceable. The campaign to change the law had three objectives: (i) passage of a uniform arbitration act by the states, (ii) passage of a federal arbitration act, and (iii) ratification of an arbitration treaty.

The lobbying efforts paid off; in 1920, New York enacted a "modern" arbitration statute, which had a great impact on the passage of the FAA insofar as it demonstrated support by one of the larger

New York, in many respects, lead the institutionalization of arbitration. See Macneil, American Arbitration Law, supra note 17, at 26. The practice of arbitration was instituted by the Chamber of Commerce of the State of New York as early as 1753, and in 1768, the first arbitration tribunal in the United State had been formed by the Chamber of Commerce. See Kent, supra note 186, at 502. In addition, as already mentioned, New York had enacted a law, making decisions of the Chamber of Commerce Arbitration Committee binding. See supra note 189. Further, in 1874, New York had established the Court of Arbitration in the Chamber of Commerce. Conciliation and arbitration practices were also occurring in the Municipal Court of the City of New York. See Macneil, American Arbitration Law, supra note 17, at 26.

Professor Macneil characterizes those persons who sought to change the law to make arbitration agreements irrevocable as "reformers." See Macneil, American Arbitration Law, supra note 17, at 29.

See, e.g., H.R. Rep. No. 68-96, at 2 (1924) ("The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it."); see also United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915) (criticizing the doctrine of revocability, but nonetheless declining to enforce an arbitration agreement).

This campaign was spearheaded by the Chamber of Commerce of the State of New York which had, in 1911, appointed a Special Committee to "revive the lagging arbitration machinery that had lain dormant since the beginning of the century." Kent, supra note 186, at 507.

See Macneil, American Arbitration Law, supra note 17, at 28-29. A statute making arbitration agreements irrevocable with respect to both existing and future disputes is called a "modern" arbitration statute. See id.

See Joint Hearings, supra note 188, at 16 (statement of Julius Henry Cohen); see also Macneil, American Arbitration Law, supra note 17, at 159.

See infra notes 269-81 and accompanying text for a discussion regarding the passage of the Uniform Arbitration Act.

See Macneil, American Arbitration Law, supra note 17, at 159-66 for a discussion of the history of the internationalization of arbitration law.

See N.Y. Arbitration Law, ch. 275, §§ 1-10 (Cahill 1923) (repealed 1937). The New York Act was different from any other arbitration statute that had been passed because it made predispute arbitration agreements enforceable. See 1 Macneil, Federal Arbitration Law, supra note 2, at § 5.4.1. The Act was unsuc-
commercial centers of the United States for arbitration and it provided the blueprint for the original draft of the FAA.

The reformers were successful in obtaining the support of the legal community for the FAA. Even before the passage of the New York act, representatives of the New York Chamber of Commerce had approached the legal community with its three objectives. In 1918, Charles L. Bernheimer, Chairman of the Arbitration Committee of the Chamber of Commerce, appeared before the Cleveland Conference of Bar Association Delegates and discussed the "matter of commercial arbitration." The issue was referred to the American Bar Association (ABA) who referred it to its Committee on Commerce, Trade and Commercial Law. Following passage of the New York act, the ABA Committee produced a tentative draft of the FAA in 1921. A more comprehensive bill was drafted in 1922 was introduced in Congress by the ABA in association with numerous chambers of commerce and trade associations and, with some changes, became the FAA.

At the first hearing on the bill, Charles L. Bernheimer described the purpose of the bill as follows:

The bill on the one hand aims to eliminate friction, delay and waste, and on the other to establish and maintain business amity and to reduce the price of commodities to the consumers; this latter on the theory that a merchant in successfully challenged on constitutional grounds. See Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288 (N.Y. 1921).

227. See MacNeil, AMERICAN ARBITRATION LAW, supra note 17, at 37.

228. See A Bill Relating to Sales and Contracts to Sell Interstate and Foreign Commerce and A Bill To Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and 4214 Before the Subcomm. of the Comm. on the Judiciary, 67th Cong., 4th Sess. 2 (1923) [hereinafter 1923 Hearings] (statement of Charles L. Bernheimer, Chairman of the Arbitration Committee of the New York Chamber of Commerce). The New York bill was drafted by Julius Henry Cohen, counsel for the Chamber of Commerce. See id. at 8 (statement of W.H.H. Piatt, Chairman of the Committee of Commerce, Trade and Commercial Law of the American Bar Association). Mr. Cohen was the primary draftsperson of the FAA. See id. at 13 (statement of Francis B. James, former Chairman of the Committee on Commerce, Trade and Commercial Law of the American Bar Association); see also MacNeil, AMERICAN ARBITRATION LAW, supra note 17, at 194 n.36. The Uniform Arbitration Act was also patterned after the New York Act. See id. at 41.

229. See 1923 Hearings, supra note 228, at 8 (statement of W.H.H. Piatt).

230. See id.

231. See id; see also MacNeil, AMERICAN ARBITRATION LAW, supra note 17, at 86-87.

232. See MacNeil, AMERICAN ARBITRATION LAW, supra note 17, at 87-88.

233. See 1923 Hearings, supra note 228, at 2-3 (statement of Charles L. Bernheimer).

234. The FAA was originally called the United States Arbitration Act.

235. In addition to being the Chairman of the Arbitration Committee of the New York Chamber of Commerce, Bernheimer was also a cotton goods merchant. See 1923 Hearings, supra note 228, at 1.
figuring his cost adds to his price a certain amount representing the risk of rejection, claims, fault-finding, etc., even including litigation. If inexpensive but dependable arbitration were possible instead of costly, time-consuming, and troublesome litigation, the risk 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.

Bernheimer's statement clearly demonstrates that the bill was suggested for the benefit of merchants, with some indirect, speculative benefit to consumers, that it was partly in response to the costs and delay of litigation, and that there was the belief that arbitration, instead of litigation, was a better method to resolve disputes from the standpoint of business relationships. The bill did not make it out of committee in 1923, but not because of any opposition to the bill.

236. Id. at 3.

237. Bernheimer continued, "The merchants want this very badly. It adds to the cost to the consumer if the merchant has in the calculation of his prices to consider, in his overhead, possible litigation, possible claims." Id. at 7. He also provided the Subcommittee with a list of the 28 trade organizations and chambers of commerce who supported the bill. See id. at 3. When the bill was reintroduced a year later, the list of commercial organizations endorsing the bill had grown to 67. See Joint Hearings, supra note 188, at 21-22. Herbert Hoover, then Secretary of Commerce, also endorsed the bill when it was originally introduced in 1923, see 1923 Hearings, supra note 228, at 14, and when it was reintroduced in 1924. See Joint Hearings, supra note 188, at 20.

It was Bernheimer's belief that arbitration would not increase with the passage of the bill. He explained that merchants were in favor of arbitration because they were "by instinct averse to any hearing. [A merchant] is adverse to any formality." 1923 Hearings, supra note 228, at 4-5. Accordingly, if a merchant knew that he would have to participate in an arbitration and that the dispute would be expeditiously resolved, the merchant would settle the dispute much more quickly than if the dispute was to be resolved by litigation. See id.

238. No one appeared at the hearing to oppose the bill. The only opposition to the bill, mentioned at the hearing, was an objection by the head of the union of seamen, who was concerned that the bill would "compel[ ] arbitration of the matters of agreement between the stevedores and their employers." 1923 Hearings, supra note 228, at 9. Because it was "not the intention of [the] bill to make an industrial arbitration," language was proposed to amend the bill to state "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." Id. That language, with minor modification, was added to the bill when it was reintroduced in 1924. See MacNeil, American Arbitration Law, supra note 17, at 91. It became part of the FAA: "[B]ut 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." 9 U.S.C. § 1 (1994).

As will be discussed, a concern was raised by Senator Walsh as to the applicability of the bill to contracts of adhesion. See 1923 Hearings, supra note 228, at 9-10. That concern was never addressed by the sponsors of the bill. See infra note 477-80 and accompanying text.
but because of timing issues.239

The bill, reintroduced in the 68th Congress, was again referred to the Judiciary Committees of the House and the Senate. A Joint Hearing was held on January 29, 1924. Again, there was no opposition to the bill.240 The testimony, all in favor of enactment, was more extensive than the testimony during the 1923 Hearing. In addition to the three sponsors who testified at the 1923 Hearing,241 additional business interests testified at the Joint Hearing,242 as did two legislators,243 a representative of the Arbitration Society of America (merged in 1926 to become the AAA),244 and, most significantly, Julius Henry

240. See id. One commentator called the hearing on the FAA a "love-fest" for commercial arbitration. See Schwartz, supra note 3, at 78.
241. Charles I. Bernheimer, W.H.H. Piatt, and Francis B. James. 1923 Hearings, supra note 228, at 1, 7, 12. Bernheimer's testimony was much the same as it was at the 1923 Hearing. At the Joint Hearing he stated:

Speaking for those who have had experience and who are engaged in business, I may say this, that arbitration saves time, saves trouble, saves money. There is no question about that. We know it. It preserves business friendships. The usual court atmosphere does not get into the arbitration hearings. ... Friendliness is preserved in business. It raises business standards. It maintains business honor, prevents unnecessary litigation, and eliminates the law's delay by relieving our courts.

Joint Hearings, supra note 188, at 7. Piatt's testimony was along the same lines:

The American Bar Association is very hopeful that the Senate and the House will see fit to enact a statute, as they believe this bill furnishes a constructive line for settling and disposing of disputes. We feel that the legislation already enacted has had the effect, not of increasing litigation, not of adding any burden to the courts, but rather of relieving the burden and of reducing controversies; that instead of creating controversies between those who might become litigants, it has created a spirit of conciliation and settlement. Men have found that if they must arbitrate at once they proceed to carry out their contracts. That we regard as morally a highly desirable thing. . . .

Id. at 10.
242. For example, Gray Silver represented the American Farm Bureau Federation. R.S. French represented the National League of Marine Merchants of the United States, the Western Fruit Jobbers' Association of America, and the International Apple Shippers' Association of America. Also serving as representatives were C.G. Woodbury of the Canners' League of California, Henry L. Eaton of the American Fruit Growers, Inc., Thomas B. Paton, of the American Bankers' Association, and W.W. Nichols of the American Manufacturers' Export Association of New York. See Joint Hearings, supra note 188, at 11-12, 28, 31.
243. The Honorables Charles I. Stengle, Representative from the State of New York and John B. Kendrick, Senator from Wyoming, provided statements at the Joint Hearing. See id. at 1, 5.
244. Alexander Rose represented the Arbitration Society of America. See id. at 25. In his testimony, he explained why the public was in favor of arbitration:

There is this advantage that appeals to the ordinary man: First of all . . . he leaves it to a man who is familiar with the subject of the controversy; he leaves it to a man who is the choice of the disputants who can


Cohen, the primary drafter of the bill, who also submitted a brief in support of the bill. In addition, numerous letters and telegrams in support of the bill, primarily from commercial organizations, were included in the transcript of the hearing.

Cohen's testimony and brief discussed, among other things, the practical and legal need for the federal act. He stated why arbitration agreements were executed:

The evils at which arbitration agreements in general are directed are three in number. (1) The long delay usually incident to a proceeding at law, in equity or in admiralty, especially in recent years in centers of commercial activity, where there has arisen great congestion of the court calendars. ... (2) The expense of litigation. (3) The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world.

Cohen urged the Subcommittee to change the common law that refused to specifically enforce agreements to arbitrate. He also explained that a federal act was needed because federal courts, at least in admiralty cases, had refused to be bound by state laws that made such agreements enforceable. Federal courts refused to be bound because the enforceability of arbitration agreements was considered a remedy, a procedural matter, where the law of the forum controlled, and federal courts, relying on common law, refused to en-
force such agreements.\textsuperscript{251} In his brief, Cohen also provided legal justifications for the bill, which will discussed in more detail below.\textsuperscript{252} Bernheimer explained that a federal act was needed because of the nature of commerce, which was mostly interstate.\textsuperscript{253}

The bill proposed to Congress by the ABA was indeed passed with minor changes. It was signed into law by President Coolidge on February 12, 1925 and made effective as of January 1, 1926. Upon its passage, the ABA stated: "No piece of commercial legislation, no enactment at the request of lawyers has been passed by Congress in a quarter of a century comparable in value to this."\textsuperscript{254} The President of the New York Chamber of Commerce stated: "The bill is one of the most far-reaching pieces of legislation that has been introduced in recent times in the interest of sound business practices."\textsuperscript{255}

3. The FAA

As stated, the primary purpose of the FAA was to change the anachronism in American law and make enforceable agreements to arbitrate, including executory arbitration agreements, and thereby put such agreements on the "same footing as other contracts."\textsuperscript{256} This objective was accomplished by § 2 of the FAA, which provides:

A written provision in any maritime transaction\textsuperscript{257} or a contract evidencing a transaction involving commerce\textsuperscript{258} to settle by arbitration a controversy

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251. See supra note 220 and accompanying text.
252. See infra notes 356-60 and accompanying text.
253. See Joint Hearings, supra note 188, at 7.
255. Id.
257. Maritime transactions are defined in § 1, as follows:
   "Maritime transactions', as herein defined, means charter parties, bills of lading or water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction . . . .
258. Commerce is defined in § 1, as follows:
   "Commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another,
thereafter arising out of such contract or transaction, or the refusal to perform
the whole or any part thereof, or an agreement in writing to submit to arbitration
an existing controversy arising out of such a contract, transaction, or refusal,
shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.259

The remainder of the FAA is concerned with the procedures available
to enforce the arbitration agreement. The drafters of the FAA con-
sciously sought to make the procedures “very simple. . . . reduc[ing]
technically (sic) and formality to a minimum.”260 A court may, upon
application, stay a pending action if the court is satisfied that the is-
sue therein is referable to arbitration.261 A court may compel a recal-
citrant party, upon being satisfied that the making of the arbitration
agreement or the failure to comply is not in issue, to submit the dis-
pute to arbitration in accordance with the terms of the agreement.262

Provision is made for the appointment of an arbitrator by the court in
the event the contract fails to provide procedures for appointment or if
a party does not comply with the procedures provided.263 An arbitrator
so appointed has the power to summon witnesses and to require
them to bring evidence material to the dispute.264 The court may also
confirm an award,265 vacate it, but only under very limited circum-
stances,266 or modify it.267

Procedures regarding the appeal of a

or between any such Territory and any State or foreign nation, or be-
tween the District of Columbia and any State or Territory or foreign na-
tion, but 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.


259. 9 U.S.C. § 2 (1994). For an explanation of the terms “valid,” “irrevocable,” and
“enforceable,” as used in section 2, see infra note 322 and accompanying text.

260. Joint Hearings, supra note 188, at 35 (brief submitted by Julius Henry Cohen);
see also Committee on Commerce, Trade and Commercial Law, supra note 239, at
154 ("The provisions for enforcing the agreement assure a prompt, speedy and
non-technical determination of the merits both of the application for enforcement
and of the matter in controversy."); H.R. Rep. No. 68-96 at 2 (1924)("The proce-
dure is very simple, following the lines of ordinary motion procedure, reducing
technicality, delay, and expense to a minimum and at the same time safeguard-
ing the rights of the parties.").


262. See 9 U.S.C. § 4 (1994). If there is an issue respecting the making of the arbitra-
tion agreement or the failure to comply, the court may proceed to trial on the
matter, unless a jury is requested to hear the dispute. See id.


266. An award may be vacated:

(1) Where the award was procured by corruption, fraud, or undue
means.
(2) Where there was evident partiality or corruption in the arbitrators,
or either of them.
(3) Where the arbitrators were guilty of misconduct in refusing to post-
pone the hearing, upon sufficient cause shown, or in refusing to hear
court's decision regarding the grant or denial of the application for a
stay, order compelling arbitration, or order confirming or modifying an
award are also set forth in the Act.\textsuperscript{268}

4. The Uniform Arbitration Act ("UAA") and State
Arbitration Law

The campaign to get a modern uniform arbitration act approved
and adopted by the states did not go as smoothly as did the campaign
to get the federal act passed.\textsuperscript{269} Although the ABA Committee on
Commerce, Trade and Commercial Law drafted a uniform act much
like the federal act, it was not approved by the Commissioners on Uni-
form State Laws. Rather, a draft, excluding enforcement of predis-
pute arbitration agreements, was overwhelmingly approved in
1924.\textsuperscript{270} The reason for the exclusion of predispute arbitration
clauses was based on a concern about the potential adhesive nature of
arbitration agreements and the fact that a person who signs an agree-
ment to arbitrate may be required to arbitrate at an inconvenient loca-
tion\textsuperscript{271}—two concerns voiced by the Montana Supreme Court in

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267. Modification is permitted:
(a) Where there was an evident material miscalculation of figures or an
evident material mistake in the description of any person, thing, or prop-
erty referred to in the award.
(b) Where the arbitrators have awarded upon a matter not submitted to
them, unless it is a matter not affecting the merits of the decision upon
the matter submitted.
(c) Where the award is imperfect in matter of form not affecting the mer-
its of the controversy.

268. See 9 U.S.C. § 16 (1994). This provision was added in 1988 as part of the Judicial
Improvements and Access to Justice Act. The purpose was to “prevent the appel-
late aspect of the litigation process from impeding the expeditious disposition of
an arbitration.” David D. Siegel, Practice Commentary in 9 U.S.C.A. § 16, at 374
(West Supp. 1998).

269. See generally MacNeil, American Arbitration Law, supra note 17, at 54-57.
270. See id. at 54; see also Sayre, supra note 187, at 597.
271. See MacNeil, American Arbitration Law, supra note 17, at 50-51.

With respect to the exclusion of predispute arbitration clauses, one Commis-
sioner stated:

It is felt by the great majority of the committee that this is wrong in
principle, to call upon men to agree in advance to arbitrate any difficul-
ties that might arise, particularly in view of the fact that that would be
done in most instances without any realization on the part of the con-
tracting parties as to what they were really doing. Of course, we all
agree that men ought to know what they are doing when they are sign-

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In an astonishing about-face, the ABA approved the "nonmodern" UAA of 1924, after much heated debate and discussion. Despite the ABA's approval, the 1924 UAA was adopted by only four states before the Commissioners on Uniform Rules removed it from the list of approved uniform rules. In contrast, by that time in 1943, fifteen states had adopted arbitration statutes that required enforcement of predispute arbitration clauses. The "common law aversion to arbitration [which ran] deep in state judiciaries," prevailed in those states that had not adopted either a modern statute or the UAA. Accordingly, in a majority of states, predispute arbitration clauses remained unenforceable and parties were free to revoke agreements to arbitrate at any time before the award was made.

In 1955, twelve years after it withdrew the 1924 UAA, the Commission on Uniform State Laws adopted a new UAA, which provided for enforcement of agreements to arbitrate future disputes. Thirty-four states and the District of Columbia have adopted the UAA. In addition, thirteen more states have adopted modern arbitration statutes, bringing the total to forty-seven states that specifically enforce predispute arbitration clauses.

Although those forty-seven states generally allow for the specific enforcement of predispute arbitration clauses, important differences exist between state statutory law, the UAA, and the FAA. For example, unlike the UAA and the FAA, numerous states refuse to enforce predispute arbitration clauses related to a specific subject matter. Some states require, in order for the provision to be enforceable, that the print type, size, language, and location of the predispute arbitration clause comply with certain requirements or that the parties separately sign or initial the clause.

Id. at 51.

272. See infra note 536 and accompanying text.

273. See supra note 222.

274. See Macneil, American Arbitration Law, supra note 17, at 54.

275. See id. at 55.


278. See id. at 1.


exempted from coverage of the arbitration statutes are labor/management contracts, employer/employee agreements, insurance policies, annuity contracts, agreements relating to personal injury or tort actions, and consumer purchase or credit agreements over a specific dollar amount. Although the differences between state law and the UAA do not cause any particular problems, the differences between state law and the FAA implicate federalism issues concerning the power of states to regulate arbitration clauses for reasons that arguably transcend a general hostility to arbitration.

B. Origins of the Clash

Although enacted in 1925, the supremacy of the FAA and its displacement of state law was not made explicit until 1984 when the Supreme Court decided Southland and held that the FAA was applicable in state court proceedings. While the Supreme Court has been severely criticized for its holding in Southland, the Southland opinion is the culmination of the Supreme Court's resolution of the

S.C. Code Ann. § 15-48-10 (Law. Co-op. 1998)(arbitration provision must meet placement and size requirements for validity, excludes employer/employee contracts (unless otherwise provided), and workmen's compensation claims, unemployment compensation claims, collective bargaining disputes, pre-agreements between lawyer-client or doctor-patient, and personal injury, insurance and annuity contracts); S.D. Codified Laws § 21-25A-3 (Michie 1998)(excludes insurance contracts); Tenn. Code Ann. § 29-5-302 (1998)(arbitration clauses in contracts relating to farm property, structures or goods or to property and structures utilized as a residence must be signed or initialed to be valid); Tex. Civ. Prac. & Rem. Code Ann. § 171.001 (West 1997)(excludes collective bargaining agreements, contracts for acquisition of property, services, money or credit with value greater than $50,000 unless parties and their attorneys sign provision, and personal injury claims unless agreed to upon advice of counsel and is signed by parties and counsel but no including worker's compensation claims); Vt. Stat. Ann. tit. 12, §§ 5652, 5653 (1997)(arbitration provision must contain language substantially similar to that provided in statute and must be signed by all parties; excludes labor interest arbitration and insurance contracts); Va. Code Ann. § 8.01-581.01 (Michie 1998)(statute shall not be construed to create right to arbitrate controversy regarding the employment terms of any employee of the State); Wash. Rev. Code Ann. § 7.04.010 (West 1998)(excludes employer/employee contracts unless otherwise provided); Wis. Stat. Ann. § 788.01 (West 1997)(excludes employer/employee contracts).

281. See supra note 280.
283. The Supreme Court had previously held in Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967), that the FAA, enacted pursuant to Congress' power under the Commerce Clause, was applicable in diversity actions brought in federal court.
dilemma it faced in interpreting and applying the FAA, caused by a change in the Court's attitude regarding the nature of the arbitral process and by its decision in *Erie R.R. Co. v. Tompkins*. The Court resolved the dilemma so as to give effect to one of the purposes intended by the drafters of the FAA—application of the FAA in diversity cases. But with that choice, came a consequence—the application of the FAA to state court proceedings.

1. The Problems Created by Erie and the Court's Perspective Regarding Arbitration

*Erie*, decided in 1938, thirteen years after the enactment of the FAA, overruled *Swift v. Tyson*, which had held that under the Rules of Decision Act, federal courts were not required to apply the common law of a state but could fashion federal common law in diversity cases. Accordingly, *Erie* required federal courts to follow state common law, as well as its statutory law, as the rule of decision in a diversity case. *Erie*, however, did more than overrule *Swift*; it also, "overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare." In *Erie*, the Court held that "except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case [in federal court based on diversity of citizenship] was the law of the state, [including its common law]." The Court further stated: "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general'; . . . and no clause in the Constitution purports to confer such a power upon the federal courts." Accordingly, there being no general federal common law, federal courts were no longer permitted to apply federal common law as the controlling substantive law in diversity actions.

285. 304 U.S. 64 (1938).
286. See id.
Some have argued that the *Erie* decision should have been a "nonevent" for the interpretation and application of the FAA in diversity cases and in state court proceedings. Federal courts had been ignoring the dictates of the Rules of Decision Act with respect to state arbitration law, whether common or statutory law, because of its view that arbitration involved a remedy and the governing law for remedies was the law of the forum. The FAA was thus characterized as a statute regarding procedure and, as such, its continuing application in diversity cases was not prohibited by the *Erie* doctrine nor, like other federal procedural statutes, could the FAA be applicable in state court. The Court's later decision in *Bernhardt v. Polygraphic Co.*, however, rejected this characterization of arbitration and the FAA, and thereby called into doubt the applicability of the FAA in diversity actions.

In *Bernhardt*, the Court declined to apply the FAA to a diversity action based on breach of an employment agreement because the transaction did not involve interstate commerce. In discussing its disagreement with the appellate court's conclusion that section 3 of the FAA, providing for a stay of litigation pending arbitration, applied, regardless of whether the transaction was one in interstate commerce, the Court, citing *Erie*, stated that if the FAA were to apply in a diversity case, "a constitutional question might be presented." The Court disagreed with the appellate court's view that arbitration was a mere form of trial—a procedural device. The Court stated:


293. At first, it did seem that *Erie* would be a nonevent. Until the Court's decision in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956), only a handful of cases considered the issue of *Erie* with respect to the application of the FAA in diversity cases and to state court proceedings. See Macneil, *American Arbitration Law*, supra note 17, at 134-36; see also Sternlight, supra note 3, at 650-51.


295. See Sternlight, supra note 3, at 651.


297. *Bernhardt* involved a breach of employment agreement. The action was originally brought in Vermont state court and was removed to the federal district court on the basis of diversity of citizenship. The contract contained a predispute arbitration clause requiring the submission of any dispute to arbitration before the AAA. The issue facing the Court was whether, in a diversity case, it was bound, pursuant to *Erie*, to apply state law, particularly Vermont law, which made predispute arbitratation agreements revocable at any time before an award was made, or the FAA, which would have made the agreement enforceable. The Court avoided the clash between state and federal law by finding that the FAA was inapplicable to the transaction because the contract did not evidence "a transaction involving commerce" pursuant to § 2 of the FAA. The FAA being deemed inapplicable on its face, the Court held that state law would apply. See id. at 200-201.

298. Id. at 202.
We deal here with a right to recover that owes its existence to one of the States, not to the United States.\textsuperscript{299} The federal court enforces the state created right by rules of procedure which it has acquired from the Federal Government and which therefore are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a state created right in a diversity case is... in substance "only another court of the State." The federal court therefore may not "substantially affect the enforcement of the right as given by the State." If the federal court allows arbitration where the state court would disallow it, the outcome of the litigation might depend on the courthouse where suit is brought.\textsuperscript{300} For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.\textsuperscript{301}

Although the \textit{Bernhardt} Court did not expressly reject the long-held view that enforcement of an arbitration provision was a mere procedural remedy, it did hold that arbitration was nonetheless outcome-determinative, and "substantive" from that perspective.\textsuperscript{302} The Court came to this conclusion by analyzing the differences between arbitration and litigation.\textsuperscript{303} Thus, the \textit{Erie} conflict was brought to a head by

\textsuperscript{299} The Court declined to view the FAA as a statute creating a federal right. \textit{Id.}
\textsuperscript{300} \textit{Id.} at 202-03 (citation omitted). The Court is referring here to the test set forth in \textit{Guaranty Trust Co. v. York}, 326 U.S. 99 (1945), for determining whether a federal court should apply a particular state law in a diversity case. There, the Court declined to characterize a state statute of limitations as either a procedural or substantive rule. Rather, the Court indicated that the proper inquiry in determining whether to apply state law in a diversity case was whether the state statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?

\textit{Guaranty Trust Co. v. York}, 326 U.S. 99, 109 (1945). This inquiry, the Court stated, satisfied the policy concerns of \textit{Erie}, that "for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." \textit{Id.} Thus, a "policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties." \textit{Id.} at 110.

\textsuperscript{301} \textit{Bernhardt v. Polygraphic Co.}, 350 U.S. 198, 203 (1956).
\textsuperscript{302} Justice Frankfurter in his concurrence did expressly find that arbitration was "substantive." \textit{See id.} at 208 (Frankfurter, J., concurring).
\textsuperscript{303} The Court stated:

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... Whether the arbitrators misconstrued a contract is not open to judicial review... Questions of fault or neglect are solely for the arbitrators' consideration... Arbitra-
the Bernhardt Court. If arbitration was outcome-determinative, as that term was used by the Court in Guaranty Trust Co.,\(^{304}\) federal courts in diversity suits could not, consistent with Erie, apply the FAA, but rather were required to follow state law. That result, of course, would have basically rendered the FAA meaningless.\(^{305}\)

The Court's view regarding the process of arbitration, although decidedly different from the view of the drafters of the FAA,\(^{306}\) was not surprising at this time. Three years earlier, in Wilko v. Swan,\(^{307}\) the Court had determined that the FAA was inapplicable to a claim based on the Securities Act of 1933. In reaching that conclusion, the Court questioned the effectiveness of arbitration to resolve issues brought pursuant to the Securities Act and expressed suspicion as to the effectiveness of the arbitral process itself.\(^{308}\) The Wilko and Bernhardt Courts' view of arbitration thus seems to maintain some of the judicial hostility to arbitration that existed in the common law prior to enactment of the FAA.\(^{309}\)
It is arguable that the Supreme Court's current view of arbitration is more akin to the view of the drafters of the FAA. In more recent cases, the Court has likened an agreement to arbitrate as a "specialized kind of forum-selection clause," where a party does not give up substantive rights but rather trades the "procedures and opportunity for review" of litigation for the "simplicity, informality, and expedition of arbitration," and has expressed its belief that arbitration is an adequate substitute for litigation in a judicial forum. One must wonder whether the Erie issue would have come up in Bernhardt if the Supreme Court's current view of arbitration had prevailed at that time. Ironically, if the Erie issue had not come up because of the belief that arbitration was merely procedural, the FAA would have still been held applicable in diversity cases but inapplicable in state court proceeding—a result the drafters probably expected.


The Supreme Court has been criticized for its view that arbitration is akin to adjudication in a judicial forum:

The argument that arbitration is "merely a form of trial" and therefore, has no impact on substantive rights is indeed a curious, if not blatantly specious, contention coming from the highest tribunal in a legal system the cardinal adage of which is that there are no rights without remedies. It is a legal culture in which legal procedure—due process and equal protection concerns—is the primary ingredient of justice. In both theory and practice, arbitration is a reduced form of adjudication to which parties consent because they want to avoid legal intricacies. Judicial and arbitral proceedings are two very different forms of achieving justice, responding to variegated goals. It is simply nonsense to equate them and to disregard the well-settled view that party consent, knowingly and freely given, is at the very core of arbitral adjudication's legitimacy.


313. The Supreme Court may be tempering its view, a bit, as to the parity of arbitration and litigation. In First Options, Inc. v. Kaplan, 514 U.S. 938, 942 (1995), the Court recognized that the issue of whom has the authority to determine whether a party has agreed to arbitrate (judge or arbitrator) can make a "critical difference to a party resisting arbitration."

314. See infra notes 336-60 & 425-32 and accompanying text.
Thus, it was not only a change in the law regarding the ability of federal courts to fashion federal common law that brought about the applicability of the FAA to state court proceedings, but it was also a change in attitude about the arbitral process itself.\footnote{315} Arbitration was no longer considered "merely a form of trial"\footnote{316} but a process that could bring about a substantive difference in the ultimate outcome of the dispute.

The \textit{Bernhardt} Court's characterization of arbitration is more realistic than the characterization that arbitration is merely a form of trial. It is undeniable that there are significant differences between arbitration and litigation. Those differences are intentional and are, in fact, touted by some as the benefits of arbitration over litigation.\footnote{317} Contrary to the recent pronouncements of the Supreme Court, \footnote{318} arbitration is not a substitute for litigation but rather is a qualitatively different process that, like litigation, has its benefits and drawbacks.\footnote{319}

Putting aside the differences between litigation and arbitration, the language of the FAA itself intuitively appears to provide a substantive right.\footnote{320} The federal statute, which makes arbitration agreements valid, irrevocable and enforceable, grants parties a "right to a remedy,"\footnote{321} which had not previously existed:

"Valid"... was meant to overrule the doctrine that future disputes provisions are "invalid" as attempts to oust courts of their jurisdiction, and... appear[s] to grant a right where none previously existed, even if a "right" to a "remedy" for breach of contract is a conceptual oddity. "Irrevocable" [was meant to address law which permitted parties to] "revoke" the arbitrator's authority at any time before [the] final hearing, although a revoking party [was liable for..."

\footnote{315}{The drafters of the FAA seemed to have accepted the remedial-procedural characterization of arbitration, although also recognizing the significant differences between arbitration and litigation. See, e.g., \textit{Joint Hearings}, supra note 188, at 5-8 (statement of Charles Bernheimer).}

\footnote{316}{That term was used by the First Circuit in \textit{Bernhardt} to characterize arbitration. See \textit{Bernhardt v. Polygraphic Co.}, 218 F.2d 948, 950 (1st Cir. 1955), \textit{rev'd}, 350 U.S. 198 (1956) (quoting \textit{Murray Oil Products Co. v. Mitsui & Co.}, 146 F.2d 381, 383 (2d Cir. 1944)).}

\footnote{317}{See infra notes 517-20 & 556-66 and accompanying text.}

\footnote{318}{See supra note 310.}

\footnote{319}{The notion that arbitration is a substitute for litigation has actually harmed the credibility of arbitration; it creates an expectation on behalf of the parties to an arbitration proceeding that they will receive all the benefits of litigation, such as the right to appeal, in the arbitral process. When that expectation is not realized, the arbitral process is deemed second-rate, or inferior to litigation.}

\footnote{320}{That conclusion is influenced by the current way of thinking about substance and procedure, rooted in \textit{Erie}, which, of course, came after enactment of the FAA.}

\footnote{321}{Note, \textit{Erie}, \textit{Bernhardt} and \textit{Section 2 of the United States Arbitration Act: A Farragio of Rights, Remedies, and A Right to a Remedy}, 69 \textit{Yale L.J.} 847, 858 (1960)(while recognizing that the concept of a right to a remedy is a "difficult one to grasp," author argues that "arbitration's place in our jurisprudence is unique, and it is more than just another remedy").}
expenses]. By withdrawing a right to revoke, "irrevocable" may be said to have granted the converse right to have an arbitration provision respected. The term "enforceable" seems included... as a prelude to provision for specific performance remedies—a peculiarly efficacious means of redressing breaches of arbitration provisions .... So analyzed, the words "valid, enforceable and irrevocable"... both changed the substantive law of arbitration and provided a new remedy.322

2. Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,323 Resolves the Erie Dilemma

The Supreme Court faced "the serious question of constitutional law"324 regarding the applicability of the FAA in diversity cases eleven years later in Prima Paint. Prima Paint sued Flood & Conklin in the United States District Court for the Southern District of New York, seeking recession of the consulting agreement between the parties because of fraudulent inducement.325 The parties had entered into the consulting agreement as part of the sale by Flood & Conklin to Prima Paint of its paint business. The consulting agreement required payment by Prima Paint to Flood & Conklin in exchange for Flood & Conklin's list of customers, covenant not to compete, and the consulting services of Flood & Conklin's chairman.326 The consulting agreement also contained an arbitration clause, requiring arbitration of the breach of contract claim before the AAA.327 When Prima Paint put the first payment due to Flood & Conklin in escrow because it believed that Flood & Conklin had breached the consulting agreement by fraudulently representing its solvency, Flood & Conklin served notice of its intent to arbitrate.328 Prima Paint responded by filing suit in federal court. Flood & Conklin thereafter sought a stay of the litigation and argued that the issue of whether there was fraud in the inducement of the consulting agreement was, under federal substantive law, an issue for the arbitrators and not for the court. Prima Paint argued that under New York law, which it asserted was controlling pursuant to Erie, claims of fraudulent inducement of the contract generally were decided by the court and not by arbitrators.329

322. Id. at 854-55. Although the author was discussing the phrases as used in the New York Arbitration Act, it was asserted that the meaning of the same terms in the FAA was significant, inasmuch as the draftsperson of the two Acts was the same and the FAA was clearly based on the New York Act. See supra note 228 and accompanying text.


326. See id. at 397.

327. See id. at 398.

328. See id.

329. See id.
The district court and the Second Circuit agreed with Flood & Conklin. The appellate court, relying on a substantially similar Second Circuit case, held that the rule that the arbitrator decides fraud in the inducement claims of the contract generally is one of "national substantive law" which governs even in the face of a contrary state rule. The Supreme Court affirmed, for somewhat different reasons. It found that section 4 of the FAA required arbitrators to decide claims of fraudulent inducement of the entire contract, and courts to decide claims of fraudulent inducement of the arbitration provision itself.

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330. See Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959). There, the Second Circuit went one step further than the United States Supreme Court was willing to go in Prima Paint when it stated that the FAA was national substantive law that governs in both federal and state court. The Supreme Court did eventually adopt the Second Circuit's view seventeen years later in Southland. See infra notes 412-21 and accompanying text.


332. See Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967). Although the Court found that section 4 of the FAA provided the "explicit answer" to the issue, the dissent viewed the Court's holding as, indeed, fashioning federal substantive law regarding the separability of the arbitration clause. See id. at 411 (Black, J., dissenting).

333. See id. at 400. Section 4 requires the court to compel arbitration if it is satisfied that the making of an arbitration provision or the failure of compliance is not in issue. See 9 U.S.C. § 4 (1994). The Prima Paint Court concluded that although Section 4 did not expressly apply to motions to stay litigation, "its principles must govern to avoid differing results depending upon which party first seeks federal court assistance." 1 MACNEIL, FEDERAL ARBITRATION LAW, supra note 2, at §14.2.3.

The dissent did not believe that section 4 provided the answer, but rather raised an important, critical question: "That language, considered alone . . . merely poses the further question of what kind of allegations put the making of the arbitration agreement in issue." Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 410 (1967)(Black, J., dissenting).

Relying on the language of section 4, the majority held that the validity of the arbitration clause is not put in issue when there is a claim that the container contract was fraudulently induced. The dissent disagreed and believed that a claim of fraudulent inducement of the container contract calls into question the validity of all provisions of the contract, including the arbitration clause. Both interpretations of section 4 seem plausible, although one is left with the impression that the dissent arrived at its view because of its concern over the competence of arbitrators to decide fraudulent inducement claims:

The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so.

Id. at 407. How the language of section 4 was interpreted seemed to depend ultimately on the interpreter's view of the arbitral process itself. The majority ap-
Unlike the Bernhardt Court, the Prima Paint Court was unable to avoid the constitutional issue raised by Erie because it found that the FAA applied to the transaction. The consulting agreement between the parties, which contained the arbitration clause, was one “evidencing a transaction in interstate commerce.”Because the contract was within the coverage of the FAA, the Court then had no choice but to decide which law to apply—New York or the FAA. Although not entirely free from doubt, New York law required the court to decide all claims of fraudulent inducement; in contrast, the FAA permitted the Court to decide only those claims of fraudulent inducement related solely to the arbitration provision itself.

After finding that section 4 provided an explicit answer to the issue of the separability of the arbitration clause, the Court explicitly recognized that it had to address the constitutionality of the application of section 4 of the FAA to the contract. The Court had three choices with respect to the Erie issue raised by Prima Paint. The Court could have found (i) that the FAA was a mere procedural statute involving only a remedy and, like other procedural statutes enacted by Congress pursuant to its powers under Article III, applicable in federal court only; (ii) that the FAA, although characterized as procedural and enacted pursuant to Congress’ power under Article III, was “outcome-determinative” pursuant to Erie and its progeny and thus inapplicable in an action brought in federal court on the basis of diversity of citizenship because the Rules of Decision Act requires state outcome-determinative rules to apply in such cases; or (iii) that the FAA was enacted pursuant to Congress’ power under the Commerce Clause and as such was applicable in federal court pursuant to the Rules of Decision Act which explicitly exempts “Acts of Congress” from its coverage.

The first option was problematic. As has been stated by scholars, the FAA was a “conceptual oddity of a ‘substantive right’ to a particular remedy,” a “peculiar amalgam of substance and remedy.”

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335. The Court stated: “There remains the question whether such a rule is constitutionally permissible.” Id. at 404.
336. See Feldman, supra note 177, at 695 n.25.
337. Problems in Federalism, supra note 305, at 482.
338. Hirshman, supra note 3, at 1316. Professor Hirshman finds however that even though the statutory reversal of the common law revocability doctrine by the FAA “would appear to be a substantive rule of contract law,” the view of the drafters was that it was merely procedural. Id. at 1315.
This option, however, was closed off by the Court in *Bernhardt* when it characterized arbitration as outcome-determinative. The second option is probably the constitutional issue the Court declined to review in *Bernhardt* and the one which Justice Frankfurter in *Bernhardt* would have avoided by making the FAA inapplicable in federal diversity actions. The constitutional issue thus raised by this option was whether Congress had the power under Article III to prescribe rules of decision in diversity cases. *Erie* made it clear that federal courts had no such powers.

The third option gave Congress the chance to avoid *Erie* and the constitutional issue altogether. The Court chose that option and, by doing so, made *Erie* irrelevant—not because the FAA was deemed procedural, but because it was based on Congress' power to enact substantive law under the Commerce Clause. The Court stated:

The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. . . . Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be affirmative. And 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."

In so finding, the Court relied on the legislative history of the FAA. The commentary has overwhelmingly and sharply criticized the Court's treatment of the legislative history. While one scholar has

339. See id. at 1320.
340. See Problems in Federalism, supra note 305 at 471.
342. "[I]mplicit in the [Bernhardt Court's] decision is that Congress does not have authority, under its powers over the federal judiciary to make the law that is applicable in diversity cases." Problems in Federalism, supra note 305, at 475. See also Hirshman, supra note 3, at 1320.
344. The United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.
346. See id. at 405-06 n.13. The FAA was silent as to the basis of Congress' power to enact it.
347. See, e.g., MacNeil, American Arbitration Law, supra note 17, at 170; 1 MacNeil, Federal Arbitration Law, supra note 2, at § 10; Atwood, supra note 3, at 79-80; Shell, supra note 284, at 49; Sternlight, supra note 3, at 663.

Justice Black in dissent in *Prima Paint* also criticized the Court's summary disposition of the *Erie* issue with "insufficiently supported allegations" that Congress based enactment of the FAA on its power under the commerce clause. See
gone so far as to call the Court’s discussion of the legislative history a “mischaracterization,” but another has found the legislative history to be “somewhat inconclusive.”

What is probably the case is that the Congress did not give “serious consideration as to which of the two alternative constitutional powers might serve to justify the legislation.” The reason for Congress’ and the drafters’ lack of consideration may be explained by the fact that at the time the FAA was enacted, Congress may have believed, pursuant to Swift, that “it still had power to create federal rules to govern questions of 'general law' arising in simple diversity cases—at least, absent any state statute to the contrary.” Or alternatively, the drafters may have believed that as long as one alternative was available, constitutional difficulties “concerning the scope and validity of the Act did not appear serious.”

In fairness to the Court, the legislative history explicitly cites the power of Congress over interstate commerce and admiralty as one source of its power and the statute itself also restricts its application to interstate and foreign commerce and admiralty transactions. However, that same legislative history discusses the fact that enforceability of an agreement to arbitrate 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.”

Moreover, the brief submitted by Julius Henry Cohen clearly indicated his belief that the source of congressional power to enact the statute was “the constitutional provision by which Congress is authorized to establish and con-


348. Atwood, supra note 3, at 80.
349. Problems in Federalism, supra note 305, at 484; see also Hirshman, supra note 3, at 1314 (“Little emerges from the legislative history other than unhappiness with prior law.”).
350. Problems in Federalism, supra note 305, at 468; see also Hirshman, supra note 3, at 1316 (“After Erie, Congress’ intent in enacting the FAA suddenly became important.”).
351. Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 n.13 (1967). The Court indicated that if Congress had in fact relied on this power, “it was only supplementary to the admiralty and commerce powers, which formed the principal bases of the legislation.”
352. Problems in Federalism, supra note 305, at 468.
353. “The remedy is founded also upon the Federal control over interstate commerce and over admiralty.” H.R. REP. No. 68-96, at 1 (1924). Of course, this statement could merely be setting forth an “additional source of congressional power to direct federal courts to enforce arbitration agreements.”
trol inferior federal courts." However, the brief also suggests that, although not entirely free from doubt, Congress had the authority under the Commerce Clause to enact the statute, although it did not have to rely on it.

So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States. It seems probable, however, that Congress has ample power to declare that all arbitration agreements connected with interstate commerce...shall be recognized as valid and enforceable even by State courts. In both cases the Federal power is supreme.

The only questions which apparently can be raised in this connection are whether the failure to enforce an agreement for arbitration imposes such a direct burden upon interstate commerce as seriously to hamper it or whether the enforcement of such a clause is a material benefit... Even if, however, it should be held that Congress has no power to declare generally that in all contracts relating to interstate commerce arbitration agreements shall be valid, the present statute is not materially affected. The primary purpose of the statute is to make enforceable [sic] 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.

One gets the impression from reading Cohen's brief that he would have liked to have relied, primarily, if not exclusively, on the Commerce Clause as the source of Congress' power, but that he had some doubts as to the constitutionality of doing so. He thus relied, as well, on Congress' power under Article III. Cohen's desire to use the Commerce Clause, and to even create an ambiguity as to the source of Congress' power, is consistent with Cohen's ultimate objective: to make arbitration agreements enforceable at both the state and federal level.

The legislative history makes at least one thing clear: the Court's pronouncement in *Prima Paint* that it was "clear beyond dispute" that Congress was relying on its interstate commerce power when it enacted the FAA was certainly an overstatement.

357. *Id.* at 38.
358. It could also be argued that Cohen emphasized Congress' Article III power rather than its Commerce Clause power to ensure passage of the Act. Surely, fewer issues regarding state sovereignty and federalism would have been raised if the Act were to apply only in federal court. *See Problems in Federalism, supra* note 305, at 468.
359. *See id.*
360. At the time of the passage of the FAA, Cohen's work to get the states to adopt a modern arbitration statute had already succeeded, to some extent. New York had previously passed a "modern" arbitration statute, shortly followed by New Jersey. A Uniform Arbitration Act had been drafted and submitted for review. *See MacNeil, American Arbitration Law, supra* note 17, at 84-91. A federal act, applicable in both state and federal court, would have ensured, for Cohen, a uniform rule of enforceability.
Irrespective of the Court's conclusion regarding Congress' intent and belief as to the source of its power to enact the FAA, it is undeniable that the purpose of the bill was to make arbitration agreements enforceable in federal court. The proponents of the bill were attempting to rectify the situation where an arbitration agreement between two New Yorkers, for example, would be held enforceable in New York courts, but one between a New York resident and a Connecticut resident would not be enforced if the action on the contract were brought in federal court. The proponents were also reacting to the fact that federal courts were unwilling to apply state arbitration statutes in admiralty cases. For these reasons, the proponents believed a federal act was needed to make arbitration agreements enforceable in federal court. That was the purpose of the Act. That purpose could not, however, be attained if the Court were to adopt option two and find that the FAA was enacted pursuant to Congress' power over the federal courts. Given the change in attitude regarding the substantive nature of arbitration, such an exercise of Congress' power in diversity cases would have been unconstitutional. Although Erie did not involve Congress' attempt to create a rule of decision to govern in diversity cases, the Court, by finding that the federal judiciary lacked that power, clearly intimated that Congress did as well. If option two had been chosen, it is likely that the FAA would have applied only in federal court when the basis for jurisdiction was something other than diversity. This result would have eliminated application of the FAA from the majority of cases brought in federal court and would have undoubtedly frustrated the intent of the drafters of the FAA.

Thus, while the result chosen by the Court may not be entirely consistent with Congress' and the drafters' belief as to the source of Congress' power to enact the statute, it is entirely consistent with the purpose of the Act. The Court was given an interpretative choice due to the fact that the FAA predated Erie and that Congress was not en-

361. Or, as has been pointed out, Congress' understanding of what had been presented to it by the ABA. See MacNeil, American Arbitration Law, supra note 17, at 108.
362. "[It is much more important to look to congressional purpose than to congressional belief as to the source of its powers." Problems in Federalism, supra note 305, at 484.
363. See Joint Hearings, supra note 188, at 6 (statement of Charles Bernheimer).
364. See id. at 16 (statement of Julius Henry Cohen).
365. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 88 (1938); see also Problems in Federalism, supra note 305, at 483.
366. "Even though the 1925 Congress and the drafters of the [Act] may have believed that they were invoking judicial regulatory authority, the act should not risk emasculation if other powers are available which would obviate present Erie constitutional problems." Problems in Federalism, supra note 305, at 484.
tirely clear as the source of its power. The Court followed the functionalist model and took the route that furthered the purpose of the Act and made it an effective federal law; a route that made sense given the language of the statute and the nature of the arbitral process. That result, however, displaced in diversity cases New York contract law which provided that a general allegation of fraud in the inducement of a contract puts into issue the validity of the arbitration provision. Thus, a neutral state contract law principle was preempted by the FAA. Although a seemingly narrow consequence, the Prima Paint case laid the foundation for expansive preemption of state arbitration law in proceedings in both state and federal court.

3. The Consequences of Prima Paint

There are at least two consequences of Prima Paint that have impacted on the applicability of state law vis-a-vis the FAA. The first was the creation by the Court of a liberal federal policy favoring arbitration. That liberal policy has led the Court to displace state law regarding contract interpretation and to uphold the arbitration of claims, based not on breach of contract, but on violation of federal law.

367. But see Macneil, American Arbitration Law, supra note 17, at 134-35 (asserting that it is clear that Congress was not acting pursuant to its Commerce Clause powers when it enacted the FAA, but rather was relying on its power over the federal courts).


369. See supra notes 320-322 and accompanying text discussing the substantive nature of arbitration.

370. Although apparently lost on many, "few knew what had hit them when [Prima Paint] was decided," 1 Macneil, Federal Arbitration Law, supra note 2, at § 10.5.1, this consequence was not lost on the Prima Paint dissent: "[T]he Court necessarily holds that federal law determines whether certain allegations put the making of the arbitration agreement in issue. And the Court approves the Second Circuit's fashioning of a federal separability rule which overrides state law to the contrary." Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 411 (1967)(Black, J., dissenting). The dissent argued that the rule was not only contrary to state law "but contrary to the intent of the parties and to accepted principles of contract law—a rule which indeed elevates arbitration provisions over all other contractual provisions." Id.

371. "Neutral" insofar as the contract principle at issue did not single out arbitration provisions for disparate treatment.

372. The New York contract law principle is not the only state contract law principle preempted by the FAA. See infra note 389-90 and accompanying text.

373. See infra notes 412-20 and accompanying text.

374. See infra notes 381-87 and accompanying text.
The second and arguably more far-reaching consequence has been the applicability of the FAA to state court proceedings.

i. The FAA's Strong Federal Policy Favoring Arbitration

The obvious consequence of holding that the FAA was enacted pursuant to Congress' power under the Commerce Clause was the finding by the Court that the FAA is substantive federal law, applicable in federal court. Beside the Act itself, the content of that federal law, however, has not been as obvious. In a finding unsupported by the legislative history of the FAA, the Court, in Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, attributed to that federal law what was implicit in the Prima Paint Court's confidence in the arbitral process: a strong federal policy favoring arbitration.

In Moses H. Cone, the Court found that it was an abuse of discretion for a federal court to stay an action seeking to compel arbitration pending the outcome of a parallel litigation brought in state court. The Court based its conclusion on, among other things, the fact that federal law was going to provide the rule of decision on the merits of the dispute - whether the dispute between the parties was within the scope of the arbitration clause. The Court stated:

The basic issue presented in Mercury's federal suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or federal court. Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the Act. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

One can only speculate as to where the Court found the strong federal policy favoring arbitration. The FAA itself contains no such language. The legislative history, while supportive of arbitration,
does not suggest, in any manner whatsoever, that such support should require that doubts concerning the scope of an arbitration clause be resolved in favor of arbitration. Indeed, the legislative history concerns itself more with what the Court has described as the FAA's primary purpose, to make arbitration agreements as enforceable as other contracts, but not more so. The policy articulated in Moses H. Cone goes beyond this and seems to say that inasmuch as Congress picked out arbitration agreements for special federal law treatment, it must mean that Congress favored those agreements that provide for arbitration to resolve disputes; why else would Congress have bothered requiring specific enforcement if it did not favor arbitration. The Court's conclusion was bolstered by the result in Prima Paint that Congress enacted the FAA pursuant to its powers under the Commerce Clause.

However, the Court's holding in Moses H. Cone clearly went beyond what the Court did in Prima Paint. The Court there relied on the language of the FAA itself to find that arbitration clauses were separable when a claim of fraudulent inducement of the container contract was made. The Court in Moses H. Cone did not rely on any

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383. In an article published after enactment of the FAA, Julius Henry Cohen recognized that arbitration is not appropriate for all kinds of disputes:

It is a remedy particularly suited to the disposition of the ordinary disputes between merchants as to questions of fact—[such as] quantity, quality. . . . It has a place also in the determination of the simpler questions of law . . . passage of title, the existence of warranties, or the questions of law that are complementary to the questions of fact. . . . It is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes. . . . It is not a proper remedy for . . . casual questions—questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges with a background of legal experience and established systems of law.


385. One scholar, at a loss to find a rationale for the Court's holding that arbitration agreements should be favored, suggests that the Court "was swayed or at least influenced by a desire to conserve judicial resources." Sternlight, supra note 3, at 660. Other scholars have made similar comments regarding the Court's decisions to hold the FAA applicable to diversity and state court proceedings. See, e.g., Macneil, American Arbitration Law, supra note 17, at 195; Carbonneau, Arbitral Justice, supra note 3, at 242; Carbonneau, A Plea for Statutory Reform, supra note 3, at 1951. At least with respect to Prima Paint, it can be argued that the Court's holding was based more on the dilemma the Court found itself in due to the change in the law and the way of thinking regarding substance and procedure, resulting from Erie, than on any desire to reduce the case loads of the federal and state judiciary.

386. Prima Paint "was itself firmly founded in particular language of the FAA. It need not therefore, necessarily have led to the development of a large penumbra of
language in the FAA to support its rule of construction. Rather, the Court developed the rule based on its perception of the policy underlying the FAA and thereby created binding federal substantive law: the FAA requires that any doubts concerning arbitrability are to be resolved with a healthy regard for the federal policy favoring arbitration.  

Although dealing with a federal statute, the Court was not bound to create a federal rule requiring liberal construction of the scope of the arbitration clause. The Court could have adopted a neutral principle of interpretation of the parties' intent, without any bias in favor of arbitration, as general contract law does regarding the interpretation of contracts. Instead, as it did in Prima Paint, the Court displaced state contract rules regarding intent concerning the scope of a contract term, even though those rules did not discriminate against arbitration.

Although the rule of contract interpretation set forth in Moses H. Cone was based on the FAA's liberal policy favoring arbitration agreements, the Court has since declined to apply it in two instances: first, to the interpretation of a choice of law clause incorporating state arbitration rules and, second, to the issue of whether a party has agreed to arbitrate the arbitrability issue. With respect to the latter issue, the Court stated in First Options of Chicago, Inc. v. Kaplan, general federal arbitration law or to one with a pro-arbitration bias."

1.  See Hirshman, supra note 3, at 1347. Although one would expect that a claim based on federal substantive law would confer subject matter jurisdiction on the federal courts, the FAA does not. The majority in Moses H. Cone recognized this anomaly: "[The FAA] creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 ...." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1982).

2.  See 1 MACNEIL, FEDERAL ARBITRATION LAW, supra note 2, at § 10.7.4.3.

3.  See id. at § 10.7.4.3.

4.  See Hirshman, supra note 3, at 1347.

5.  See Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989). There the Court declined to find that the California Court of Appeal offended Moses H. Cone when it interpreted a choice of law clause to mean that the parties intended the California arbitration rules to apply to their arbitration agreement. The Court stated:

There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in Moses H. Cone, nor does it offend any other policy embodied in the FAA.

Id. at 476; see also supra note 89.

that the controlling law is state law principles regarding the formation of contracts and that the presumption in favor of arbitrability, as set forth in *Moses H. Cone*, is not only inapplicable to the consent issue, but is actually reversed. Accordingly, the Court should not find that the parties consented to arbitrate the arbitrability issue unless there is "clear and unmistakable" evidence that they did so.

The Court's conclusion that the FAA reflects a strong federal policy favoring arbitration and its corresponding faith in the arbitral process itself led the Court to uphold arbitration of federal statutory claims. Despite its holding in *Wilko v. Swan*, where the Court declined to permit arbitration of claims based on the Securities Act of 1933, the Court, for the first time, upheld arbitration of a statutory claim in *Scherk v. Alberto-Culver Co.* There the Court held that *Wilko* did not bar arbitration of a section 10(b) claim under the Securities Exchange Act of 1934 when the arbitration clause was contained in an agreement evidencing an international transaction. Although the Court stressed that it was the international aspect of the transaction that distinguished it from *Wilko*, the Court's willingness to permit arbitration of claims under the Exchange Act, which was enacted to protect investors from fraudulent and deceptive practices, demonstrated unprecedented faith in the arbitral process and a sea

393. See id. at 944-45.
394. Id. at 944 (quoting AT&T Techs. v. Communications Workers, 475 U.S. 643, 649 (1986)).
397. See id. at 513. Alberto-Culver, an American company, purchased from Scherk, a German citizen, trademarks and businesses which were organized under the laws of Germany and Liechtenstein. Upon learning that the trademarks were encumbered, Alberto-Culver attempted to sue Scherk in a United States federal court even though the contract between the parties provided that any claim or controversies be referred to arbitration before the International Chamber of Commerce in Paris. See id. at 508.
398. See id. at 515. The Court found that difference to be "significant" and "crucial," which raised concerns that did not exist in *Wilko*. See id. Whereas it was clear in *Wilko* that the law of the United States would govern the controversy, it was uncertain what law would apply to the Alberto-Culver-Scherk controversy. That uncertainty, the Court found, made the predispute arbitration clause an "almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." Id. at 516.
399. The dissent, on the other hand, was not convinced that the arbitral process was appropriate for the Exchange Act claim:

We spoke at length in *Wilko* . . . elucidating the undesirable effects of remitting a securities plaintiff to an arbitral, rather than a judicial, forum. Here, as in *Wilko*, the allegations of fraudulent misrepresentation will involve "subjective findings on the purpose and knowledge" of the defendant, questions ill-determined by arbitrators without judicial instruction on the law. . . . An arbitral award can be made without explica-
change in the Court's prior attitude regarding the competence and adequacy of arbitration for statutory claims. The Court now looked at an agreement to arbitrate as "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." The Court has, since Scherk, permitted arbitration of other statutory claims, despite arguments that the arbitral process was inadequate to effectively vindicate such claims. Accordingly, the Court has upheld claims based on the Sherman Act, in an international context, the Securities Exchange Act of 1934, in a domestic context, the Racketeer Influenced and Corrupt Organizations Act (RICO), the Securities Act of 1933, and claims based on the Age Discrimination in Employment Act. Indeed, the Court has cited the FAA's pro-arbitration policy, as articulated in Moses H. Cone, as the basis for rejecting a blanket prohibition of arbitration of statutory claims. In Mitsubishi, the Court stated:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. . . . [T]he FAA

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404. See Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987). In upholding arbitration, the Court stated that the Wilko Court's "general suspicion of the desirability of arbitration and the competence of arbitral tribunals" had been subsequently rejected by the Court. Id. at 231-32. The Court thereafter rebuked each reason given by the Wilko Court for distrusting the adequacy of the arbitral forum. The Court had previously recognized that arbitrators are capable of handling complex legal and factual claims, that the streamlined procedures of arbitration did not entail any "consequential restrictions on substantive rights," and that it had refused to assume that arbitrators would not follow the law. Id. at 232.

405. See id.


itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.\(^{409}\)

The Court's confidence in arbitration, which likely led it to articulate the federal policy favoring arbitration, has profoundly impacted state contract law and state public policy. State contract law regarding separability and interpretation of arbitration clauses has been displaced by the FAA, and state arbitration law, exempting statutory claims from coverage, is preempted in those cases where the FAA is held applicable because of the interstate nature of the transaction.\(^{410}\)

\[\text{ii. The Applicability of the FAA to State Court Proceedings}\]

The natural implication of the Court's finding in *Prima Paint* that the FAA was enacted pursuant to Congress' power under the Commerce Clause, and its finding in *Moses H. Cone* that the FAA creates substantive federal law,\(^{411}\) was the applicability of the FAA to state court proceedings and its preemption of state laws that conflicted with it. The Court so held in *Southland Corp. v. Keating*.\(^{412}\) The Court's expansive reading of the FAA and its willingness to interpret it in a manner to give effect to the broad purposes the Court attributed to it made the FAA's application in state court proceedings an almost foregone conclusion. Once that conclusion was reached, the FAA's displacement of conflicting state law was preordained by the drafters of the Constitution, who made federal law supreme to state law and bound state court judges to recognize such supremacy,\(^{413}\) and by the Supreme Court's 1816 decision in *Martin v. Hunter's Lessee*, where the Court held a state court bound by federal law when adjudicating a state claim.\(^{414}\) As stated by a leading scholar on federal courts:

\[\text{[T]here has never existed doubt that state courts are obligated to consider and apply relevant principles of federal law which become applicable in the course of the adjudication of a state cause of action... If the federal system is to function properly, a state court cannot be permitted to ignore federal constitu-}\]

\(^{409}\) Id. at 626-27.


\(^{411}\) In dicta, the Court in *Moses H. Cone* stated that the FAA was indeed applicable in state court proceedings. See Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1982).


\(^{413}\) "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

\(^{414}\) See 14 U.S. (1 Wheat.) 304 (1816). There, the Virginia state court refused to give effect to a federal treaty when adjudicating conflicting claims to real property.
tional and statutory principles that conflict with state law. The supremacy clause does not appear to permit any other result. Absent evidence that Congress did not intend for the FAA to displace conflicting state law, it seemed clear, based on its holdings in *Prima Paint* and *Southland*, that the Court would find the FAA preemptive of conflicting state law. The FAA itself provides no such evidence; it is silent as to its preemptive effect on state law. The legislative history, although again not entirely free from doubt, on balance suggests that Congress did not intend or anticipate that the FAA would be applicable in state court proceedings. Julius Cohen, however, recognized, and even informed Congress, that if the FAA was enacted pursuant to the Commerce Clause, it would be applicable in state court and deemed supreme over state law.

The clash between federal and state law was unavoidable in *Southland*. There, franchisees brought a class action in California state court against Southland, owner and franchisor of 7-Eleven convenience stores, for breach of contract, fraud, breach of fiduciary duty, and violation of California's Franchise Investment Law. The contract between the franchisees and the franchisor contained a broad arbitration clause. The Franchise Investment Law, however, prohibited arbitration of claims brought pursuant to it. The FAA required enforcement of the arbitration agreement with respect to all claims asserted by the franchisees, even those claims brought pursuant to the Franchise Investment Law.

The Supreme Court found that the California Franchise Investment Law directly conflicted with section 2 of the FAA, which "declared a national policy favoring arbitration and withdrew the power of states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." The only limitations to enforcement of an agreement to arbitrate, the Court found, were those limits set forth in the FAA itself. Thus, state law cannot subject the enforceability of arbitration agreements to any additional limitations. The Court relied on the finding in *Prima Paint*.
that the FAA was enacted pursuant to Congress' power under the Commerce Clause to justify its application of the FAA to a state court proceeding:

The statements of the Court in *Prima Paint* that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts. . . . [W]hen Congress exercises its authority to enact substantive federal law under the Commerce Clause, it normally creates rules that are enforceable in state as well as federal courts.420

After relying on the natural consequence of Congress acting pursuant to its Commerce Clause power to find the FAA applicable in state court, the Court next considered the legislative history of the FAA to determine if that history supported that conclusion. As with its treatment of the legislative history in *Prima Paint*, the Court has also been criticized for its treatment of it in *Southland*.421

The Court reviewed the legislative history of the FAA and found "strong indications" that Congress intended the FAA to have a broad purpose and thus to apply to state court proceedings. The legislative history contains no explicit statement supporting that contention. The Court cites only one sentence from the House Report that arguably supports its contention.422 The Court ignores the bulk of the legislative history detailed by Justice O'Connor in her dissent423 which indicates that Congress did not, in fact, intend for the FAA to apply in state court.424

Relying on the legislative history, Justice O'Connor, joined by Justice Rehnquist, would not have applied the FAA to state court proceedings.425 Her conclusion was based solely on Congress' intent when enacting the FAA. She did not advocate or even suggest that *Prima Paint* be overruled. Indeed, she recognized that the *Prima Paint* decision was faithful to Congress' purpose when enacting the FAA, to make it applicable to diversity cases. She was unwilling, however, to carry *Prima Paint* further because she believed that such a result was...

420. *Id.* at 12 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 420 (1967)).

421. *See*, e.g., 1 MACNEIL, FEDERAL ARBITRATION LAW, *supra* note 2, at § 10.2 (discussing the Court's "painfully misleading history of the FAA").

422. *See* Southland Corp. v. Keating, 465 U.S. 1, 12-13 (1984). A persuasive argument has been made by one scholar that the sentence relied upon by the Court contains a typographical error that, when corrected, would not support the Court's contention. *See* MACNEIL, AMERICAN ARBITRATION LAW, *supra* note 17, at 140-41. It is that scholar's opinion that, regardless of the typographical error, the legislative history clearly does not support the Court's holding. *See id.* at 141.


424. The Supreme Court's selective reading or misreading of the legislative history has been comprehensively detailed by other commentators and will not be repeated here. *See supra* notes 347-49 & 421-22.

contrary to Congress' intent and unfaithful to Congress' purpose in enacting the FAA.\textsuperscript{426}

In response to Justice O'Connor's opinion that Congress viewed the FAA as a procedural statute applicable in federal court only,\textsuperscript{427} the majority offered two arguments. First, the Court asked why, if the statute was procedural, it was expressly tied to interstate commerce.\textsuperscript{428} Second, the Court argued that if the statute was applicable in federal court only, forum shopping would be "encourage[d] and reward[ed]."\textsuperscript{429} The Court was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted."\textsuperscript{430} The Court's argument seems reasonable, yet it is dependent on questionable conclusions the Court had previously reached. It makes sense only if Congress was relying on its Commerce Clause power when it enacted the FAA and if Congress intended the federal law to be supreme. The Court's conclusion that Congress acted pursuant to the Commerce Clause may be based more on fiction than reality, and its conclusion that Congress intended such a result is belied, to a large degree, by the legislative history of the FAA.

Although contrary to the bulk of the legislative history, the Court's decision makes sense from at least one important perspective. The enforceability of arbitration agreements was now going to be uniform. Accordingly, nondiverse parties, as well as diverse parties, were entitled to have their arbitration agreements enforced.\textsuperscript{431} This important

\textsuperscript{426} See id. at 30.

\textsuperscript{427} See id. at 14-15.

\textsuperscript{428} See id. at 14. One explanation has been provided: "The limitation was probably induced by fears of the reformers that even though arbitration was a procedural matter of the forum, an act extending to intrastate commerce might nonetheless be viewed as improperly intruding on states' rights." 1 MACNEIL, FEDERAL ARBITRATION LAW, supra note 2, at § 10.5.3 n.31.


\textsuperscript{430} Id.

\textsuperscript{431} Justice O'Connor disagreed with the Court's forum shopping analysis. She argued that neither the plaintiff nor the defendant would gain an advantage by making the FAA applicable in federal court only. If the parties were diverse, she maintained, the defendant could always remove the action to federal court. See id. at 33-34. Justice O'Connor's analysis while correct, is overly narrow: "Erie was not concerned with an advantage as between plaintiff and defendant, but with the ability of a diverse plaintiff, unlike a nondiverse plaintiff, to select a federal forum with a more favorable rule." Hirshman, supra note 3, at 1345 n.265.

Professor Hirshman asserts that neither the position of the majority nor of the dissent in \textit{Southland} is without flaw:

\textbf{Each construct—the FAA as a preemptive federal law governing commerce or as a directive only to the federal courts—produces anomalous}
policy consideration, first articulated in *Erie*, seems to have played an important part in the Court's decision. Accordingly, arbitration could no longer be used as a "tactical ploy for forum shopping."\textsuperscript{432} Nondiverse parties were no longer subject to state arbitration rules that either prohibited or limited the enforceability of arbitration agreements.

As in *Prima Paint*, the Court's interpretation of the FAA in *Southland* can be justified not because it is clearly consistent with the legislative history of the Act, but rather because it attempts a more dynamic or functionalist approach to the statute, one that focuses more on Congress' underlying purpose in enacting the FAA than on the less than clear legislative history.\textsuperscript{433} At the very minimum, Congress wanted arbitration agreements to be enforceable. Congress probably believed it was limited by the Constitution to making them enforceable in federal court only. But the proponents of the bill were clearly concerned with the notion that agreements would be held enforceable in one forum but not in another and they made that concern known to Congress. The point was uniformity of enforcement and the *Southland* decision achieves that purpose.\textsuperscript{434}

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\textsuperscript{432} Stempel, supra note 3, at 1414: "Prior to the Court's quiet revolution on arbitration, contracting parties frequently used judgemade 'exceptions' to arbitrability simply as tactical ploy for forum shopping or other efforts to gain a step on litigation opponents."

\textsuperscript{433} See id. at 1420-21. The Supreme Court's decision in *Prima Paint* to give the FAA a functional interpretation is arguably more defensible than its choice in *Southland*. In *Prima Paint*, the Supreme Court, in order to save the FAA from extinction, interpreted it in a manner to further Congress' purpose and to alleviate the problems created by *Erie* and the change in perspective regarding substance and procedure. The Supreme Court seems to have gone further in *Southland* and engaged in a functional interpretation to further, in some respect, the broader policy of the FAA, not as articulated by Congress, but as articulated by the Supreme Court in *Moses H. Cone*. But see Stempel, supra note 3, at 1421-22 (asserting that dynamicism of the Supreme Court's approach in *Southland* can be defended on numerous grounds).

\textsuperscript{434} As Professor Stempel stated: *Southland* can be well defended on the ground that it modernized the Act in a manner consistent with longstanding legal, social and political preferences. Construing the [FAA] to create substantive federal law "updates" and modernizes the statute to make it more useful in an era of growing caseloads and interest in ADR. When confronted with an interpretative fork in the road, there is nothing inherently wrong with the Court using these factors to decide the case so long as other, more commanding factors do not compel the court to choose a different path.
Once the Court determined that the FAA was applicable in state court proceedings, the Court then needed to determine if it preempted the California Franchise Investment Law. The Court concluded that the California law directly conflicted with the FAA and was thus preempted. The Court stated: "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." This conclusion, which Justice Stevens and others have argued was unnecessary, has had the most devastating consequence to state law seeking to limit the enforceability of arbitration agreements.

Justice Stevens concurred in the Court's decision regarding the applicability of the FAA to state court proceedings. Although recognizing that the legislative history demonstrated Congress' intent to enact only a procedural statute, Justice Stevens concluded that "the intervening developments in the law" compelled the Court's decision. However, Justice Stevens dissented as to the Court's conclusion regarding the preemption of the California law. He asserted that the exception to the enforcement of arbitration agreements, as set forth in the FAA's savings clause, left room "for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses." Because California law deemed any clause waiving compliance with the terms of the Franchise Law void, the arbitration clause would then be "revocable at law or in equity."

While agreeing that under the savings clause of section 2 of the FAA a party can assert general contract defenses to the arbitration clause, the majority rejected Justice Stevens' position that a defense based on the California law was a ground that existed for the revocation of any contract. Rather, it was "a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law." The majority was also concerned that if a state public policy such as that reflected in the Franchise Investment Law could void an otherwise enforceable arbitration clause, "states could wholly eviscerate congressional intent to place

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436. See id. at 17-21 (Stevens, J., concurring and dissenting).
437. See, e.g., Sternlight, supra note 3, at 667.
439. Id. at 17.
440. Id. at 18.
441. Id. at 20.
442. See id. at 16-17 n.11.
443. Id.
arbitration agreements 'upon the same footing as other contracts'... simply by passing statutes such as the Franchise Investment Law.'

Unlike the majority, the dissent was willing to give the savings clause a broad interpretation that would have "respect[ed]" California's public policy to protect franchisees and effectuate the remedial purposes of the Franchise Investment Act. The majority's decision was the death knell to other state laws that sought to provide protection to persons with unequal bargaining power. According to the majority, section 2 of the FAA left no room for such laws.

Many were troubled by the broad preemptive effect the Court gave the FAA in *Southland* insofar as it struck down a state law that was based not on a uniform policy against arbitration, but on "an independent state law interest such as judicial protection of particular statutory rights and remedies." Even if the statute at issue in *Southland* was part of a larger regulatory scheme regarding the relationship between franchisees and franchisors, the truth of the matter is that the state legislature determined that franchisees needed special protection from certain practices of the franchisors, including the practice of inserting an arbitration provision in the franchise agreement. That sentiment, while driven by the disparity in the bargaining power between the franchisor and franchisee, assumes that a franchisee needs protection from arbitration because it is inherently biased, or because the arbitral forum is inadequate to effectuate the remedial purposes of the franchise law. If the issue was solely to ensure knowing waiver of the right to a judicial forum, one would assume that California contract law would have been adequate to address that issue, or that the statute would have been more narrowly drawn, denying enforceability upon a showing that the franchisee did not voluntarily agree to waive his or her right to a judicial forum. Accordingly, the statute does seem to rest on a suspicion of arbitration that is contrary to the Supreme Court's and Congress' endorsement of arbitration. The broad reading of the savings clause as asserted by Justice Stevens, while respecting certain legitimate state policies, would also have had the effect of upholding a state policy reflecting to some degree suspicion of arbitration in the context of franchise relationships.

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444. *Id.* at 17 n.11 (citation omitted).
446. *Atwood*, *supra* note 3, at 88; see also *Feldman*, *supra* note 177, at 702-03; *Hirshman*, *supra* note 3, at 1315-16; *Sternlight*, *supra* note 3, at 666-67.
447. If, as Justice Stevens suggested, the FAA preempts only those state laws that are generally hostile to arbitration and not those where nonenforceability of an arbitration agreement is part of a larger regulatory scheme, a court would have to
The ink may not be dry on the issue of the applicability of the FAA to state court proceedings. As previously explained, the Supreme Court was recently asked in Dobson to overrule Southland so that Alabama could apply its own arbitration law that prohibited enforcement of predispute arbitration clauses. The Court declined to do so. However, Justices Scalia and Thomas dissented and advocated overruling Southland.

Justice Thomas' dissent, joined by Justice Scalia, contained the most comprehensive argument in favor of overruling Southland and rested on, among other things, federalism concerns. Like Justice O'Connor in Southland, Justice Thomas concluded that the FAA was inapplicable in state courts. Enforcement of arbitration agreements was deemed procedural by the Congress that enacted the FAA and because "[i]t would have been extraordinary for Congress to attempt to prescribe procedural rules for state courts" Congress did not intend the FAA to apply in state court. He also rejected the notion that changes in the law, particularly the new meaning subscribed to "substance" and "procedure" after Erie could alter the original meaning of the statute.

In further support of his opinion that Southland should be overruled, Justice Thomas focused on the fact that the FAA does not confer jurisdiction under 28 U.S.C. § 1331. He argued that if Congress intended to create substantive law, "then the breach of an arbitration..."

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448. See supra note 140 and accompanying text.
450. See id. at 271.
451. See id. at 284-97 (Thomas, J., dissenting).
452. Justice Scalia also wrote separately. He indicated his agreement with Justice Thomas and his belated agreement with Justice O'Connor regarding the proper interpretation of the FAA. See id. at 284 (Scalia, J., dissenting). Although he stated that he would not in the future dissent from judgments that rest on Southland (and he did not in Doctor's Associates), he did indicate that he "stand[s] ready to join four other Justices in overruling" Southland. Id. at 285.
453. Id. at 287-88 (Thomas, J., dissenting). Although rejected three decades earlier in Bernhardt (see supra notes 296-302 and accompanying text), Justice Thomas asserted that a "strong argument" can be made that arbitration statutes are procedural. He characterized arbitration agreements as a species of forum-selection clauses that "concern procedure rather than substance." He analogized to Federal Rule of Civil Procedure 73, which gives the district court, with the parties consent, the power to refer their case to a magistrate and Rule 53, which permits the district court to refer issues to a special master. See id. at 289.
454. See id. at 292. The changes in the law, referred to by Justice Thomas, more than altered the original meaning of the statute. Rather, those changes rendered the statute largely ineffective. Justice Thomas clearly rejected a functional interpretation of the FAA.
agreement covered by § 2 would give rise to a federal question within the subject-matter jurisdiction of the federal district courts." \(^{455}\) One possible answer to this argument is that Congress, while willing to make arbitration agreements enforceable, was unwilling to subject the federal courts to the increased workload that would result from the additional motion practice seeking to compel arbitration or stay litigation pending arbitration. \(^{456}\)

Justice Thomas also provided a rationale for the link to interstate commerce set forth in section 2 of the FAA. Contrary to the position taken by Justice Burger in *Southland*, \(^{457}\) Justice Thomas did not view the requirement that the arbitration agreement be one involving an interstate transaction as evidence that Congress intended the FAA to have universal applicability. Rather, he argued while Congress may have believed it had the power "to call upon federal courts to enforce arbitration agreements in every single case that came before them," it had no federal interest in doing so. \(^{458}\) He further argued that "[e]ven if the interstate commerce requirement created uncertainty about the original meaning of the statute," such uncertainty should be resolved "in light of core principles of federalism." \(^{459}\) In other words, Justice Thomas believed that the Court should be unwilling to displace state law absent more certainty that Congress intended to interfere with the role of the states in our federal system. \(^{460}\) Justice Burger in *Southland* resolved the uncertainty, although not expressly admitting its existence, in favor of effectuating the purposes of the FAA and furthering the strong federal policy favoring arbitration.

**iii. Consequences of *Southland***

The consequence for state law is clear: state laws that prohibit arbitration of certain claims are preempted by the FAA. \(^{461}\) Accordingly,

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455. Id. at 291.
456. See Hirshman, *supra* note 3, at 17; see also *Problems in Federalism*, supra note 305, at 490 ("Though the concept that a congressional statute can create a substantive right and yet not afford a basis for federal question jurisdiction may appear unreasonable, the Supreme Court held . . . that such a situation is entirely possible.").
457. See *supra* note 428 and accompanying text.
459. Id.
460. In response to Justice O'Connor's decision to concur in the majority decision to let *Southland* stand Justice Thomas stated "that preserving state autonomy in state courts" was sufficient justification to ignore the doctrine of *stare decisis*. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 296 (1995)(Thomas, J., dissenting).
461. See, e.g., Atwood, *supra* note 3, at 62 ("Under [*Southland*] the states lack power to ensure that specially favored claims, such as claims brought under investor-protection or consumer protection statutes will be resolved by a court rather an arbi-
since Southland, the Supreme Court has found that the FAA preempted a California state law that prohibited arbitration of wage claims, an Alabama law that refused to enforce a predispute arbitration clause in a consumer contract, and the Court stated in dictum that a state law prohibiting arbitrators from awarding punitive damages would be preempted as well. The lower federal and state courts have also found a whole host of state laws that required a judicial forum for the adjudication of certain categories of claims preempted by the FAA. Further, as we saw in Doctor's Associates,
Southland has been applied to preempt state laws that conditioned enforceability on compliance with rules regarding conspicuous notice of the arbitration clause. The conclusion that statutes like the Montana law at issue in Doctor's Associates are preempted by the FAA seems counter-intuitive inasmuch as the Montana statute was designed to ensure that persons signing arbitration clauses do so knowingly. However, although the Montana law arguably had a different purpose than the laws displaced in Southland, Perry and Dobson, its effect was the same—unenforceability of an agreement to arbitrate.

State laws requiring special notice were obviously enacted to address the very serious issue of the prevalent use of arbitration clauses.


467. See supra note 66 and accompanying text.

468. Montana was not interested in protecting certain claims from arbitration.
in adhesion contracts. Time and time again, the Supreme Court has shown that it simply does not believe that the FAA should play any role in limiting enforceability of arbitration clauses in contracts of adhesion—the FAA is unconcerned with protecting the weaker party from mandatory predispute arbitration clauses.\(^4\) Accordingly, the Supreme Court has upheld the enforceability of arbitration clauses in classic adhesion contracts/relationships: contracts between investors and broker-dealers,\(^4\) franchise agreements,\(^4\) employment relationships\(^4\) and bills of lading.\(^4\) The Court has expressly held that mere inequality in bargaining position in and of itself is not enough to hold an arbitration clause invalid,\(^4\) although courts should "remain attuned to well-supported claims of fraud and overreaching."\(^4\) It should be noted as well that the proponents of the FAA were equally unconcerned. In the first hearing on the FAA, Senator Walsh raised the issue of arbitration agreements in adhesion contracts and implied

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\(^4\) Although an "employment agreement" per se was not signed in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) nor in Perry v. Thomas, 482 U.S. 483 (1987), the Court nonetheless required the employees in those cases to arbitrate claims against their employers because the employees had signed U-4s (Uniform Application for Securities Industry Registration or Transfer) providing for arbitration of disputes with their employers.


that the FAA as drafted would in fact uphold the enforceability of such contracts.\footnote{476} Senator Walsh stated:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all. \ldots 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 tried before a tribunal in which he has no confidence at all.\footnote{477}

Senator Walsh asked Mr. Piatt to come up with a solution as to how his objection could be obviated.\footnote{478} Mr. Piatt responded that he saw the problem and that he would take it up with the other members of the drafting committee immediately.\footnote{479} Apparently nothing was done inasmuch as the bill that was enacted did not contain any language exempting adhesion contracts from its scope.\footnote{480}

The Supreme Court has construed the admittedly broad language of section 2 of the FAA to impose few limitations on the enforceability of agreements to arbitrate: to be enforceable arbitration agreements must be in writing, involve interstate or maritime commerce, and such an agreement will be enforceable save upon such grounds that exist at law or in equity for the revocation of any contract. Any other limitations, restrictions or conditions imposed by state law are preempted. This displacement of state law raises the issue of what role, if any, state law plays, and whether, if at all, states can protect residents from mandatory predispute arbitration clauses. These issues will be explored in the following section.

\section*{C. Role of State Law After Southland and Doctor's Associates}

It is clear that state arbitration laws that (i) make predispute arbitration clauses unenforceable, (ii) exempt from enforceability certain transactions or claims or (iii) require special notice of the arbitration clause, are preempted by the FAA and such state laws now in existence\footnote{481} will be found preempted if the transaction is one involving interstate commerce. Those state statutes that make predispute arbitration clauses unenforceable or that exempt certain claims from arbitration reflect residual hostility to arbitration. There is probably nothing, and there should be nothing, the state can do to further a public policy per se hostile to arbitration. On the other hand, other state efforts, particularly state statutes that require conspicuous notice or separate initialing, reflect a concern about the voluntary nature

\footnote{476}{See 1923 Hearings, supra note 228, at 9.}
\footnote{477}{Id. at 9.}
\footnote{478}{See id. at 11.}
\footnote{479}{See id.}
\footnote{480}{See supra note 280.}
\footnote{481}{See supra note 280.}
of the agreement to arbitrate or, more accurately stated, the unknowing relinquishment of the right to resolve a dispute in a judicial forum. State efforts to remedy that problem through their arbitration laws have been overwhelmingly unsuccessful. But all is not lost for the states. There is another way the states can address the concerns about mandatory arbitration—they can use their general contract laws.482

The Supreme Court in Perry provided insight into the role state law plays with respect to arbitration agreements—a role specifically designated by the FAA:

An agreement to arbitrate is valid, irrevocable and enforceable as a matter of federal law. . . "save upon such grounds as exist at law or inequity for the revocation of any contract." Thus, state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with the requirement of § 2.483

Thus, it is the "savings clause" in the FAA that contemplates a role for state general contract law.484 State contract law defenses are indeed applicable to arbitration agreements. Doctor's Associates itself made that clear.485 However, state contract law that singles out arbitration agreements for disparate treatment would indeed be preempted as would judicial decisions that apply consensual defenses more aggressively to arbitration agreements than to other contracts.486 The FAA requires that the state law, whether statutory or judge-made, be neutral. The goal of the FAA was to put arbitration agreements on the same footing as other agreements.487 That goal cannot be met if state law treats arbitration agreements differently. A state law that requires that the nonnegotiable arbitration clause be accompanied by special language or be in certain type but does not impose the same

482. In other words, state contract law applicable to contracts generally, not just to contracts to arbitrate. See 2 MacNeil, Federal Arbitration Law, supra note 2, at § 19.1.1.
484. "The Supreme Court in First Options v. Kaplan has made it clear that consent to arbitration is governed by general contract law of a particular state. . . . State contract law may be subject to supersession if it conflicts with the FAA or with general federal arbitration law." 2 MacNeil, Federal Arbitration Law, supra note 2, at § 17.2 (1995 Supp.).
485. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996). See also Jonathan E. Breckenridge, Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements, 1991 ANN. SURV. AM. L. 925.
487. See supra note 256 and accompanying text.
requirement on other nonnegotiable clauses in the container contract clearly runs afoul of the FAA. The FAA does not permit unequal treatment; it does not permit the states to single out arbitration agreements even though they are the product of an adhesion contract. If a state is sincerely concerned with the adhesive nature of the arbitration clause, the state may regulate it, but it must regulate all other provisions in the adhesion contract as well. A state's willingness to make all adhesion contracts unenforceable or to require conspicuous notice as to a whole variety of terms in an adhesion contract would demonstrate that the state was genuinely concerned about consent issues and that the regulation was not a cover for legislation hostile to or suspicious of arbitration.

It is undoubtedly a tall order for a state to prohibit adhesion contracts generally. Adhesion contracts are typically form contracts; form or standardized contracts, which account for the vast majority of contracts made, are, because of their perceived efficiency, considered "an essential element of modern commercial life." Accordingly, states are discouraged from overregulating them. However, state law does already regulate, to some degree, all contracts and imposes restrictions on the parties' freedom to contract. General contract law defenses are already available to the courts and the states to ensure assent to arbitration and fairness of the arbitration provision even when the provision is contained in an adhesion contract. The FAA does not displace general contract defenses such as fraud in the inducement of the arbitration provision, duress, unconscionability,

488. See W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529 (1971).
490. See Carrington & Haagen, supra note 3, at 337-38. Hacker v. Smith Barney, Harris Upham & Co., 501 N.Y.S. 2d 977 (Civ. Ct. 1986), aff'd, 519 N.Y.S. 2d 92 (App. Div. 1987), provides an excellent example of what a state legislature can do to protect consumers from mandatory arbitration without violating the FAA's mandate that arbitration agreements be treated like other contracts. There, the court refused to compel arbitration of a brokerage firm's customer's claim because the arbitration agreement violated "the size and legibility requirements" of a state statute which provides:

The portion of any printed contract or agreement involving a consumer transaction . . . where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence in any trial, hearing, or proceeding on behalf of the party who printed or prepared such contract or agreement. . . .

N.Y. C.P.L.R. § 4544 (McKinney 1997). The court's reliance on § 4544 is permissible because that statute applies to all provisions in a consumer contract, not just the arbitration provision.
and mistake. As long as the courts do not apply these doctrines “more aggressively” to the arbitration provisions than to other contracts, they remain the sole means available to the states and their judiciaries for the regulation of arbitration provisions.

While the Supreme Court of Montana could not have “avoided FAA preemption by labeling the reasoning [it] used in Doctor's Associates ‘unconscionability’ instead of ‘Montana Code section 27-5-114(4),’” inasmuch as that reasoning indicated Montana's disparate treatment of arbitration clauses, the doctrine of unconscionability can be used to address some of the concerns Justice Trieweiler raised with respect to the arbitration clause. Courts and commentators have recognized that provisions requiring arbitration in a distant location may be substantively unconscionable, as would provisions requiring the non-drafting party to pay for some or all of costs of arbitration.

492. For a discussion of the role of the unconscionability doctrine in invalidating arbitration provisions and its relationship to the FAA and preemption, see Ware, supra note 486. See also Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138 (Ct. App. 1997)(court invalidated arbitration provision because it was unconscionable; it was egregiously one-sided and restricted the remedies the weaker party could obtain for violation of statutory law and breach of contract).

493. Under the separability doctrine, such defenses to the validity of the arbitration agreement would be heard by the court. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

494. See supra note 486, at 1030.

495. Id. at 1016.

496. See Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563 (Ct. App. 1993)(arbitration provision requiring California residents to arbitrate claim against finance company in Minnesota unconscionable and unenforceable). But see Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157 (2d Cir. 1998)(provision requiring arbitration at distant location not unconscionable), cert. denied, 119 S. Ct. 867 (1999); Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975 (2d Cir. 1996)(same). See also Ware, supra note 486, at 1026-27; 2 MACNEIL, FEDERAL ARBITRATION LAW, supra note 2, at § 19.3.2. Both commentators recognize, however, that the Supreme Court has been extremely generous in upholding agreements requiring resolution of disputes in distant forums. See also Breckenridge, supra note 485, at 965 (“Claims that the designated arbitration forum is too distant have rarely been successful.”).

The criticism leveled at the Supreme Court for its refusal to interpret the FAA to permit states to carve out exceptions to enforcement or to condition enforcement is misplaced. In the savings clause, the FAA clearly designates state general contract law as the law that should govern such issues as disparity in bargaining power and assent to arbitration. If state contract law is insufficient to protect consumers and others from unfair arbitration agreements, which it may very well be, then state contract law must change. But again, the change must be evenhanded; it must apply to contracts generally and not just to arbitration agreements.

IV. APPROPRIATENESS OF ARBITRATION

The issue regarding the power of the states to regulate or otherwise condition enforceability of an arbitration agreement implicates the ultimate question of whether arbitration is an appropriate method of dispute resolution. With respect to those parties who have voluntarily and knowingly agreed to resolve their dispute by arbitration, resolution of the issue is irrelevant. The parties agreed to use arbitration and their choice should not be disturbed. Any other result would surely appear paternalistic and would suggest that a court is disturbing the parties' choice not because arbitration is inadequate, but because it is attempting to preserve its monopoly on dispute resolution.

The issue must be resolved against arbitration when the agreement to arbitrate is the product of an adhesion contract. Although it could be argued that both parties voluntarily agreed to arbitrate, inso-

2d 177 (Fla. Dist. Ct. App. 1993) (improper to refuse to compel arbitration because party claims he or she is unable to pay required fees). See also Ware, supra note 486, at 1023-24.


498. One commentator has noted that parties raising such defenses are usually unsuccessful. See 2 MacNeil, Federal Arbitration Law, supra note 2, at § 19.2.1.
far as the party in the weaker bargaining position had the "choice" not
to do business with the stronger party who insisted on the arbitration
clause, that kind of "voluntary choice" does not go directly to the arbi-
tration clause itself. In other words, although the party agreed to do
business with the other party, he or she did not independently make a
determination as to whether arbitration was appropriate for the type
of dispute that may arise. That is one of the fundamental problems
with compulsory arbitration clauses. Only one party, the party who
insists on the clause, has made the determination that arbitration is
the best method to resolve the dispute. Only that party's costs and
benefits were factored into the decision to use arbitration as the dis-
pute resolution process. The costs and benefits to the party in the
weaker bargaining position were not considered.

Accordingly, because the party in the weaker bargaining position has not had the op-
portunity to consider whether the costs and benefits of arbitration weigh in favor or against the relinquishment of the right to a judicial
forum, arbitration must be considered inappropriate.

That arbitration is inappropriate or unfair under these circum-
stances is, of course, the natural reaction of those who are deprived of
any real choice but to agree to arbitrate. Arbitration, it is believed,
must be inappropriate because the stronger party insisted upon it and
the stronger party will do all he or she can do to further his or her own
interests. It would be inconceivable that the stronger party would
choose a dispute resolution process that would give the weaker party
an advantage. It is equally inconceivable that the stronger party
would choose a neutral process, where both parties interests are
equally addressed. The use of mandatory arbitration clauses has re-
sulted in this very type of thinking about the arbitral process.

Whether or not these conclusions are accurate does not really matter.
What matters is the perception and the perception is that arbitration,
when compelled, must further the interests of the stronger party to
the detriment of the weaker party—and litigation, that process that

499. See Robert A. Baruch Bush, Dispute Resolution Alternatives and the Goals of
Civil Justice: Jurisdictional Principles for Process Choice, 1984 Wis. L. Rev. 893,
993-94.

500. See id.

501. See Leo Kanowitz, Alternative Dispute Resolution and the Public Interest: The
alternative dispute resolution devices (including arbitration) are flawless; each
method has strengths and weaknesses and choosing one over another inevitably
requires trade-offs, calculations of relative costs and benefits, and a variety of
value judgments.").

502. It has been asserted, based on admittedly sketchy evidence, that employers, for
example, insist upon arbitration because it reduces their payout. See Schwartz,
supra note 3, at 64-67; see also Sternlight, supra note 3, at 680-84 (suggesting
that “big business” insists on arbitration for the same reason).
has been denied to the weaker party, furthers the weaker party’s interests or else equalizes the inequality in power.\textsuperscript{503}

When arbitration clauses are presented on a take it or leave it basis, the very foundation of arbitration is shaken. Commercial arbitration arose and gained favor in this country as a means for a community of merchants and businesspeople to control their own disputes.\textsuperscript{504} It was believed that the business community could better handle the dispute than the courts or juries. Arbitrators who were familiar with the customs in the industry and with the business practices of the group could make more intelligent decisions than inexperienced and unknowledgeable judges or juries.\textsuperscript{505} Moreover, arbitration would not cause the same kind of disruption in the business relationship that litigation would cause. Commercial arbitration was thus developed by members of a community to achieve certain characteristics in the handling of disputes with other members of the community: easy access to the process, speed in the resolution of a dispute with minimal cost, preservation of business relationships, and intelligent and practical decisions by those intimately familiar with the business world.\textsuperscript{506} Accordingly, when two parties voluntarily agreed to arbitrate, their agreement demonstrated a shared commitment to those values.\textsuperscript{507} The same cannot be said when the agreement to arbitrate is not voluntarily entered. The party in the weaker bargaining position may not be, and most likely is not, a member of the business community that determined that arbitration is the more appropriate method of dispute resolution for a commercial dispute. Moreover, the weaker party may have very different values and expectations concerning the manner in which the dispute should be handled. It is this disparity in the expectations and values between the parties that causes the tension seen in so many cases, such as Doctor's Associates, where the party with less power attempts to use the judicial process to...
get out of his or her agreement to arbitrate.\textsuperscript{508} Arbitration becomes suspect; it is viewed by those in the weaker bargaining position as a cover for the interests of the party in the stronger bargaining position.\textsuperscript{509} It is deemed illegitimate. Resolution of the dispute in a judicial forum becomes the only fair method for achieving justice.

However, it is an overstatement to conclude that, even for persons in a weaker bargaining position, litigation is always the best method for resolution of the dispute and that arbitration is always inappropriate.\textsuperscript{510} The prevalence of arbitration clauses in adhesion contracts and the issues surrounding consent have unfortunately led some to that exact conclusion. When it is forced upon an unwitting party, the process becomes suspect. The result is that the arbitration process itself has been undermined; any benefits that could accrue to the weaker party are deemed illusory or not worth the costs associated with the process.

The undermining of arbitration is an unfortunate consequence of the use of arbitration clauses in adhesion contracts. But arbitration does have its benefits, benefits which may make it an attractive process choice to many litigants. Accordingly, it is entirely possible that, given the particular kind of dispute, arbitration would be a more appropriate dispute resolution choice. Further, it is entirely possible that the party in the weaker bargaining position would voluntarily agree to arbitrate if that party had been given a real choice and had been counseled about the costs and benefits of arbitration vis-a-vis litigation.\textsuperscript{511} However, the questioning and examination of arbitration

\textsuperscript{508} The time and costs associated with the weaker party using the litigation process to avoid the arbitration clause could, of course, be eliminated if the party in the stronger position did not refuse to negotiate the clause. Knowledge and negotiation of the clause would undoubtedly help ease the tension and put the parties closer to shared values. By refusing to negotiate the clause or to even call attention to it, parties in the stronger position suggest by their behavior that they are trying to gain an advantage over the other party. It also suggests that if the weaker party knew about arbitration, that party would not agree to it. That conclusion is not necessarily accurate. A party in a weaker bargaining position may in fact conclude that arbitration is a sensible way to resolve a present or future dispute. See G. Richard Shell, \textit{Fair Play, Consent and Securities Arbitration: A Comment on Spiedel}, 62 \textit{Brook L. Rev.} 1365, 1368 (1996)(author asserts that a significant number of investors, when given a choice, would agree to arbitrate disputes with broker-dealers if arbitration gained a reputation for fairness). It is the reluctance to bring attention to the clause and the refusal to budge on it that create the suspicion that ultimately undermines the arbitral process.

\textsuperscript{509} \textit{See supra} note 33.

\textsuperscript{510} It is equally an exaggeration to assert, as those who insist on the arbitration clause, that arbitration is always the best method for resolution of any dispute that may arise between the parties.

\textsuperscript{511} The purpose of this discussion is not to suggest that arbitration is always good for the party who is bound to arbitrate because of a contract of adhesion but rather to restore some balance into the discussion about the process of arbitration. Many commentators have persuasively suggested that arbitration clauses in contracts
that is occurring today, in response to the use of arbitration clauses in adhesion contracts, would suggest to some that arbitration is never a viable dispute resolution process, regardless of the type of dispute, amount in controversy, relationship between the parties or voluntary nature of the decision to arbitrate. Compulsory or compelled arbitration has tainted arbitration as a dispute resolution process. That taint will undeniably affect the decision by those who have a real choice to make as to whether to submit an existing or future dispute to arbitration. Arbitration will be shunned, even though, in many kinds of cases, it may be a particularly good way to resolve a dispute.

Arbitration should be seriously examined and questioned. To be fair, however, that questioning and examination of arbitration must take into account the benefits of arbitration and must be willing to view arbitration as a distinct and independent process of dispute resolution.\textsuperscript{512} Too often, arbitration is simply compared to litigation and when such comparison is made, arbitration invariably comes out looking like a second-rate method to resolve disputes\textsuperscript{513} and achieve justice, particularly because of the cultural bias in favor of a formal legal system.\textsuperscript{514} While comparisons between arbitration and other dispute resolution methods are indeed necessary in order to help define and understand the process, arbitration's similarities or dissimilarities to the litigation model should not be the only measure of arbitration's worth. Only when arbitration is viewed, not as a substitute for litigation,\textsuperscript{515} but rather as a distinct and separate dispute resolution process, can a fair assessment of arbitration be made.

\textsuperscript{512}See Bush, supra note 499, at 990.

\textsuperscript{513}See Carbonneau, A Plea for Statutory Reform, supra note 3, at 265 ("In both theory and practice, arbitration is a reduced form of adjudication to which parties consent because they want to avoid legal intricacies.").

\textsuperscript{514}See generally Auerbach, supra note 504, at 3, 11; Carbonneau, Arbitral Justice, supra note 3, at 1946-51. Professor Bush suggests that the bias in favor of court adjudication is the result of incomplete analysis of the costs associated with the process. See Bush, supra note 499, at 995-97.

\textsuperscript{515}The Supreme Court is guilty of planting or legitimizing the notion that arbitration is a substitute for litigation. See, e.g., Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); see also Carbonneau, A Plea for Statutory Reform, supra note 3, at 263-64; Sternlight, supra note 3, at 672-73.

It is not entirely fair or even very accurate to view arbitration solely as a substitute for litigation inasmuch as arbitration predates formal state sponsored methods of dispute resolution. See supra note 185 and accompanying text.
At least judicially, one of the most recent and less friendly assessments of arbitration was made by the Montana Supreme Court in the *Doctor's Associates* case—a case where the arbitration clause was contained in an adhesion contract. The court’s critique of arbitration succumbs to the natural inclination of simply comparing it to litigation and finding it inadequate.

Both the majority and Justice Trieweiler in his concurrence discuss the “lack of procedural safeguards” in arbitration. Justice Trieweiler gives a litany of the procedural safeguards adopted by the State of Montana to insure fairness to litigants that are absent in arbitration. His discussion assumes that the litigation process, with its full panoply of procedures, will achieve a fair result. The in-

516. For recent commentary critical of arbitration, see e.g., Carrington & Haagen, *supra* note 3, Schwartz, *supra* note 3 and Sternlight, *supra* note 3.

517. *See* Casarotto v. Lombardi, 886 P.2d 931, 935-36, 939-40 (Mont. 1994), *cert. granted and judgment vacated sub nom.* Doctor’s Assocs., Inc. v. Casarotto, 515 U.S. 1129 (1995), *on remand to Casarotto v. Lombardi, 901 P.2d 596 (Mont. 1995), rev'd sub nom.* Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996). Justice Trieweiler also criticizes judges who endorse arbitration because it reduces their case loads. *See id.* at 939 (Trieweiler, J., concurring). While Justice Trieweiler is right that a court’s self interest in reducing its case load should have no bearing on its interpretation of an arbitration clause or on the FAA, it is impossible to determine whether and how a court’s decision is influenced by its own concern over its calendar. It is equally impossible to determine whether an attorney’s dissatisfaction with arbitration or his or her advice to a client to challenge the arbitration clause is influenced by his or her own self interest. Arbitration, which may be more expeditious than litigation, may mean less fees than if the case were litigated. “High litigation costs are fees to the clients but they are income to the lawyers. Delays benefit at least one side in every litigation and sometimes both. Those who profit from the present system are unlikely to lead the assault on the citadel.” Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646 (1985). Attorney self interest was identified many years ago as one of the stumbling blocks to the endorsement of arbitration. *See* Joint Hearings, *supra* note 188, at 7.

518. He lists, for example, “standards for appellate review which protect litigants from human error or the potential arbitrariness of any one individual;” the state’s belief in the rule of law which the appellate courts will enforce even if the trial courts do not; rules for venue and jurisdiction to protect citizens from having to litigate at an inconvenient forum; liberal discovery rules that ensure candid and open exchanges of information; accessibility of the courts to everyone; and contract and tort laws that protect citizens from unfair business practices. *See* Casarotto v. Lombardi, 886 P.2d at 939-40.

Justice Trieweiler’s assumption that these procedural safeguards adopted by Montana are indispensable to obtain fairness is not shared by all. *See generally* Newman, *supra* note 517.


The court also ignores the fact that the Casarottos’ action would most likely have been settled out of court prior to trial with no decision on the merits or
tended and inextricable conclusion to be drawn from the discussion is that, absent those safeguards, the arbitration process is not, and cannot, be fair, nor can it achieve justice. That argument suggests a narrow notion of fairness—that only the procedural protections and other items listed impact on fairness. Justice Trieweiler does not take into account the impact on fairness and justice that results when a party must wait years for a decision which is probably at a cost far in excess of what the party expected. Arbitration undeniably and purposefully does not have all the procedures that exist in a judicial forum. In order to maintain simplicity and in order to expedite resolution of the claim, the procedures in arbitration are streamlined. However, it does not follow that because arbitration does not provide the same procedures to the same extent provided in a judicial forum, it cannot achieve a fair result. It does not necessarily follow either that the litigation process with its full panoply of procedures will, in fact, achieve a fair result.

The majority specifically discusses the fact that the rules of evidence are inapplicable in an arbitration proceeding and according to the rules of the AAA, discovery is at the sole discretion of the arbitrator. The court does not indicate why the rules of evidence are essential in an arbitration proceeding where the factfinder is not a jury, but a mutually agreed upon neutral third party or parties who most likely have some expertise in the subject matter of the dispute. The discomfort the court feels regarding the AAA rule giving the arbitrator(s) discretion regarding the extent of pretrial discovery is, at first blush, understandable, especially to those trained in the law and who have knowledge about the origins and purposes of the discovery process; a process instituted at the pretrial phase to eliminate the ele-

opportunity for the Casarottos to tell their story. See Samuel R. Gross & Kent D. Syverud, Don't Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. Rev. 1 (1996). Arbitration allows the Casarottos a better chance to get a decision on the merits either because there will be less pressure on them to settle their claims because the costs and time delay of arbitration will be less than would be experienced in litigation or because it is unlikely that their complaint will be dismissed prior to the hearing for failure to state a claim or for some other reason. Cf. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1488 (D.C. Cir. 1997) (in upholding arbitration of a Title VII claim, court stated: “Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exits in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts.”).

520. Most litigants expect to have their “day” in court—not the typical two to three years it takes to get a case to a jury.

521. See Newman, supra note 517, at 1646-52.


ment of surprise at trial. However, the court, without any factual basis, seems to suggest that the arbitrator(s), again, those factfinders mutually agreed upon by the parties, are either likely to abuse that discretion or are incapable of making informed decisions regarding the extent of discovery. That conclusion is unsupported and is contrary to the ethical duties of the arbitrator. The court also seems to conclude that the arbitrator will deny discovery and thereby deprive a person of the opportunity to discover the truth. It has been suggested by one commentator that the AAA rule regarding discovery is insufficient, but for the opposite reason suggested by the court: that the rule does not expressly limit discovery and, consequently, parties are abusing the discovery permitted because arbitrators “often permit lengthy and repetitive discovery” which has transformed the arbitration process into one that too closely mimics the litigation process and undermines the objectives of the arbitral process.

Justice Trieweiler discusses the availability of appellate review in state court that is restricted in arbitration. The FAA limits the grounds upon which to appeal an arbitrator’s award. Those grounds are concerned specifically with making sure that the parties and the factfinder chosen by the parties acted properly in procuring and making the award. Accordingly, awards may be vacated if procured by fraud or corruption or where the arbitrator was biased or guilty of other misconduct. Those grounds alone are available, although some courts have expressed a willingness to vacate an award where the arbitrators have manifestly disregarded the law. The limited right to appeal an arbitrator’s decision is deemed, by some, to be one of the hallmarks of arbitration—a benefit rather than a detriment. The unavailability of a general right to appeal an award makes the award final so that the parties can move on in their business relationships, and it reduces the costs and delays associated with bringing the claim.

The majority, as well as the concurrence, also touch upon the fact that the arbitrator does not have to follow the law when rendering a

524. See American Arbitration Assoc’n, The Code of Ethics for Arbitrators in Commercial Disputes, (1996). The Code was originally prepared in 1977 by a joint committee of the AAA and the ABA and has been approved by both associations. The Code requires, for example, that the arbitrator “uphold the integrity and fairness of the arbitration process,” Canon I, and that he or she “conduct the proceedings fairly and diligently,” Canon IV.


527. See supra note 266.

528. See infra note 532 and accompanying text.

529. See, e.g., Stipanowich, supra note 312, at 475 (“all groups [see] finality of arbitration awards as a virtue of the process”).

530. See id. at 439-40.
decision on the merits. While it is pretty clear that arbitrators do in fact follow the law,\textsuperscript{531} it is undeniable that there is no language in the FAA that imposes such an obligation.\textsuperscript{532} However, the court assumes that the lack of such an obligation is necessarily a negative aspect of arbitration and presupposes that justice is achieved only when there is strict adherence to the law. The lack of obligation to follow the law can however be viewed as a positive attribute of arbitration—making it a dispute resolution process where justice and fairness can be achieved in spite of the law. Arbitrators who base their decisions on what is "fair," "just" or 'sensible' under the circumstances,"\textsuperscript{533} may be more attractive to a party than a judge or jury who is sworn to uphold and strictly apply the law, even though such application may produce an unjust result.\textsuperscript{534}

The expense of arbitration is also discussed by the court.\textsuperscript{535} The court is troubled by the fact that the arbitration clause requires the Casarottos to travel to Connecticut to arbitrate the claim and the


\textsuperscript{532} Although the FAA clearly does not require that the arbitrators base their decision on the law, some courts have expressed a willingness to vacate an award where it is shown that the arbitrators manifestly disregarded the law. See, e.g., Carte Blanche (Singapore) PTE., Ltd. v. Carte Blanche Inv'l, 888 F.2d 260 (2d Cir. 1989); O.R. Sec., Inc. v. Professional Planning Assocs., Inc., 857 F.2d 742 (11th Cir. 1988). One court has, in fact, vacated an award because the arbitrators ignored the law or the evidence or both. See Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998); see also Stephen L. Hayford, \textit{Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards}, 30 GA. L. REV. 731, 776 (1996).


\textsuperscript{534} Although I am not an expert on contract law, my initial reading of the facts in \textit{Casarotto}, as provided in the court opinions, suggested to me that the Casarottos may indeed be better off with an arbitrator, who is willing to do what is fair under the circumstances, than with a judge or jury who is bound to strictly follow the law. Although it is not entirely clear from the limited facts available, it appears that the Casarottos, who are claiming that Doctor's Associates made an oral agreement to give them their preferred location, may have some problems under various contract theories in proving their breach of contract claim. The statute of frauds comes to mind, as well as the likely existence of a clause in the franchise agreement to the effect that the agreement embodies all the representations of the parties and that no party is relying on any other representation not reflected in the contract when signing the agreement.

\textsuperscript{535} See \textit{Casarotto} v. Lombardi, 886 P.2d 931, 939 (Mont. 1994), cert. granted and judgment vacated sub nom. Doctor's Assocs. Inc. v. \textit{Casarotto}, 515 U.S. 1129 (1995), on remand to \textit{Casarotto} v. Lombardi, 901 P.2d 596 (Mont. 1995), rev'd sub nom. Doctor's Assocs., Inc. v. \textit{Casarotto}, 517 U.S. 681 (1996). Professor Ware explains the dilemma faced by those drafters who insist on predispute arbitration clauses. If the drafter agrees to pay the costs of arbitration, an impression is created that the arbitrator will rule in that person's favor because the arbitrator is being paid by that person. On the other hand, requiring the weaker party to
court details the potential expense of the arbitration process, an expense that, pursuant to the agreement, must be shared by the parties, regardless of who wins or loses the dispute.\textsuperscript{536} Undoubtedly, arbitration is going to cost the parties significant money; filing fees, administrative fees and arbitrators’ fees will be assessed. In discussing the expense of arbitration however, the court curiously declines here, unlike in its discussion of the existence of procedural safeguards, to compare arbitration to litigation. Litigation is not going to be a free proposition to the Casarottos or to anyone else. Although, as Justice Trieweiler says, courts are provided at public expense,\textsuperscript{537} litigation, especially a complex commercial case like the one at issue in Doctor’s Associates, is nevertheless costly; the discovery process will, in fact, be one of the more significant elements of the total cost,\textsuperscript{538} a cost that is unlikely to be as great in arbitration. Arbitration, for that reason and others, is generally less expensive than litigation.\textsuperscript{539} The court tells us that because Connecticut law is called for in the contract, the Casarottos would have had to hire a Connecticut attorney. Realistically, the Casarottos would have to hire an attorney even if the agreement called for the application of Montana law. There are no facts in the case to suggest that the Casarottos were experts in Montana contract and tort law. In addition, even if the Casarottos were free to institute suit in Montana state court, it is also likely that they would feel compelled to hire counsel. The facts suggest a complex commercial case, with issues ranging from breach of contract, to fraud, to vio-

\begin{itemize}
  \item pay the total costs of the arbitration raises serious unconscionability issues. See Ware, supra note 486, at 1023-24.
  \item See Casaretto v. Lombardi, 886 P.2d at 935. Of course, in some court proceedings, the party who loses may be responsible for the entire costs. Ironically, the United States Supreme Court ordered the Casarottos to pay court costs in the amount of nearly $4,000 to Doctor’s Associates and Nick Lombardi. See Casaretto v. Lombardi, No. 93-488 (Mont. July 16, 1996) (order remanding action to District Court of the Eighth Judicial District in Cascade County for entry of judgment consistent with Doctor’s Associates v. Casaretto).
  \item See Casaretto v. Lombardi, 886 P.2d at 939. Of course, if the costs of the arbitration or the designated location effectively deprive the Casarottos’ of their “day in court,” they may seek to have the agreement declared unenforceable on the basis of unconscionability. See supra notes 496-97.
  \item See Stipanowich, supra note 312, at 433 n.38.
  \item It is commonly believed that arbitration costs less than litigation: “[A]rbitration is expected (and assumed) to be quicker, less formal, and less expensive than litigation in court.” I MacNeil, Federal Arbitration Law, supra note 2, at § 2.6.2. There are, however, some surveys that show that the costs savings may be minimal or are dependent on the size and complexity of the case. See Stipanowich, supra note 312, at 463-77 for a description of the various studies undertaken to determine the cost effectiveness of arbitration. Ironically, attorney conduct has been cited as a major factor in the increasing costs of using arbitration. See id. at 474.

  Costs savings alone, however, may not be the primary advantage of arbitration for some parties. See infra note 558 and accompanying text.
\end{itemize}
lation of state statutory law. Doctor's Associates would, no doubt, retain counsel to represent it if the litigation were brought in state court or submitted to arbitration. Certain procedural rules that exist in most court proceedings can cause a party who fails to comply with them to unwittingly waive certain claims or defenses. Accordingly, the Casarottos may feel more compelled to hire counsel if the case were brought in state court than if it were submitted to arbitration where such rules do not exist. The expense of an attorney would have undoubtedly been borne by the Casarottos even in the absence of the arbitration clause.

What is most troubling about the court's comparison of arbitration to litigation is the assumption that if a party had not signed the arbitration provision, he or she would have instituted suit in a judicial forum. It is entirely possible that a party with a grievance may not make a claim because of the burdens and costs associated with bringing a court action or because of the inaccessibility of the court system to the litigant. Litigation has many costs, financial as well as emotional, it can be destructive to ongoing relationships; it is generally time consuming. Access to counsel, perceived by many to be indispensable to the successful resolution of a claim, may be difficult. Arbitration, which is generally more expeditious and less costly than litigation, may provide a party, who may otherwise not have made a claim, a viable process for the resolution of the claim. Accordingly, simply comparing arbitration to litigation is insufficient. Arbitration has to be compared with other options as well, including the option of "jumping it."

The court's opinion is completely devoid of any discussion of the benefits of arbitration, or for that matter, the disadvantages of litigation, which may be exacerbated for persons like the Casarottos, who have little or no bargaining power. The court focuses solely on what arbitration lacks; not what attributes it possesses. There are benefits to arbitration. Those benefits tend to get overlooked when the procedures available in arbitration are compared to those available in litigation. If the benchmark for evaluating a dispute resolution pro-

540. As Learned Hand stated, "[A]s a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death." Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter in 3 Lectures on Legal Topics, 89, 105 (1926), quoted in Gross & Syverud, supra note 519, at 63.
543. "Modern judicial process is characterized by high cost, excessive formality, and long delays." Stipanowich, supra note 312, at 427-28. Much has been written regarding the disadvantages of litigation. See, e.g., Gross & Syverud, supra note 519.
544. See Auerbach, supra note 504, at vii.
cess is the number and extent of the procedures available, litigation will always be deemed more appropriate and more desirable than arbitration. For that matter, it will be deemed more appropriate than mediation and negotiation and settlement, where there are virtually no procedural safeguards to ensure that the settlement, if reached by the parties, is fair or just. Under this analysis, arbitration, which most closely resembles litigation, would actually be considered more desirable than mediation and negotiation and settlement. Such a result is nonsensical. Mediation and negotiation, which give the parties the opportunity to come to a mutually agreed upon resolution of a claim, may be more desirable than arbitration for resolving certain kinds of disputes. Accordingly, the benchmark cannot be the quantity of available procedures. Each process must be evaluated for its strengths and weaknesses and contextualized for the type of dispute at issue.

Although arbitration lacks many of the procedures found in a court proceeding, it nonetheless possesses what may be deemed the most important and crucial. This argument, of course, assumes that some procedures in standard court adjudication are not as important as others. Indeed, it has been suggested that there is no guarantee that certain procedural rules will lead to infallible results and accordingly, some rules may not be worthwhile given the slight chance that the rules will promote fairness. Moreover, many litigants may question whether justice was indeed served when the person, although ultimately victorious in the court proceeding, waited years for the result, which cost them “30 to 50” percent of the amount claimed.

545. With respect to settlement of a class action, a court may play a role in insuring that the settlement is fair to all class members. See Fed. R. Civ. P. 23(d).

Of course, it could be argued that the lack of procedures in mediation and negotiation is irrelevant because those processes do not involve a third party who makes a binding decision regarding the merits of the dispute. Accordingly, because the parties themselves make the decision to settle and what to settle for, procedural protections are unnecessary. That argument presupposes that parties will only settle on fair terms, which may not be true. Cf. Richard Delgado et al., Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, 1985 Wis. L. Rev. 1359; Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991).

546. See Bush, supra note 499, at 991.

547. “Surely there is a good deal of tosh—that is, superfluous rituals, rules of procedure without clear purpose, needless precautions preserved through habit—in the adjudicative process as we observe it in this country. Our task is to separate the tosh from the essential.” Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 356 (1978).

548. See Newman, supra note 517, at 1648.

549. See Stipanovich, supra note 312, at 428 n.6 (citing Eric R. Max, Arbitration—The Alternative to Timely, Costly Litigation, 42 Ala. L. Rev. 309 (1981)).
Professor Fuller suggested that the essence of adjudication\(^{550}\) "lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned argument for a decision in his favor."\(^{551}\) The Casarottos would have been given the opportunity before the AAA arbitrator(s) to prove their case by presenting evidence and making opening and closing statements.\(^{552}\) Professor Fuller also stresses the need for partisan advocacy in adjudication.\(^{553}\) Under the AAA rules, the Casarottos were entitled to be represented by counsel at the hearing on their claim.\(^{554}\) Finally, Professor Fuller highlights one of the advantages to the absence of many of the procedural rules found in litigation in a judicial forum: "Being relatively free from technical rules of procedure, the wise and conscientious arbitrator can shape his procedures upon what he perceives to be the intrinsic demands of effective adjudication.\(^{555}\)"

\(^{550}\) Professor Fuller explained that the term adjudication referred not only to "tribunals functioning as part of an established government," but also to "adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission." Fuller, \textit{supra} note 547, at 354.

\(^{551}\) Fuller, \textit{supra} note 547, at 364. \textit{But see} Bush, \textit{supra} note 499, at 927, questioning Fuller's approach because it failed to focus on the goals of the civil justice system. Professor Bush identified seven goals of the civil justice system: resource allocation, social justice, fundamental rights protection, public or social order, human relations, legitimacy and administration cost minimalization. \textit{See id.} at 934-39. He asserted that any dispute resolution process must be reviewed to determine how well it minimizes the "sum of all the different costs associated with failure to achieve different civil justice goals." \textit{Id.} at 934.

\(^{552}\) The AAA Commercial Arbitration Rules provide in relevant part:

\begin{quote}
29. Order of Proceeding and Communication with Arbitrator

The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved. . . . The complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to question or other examination. The arbitrator has the discretion to vary this procedure but shall afford a full and equal opportunity to all parties for the presentation of any material and relevant evidence. Exhibits when offered by either party, may be received in evidence by the arbitrator.
\end{quote}

31. Evidence

The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator of other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.


\(^{553}\) \textit{See} Fuller, \textit{supra} note 547, at 382.

\(^{554}\) \textit{Commercial Arbitration Rules, supra} note 552, Rule 22.

\(^{555}\) Fuller, \textit{supra} note 547, at 393.
The more obvious benefits to arbitration have already been touched upon.\textsuperscript{556} Arbitration is typically less costly and time consuming than litigation.\textsuperscript{557} The savings in time and cost come about for a number of reasons, although the limited right to appeal and the limited right to discovery are significant factors that help to minimize or reduce the costs and time associated with bringing a claim. There are other benefits as well that may, in fact, play a greater role in the decision to use arbitration than the cost and time savings.\textsuperscript{558}

Another hallmark of arbitration is that the parties get to choose their decisionmaker(s).\textsuperscript{559} Accordingly, parties can choose individuals who have special expertise and knowledge of the subject matter of the dispute. An expert decisionmaker(s) will, theoretically, produce better resolution of the claim and will also help to minimize costs; the parties

\textsuperscript{556} This entire discussion regarding the benefits of arbitration, is, of course, theoretical. It is entirely possible, for a variety of reasons, that, in a particular case, the arbitral process, like any other dispute resolution process, will not live up to its objectives or will not confer the particular benefit which caused the parties to choose it as their dispute resolution process. See generally Hayford & Peeples, supra note 522; Stipanowich, supra note 312, at 441-53.

Generally, when parties decide to arbitrate, they agree to arbitrate in accordance with the rules and procedures of an independent, neutral arbitration service provider, such as the AAA. It is up to the parties, and/or their counsel, to insure that the service provider is providing a process that will meet the particular goals of the parties, such as cost effectiveness and expediency.

\textsuperscript{557} Concern has been voiced that arbitration is becoming more like litigation, especially with respect to the amount of discovery that is being requested, and that it is therefore losing two important benefits once associated with it, cost savings and expediency. See Stipanowich, supra note 312, at 445.

\textsuperscript{558} See id. at 474 (discussing study conducted by Harvard Business School which found that the groups surveyed did not "always consider speed to be of paramount importance"); see also Lucy Katz, Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Sides of the Same Coin?, 1993 J. Disp. Resol. 1, 48-49 ("Most studies report high satisfaction rates with arbitration and even other ADR methods. Interestingly, however, the aspects of ADR with which litigants are most satisfied tend not to be cost and speed but qualitative features such as fairness and the need to be heard.")

\textsuperscript{559} This was the case for the Casarottos. Although they had no choice but to go to arbitration, they were entitled under the AAA rules to have the same input as Doctor's Associates in the selection of the arbitrator(s). This is not necessarily the case in all arbitration adhesion contracts, however. The party insisting on the clause may also in the contract designate the arbitrators; the weaker party will have no choice but to agree to the designation if he or she wants to do business with the stronger party. If such a clause is not deemed unconscionable, see Ware, supra note 486, at 1018-23, the weaker party would have a ground upon which to vacate the award if the arbitrators were biased. See supra note 266 (detailing grounds upon which to vacate award).

That the parties get to choose their arbitrator(s) is in sharp contrast to litigation. In litigation, disputants get no choice as to the identity and qualifications of the judge assigned to their case; parties are given more of a choice if the dispute is to be resolved by a jury, but certainly not to the same extent that arbitration permits.
will not have to utilize expert witnesses to educate the decisionmaker(s). It has also been suggested that expert decisionmakers enhance the predictability of the outcomes because of the arbitrators' awareness of the trade meaning of the contract terms.660

Because arbitration is contractual, the parties are the architects of the process. Accordingly, they are free to incorporate whatever rules or procedures they deem necessary for the just resolution of their claim. For example, if it is important that a written opinion be given a practice generally discouraged by the AAA, the parties may so provide for it in their contract. The parties to the dispute have power over the process. This attribute as well as others discussed cannot be attained, however, if the drafter of the arbitration provision refuses to negotiate it.

The arbitration proceeding is also informal. Its informality may make the parties more willing to participate in the process, and thereby not rely solely on their counsel to tell their story. Professor Menkel-Meadow offers anecdotal evidence that arbitration performs a cathartic function by letting the parties freely tell their stories.561 It is the informality of the process that makes that possible.

The informality also helps to expedite the process. The parties may schedule the hearing at any day or time as long as the arbitrator(s) and witnesses are able to attend. Accordingly, the parties need not compete with a crowded docket in order to have their claim resolved. The informality of the process, which facilitates expeditious resolution of the claim, may also help to preserve the relationship between the parties. Arbitration, theoretically, is not as adversarial as court adjudication; there are fewer opportunities for the parties to engage in vexatious behavior562 to delay the case, cause unwarranted expense or otherwise outposition or outmaneuver each other.”563

Finally, the arbitral process may have a significant impact on the type of remedy received by the “prevailing” party. Arbitrators are generally given more flexibility in fashioning remedies than a judge or jury;564 they are not bound by the binary approach seen in court adjudication, where either plaintiff or defendant will prevail. Accordingly,

560. See Mentschikoff, supra note 531, at 853.
561. See Menkel-Meadow, supra note 503, at 2688.
562. See Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values, 59 BROOK. L. REV. 931, 931-32 (1993), for a discussion of the escalation in litigation warfare, the use of litigation as a strategic tool and the suggestion that alternative dispute resolution processes have been adapted to control “strategic and scorched earth litigation.” Id. at 946.
563. Bush, supra note 499, at 990-91. It is pretty clear that in court adjudication, the party with the greater resources can more easily outposition the party with fewer resources. See id. at 991.
in addition to the traditional remedies of compensatory damages, punitive damages or specific performance, the arbitrators may also consider non-zero sum factors in awarding the remedy and need not reduce each need of the parties to monetary terms.

The arbitration process is not flawless; neither is the litigation process. Each has its advantages and disadvantages, which may make the process more or less appropriate depending upon the circumstances of each case. The flaws with the litigation process and the benefits of the arbitral process, however, have been overlooked when a party is compelled to go to arbitration because of an adhesion contract. The use of arbitration clauses in contracts of adhesion has collapsed the analysis of two very distinct issues: should courts under state or federal law enforce the clause when it is contained in a contract of adhesion, and is arbitration an appropriate dispute resolution process. The intermingling of the two issues has resulted in the undermining of the arbitral process and in the overvaluing of the litigation process.

V. CONCLUSION

Through its questionable interpretation of the FAA, the Supreme Court has severely restricted a state's power to regulate the use of arbitration clauses in adhesion contracts. While such a course has resulted in uniform enforcement of arbitration agreements, it has displaced state law seeking to equalize, to a small degree, the power imbalances inherent in adhesion contracts. It is unlikely that the Supreme Court is going to change course and permit states to impose conditions, even nonburdensome conditions, on the enforceability of arbitration agreements. If states are stripped of their power to protect persons from the unknowing waiver of their right to a judicial forum, we must look elsewhere for the means to ensure meaningful relinquishment. There are at least four places to look.

The first and most logical place to look is Congress. An amendment to the FAA requiring conspicuous notice of the predispute arbit-

565. The Supreme Court has suggested in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), that it will uphold an arbitration agreement that limits the type of relief an arbitrator may provide, but again, such limitation may be examined for unconscionability. See Ware, supra note 486, at 1026.

566. The AAA rules permit the arbitrator to "grant any remedy or relief the arbitrator deems just and equitable within the scope of the agreement." *COMMERCIAL ARBITRATION RULES*, supra note 552, Rule 43.

567. That I perceive the issues to be separate and distinct does not suggest that I advocate upholding arbitration clauses in contracts of adhesion. On the contrary, an arbitration clause should be upheld only when it is shown to have been voluntarily and knowledge entered. That analysis may take into account the parties knowledge of the arbitral process; it need not, however, lead to the conclusion, as it often does, that arbitration is a second-rate dispute resolution process.
tation clause as a condition to its enforceability, applicable to contracts executed after its enactment, will undoubtedly be the most effective way to ensure knowledge by the weaker party of the arbitration clause. Because such an amendment would be uniformly applied, corporations and others, who include predispute arbitration clauses in form contracts and who do business in a variety of states, will not be subject to different rules impacting on the enforceability of the predispute arbitration clause. Each contract must contain conspicuous notice in the manner proscribed by Congress, regardless of where the contract is executed or enforced. Accordingly, form contracts can continue to be used; the economic benefits derived from their use will not be compromised by the amendment. While Congress has not recently indicated an inclination to amend the FAA in such a manner, the continuing prevalent use of predispute arbitration clauses with terms that smack of one-sidedness in favor of the drafting party, may, and should, force Congress' hand.

The second place to look is state general contract law. Although it has been noted that such law in the past has not been particularly effective in protecting the weaker party, states can amend general contract law to breathe new life into consensual defense doctrines so as to prevent unfairness in the terms and conditions of the arbitration provision. Of course, states walk a fine line here. Consistent with the FAA, states must apply such amendments to contracts generally. If states are willing to step up to the plate and provide across the board protection to the weaker party, states can safeguard the rights of parties compelled to arbitrate a dispute.

568. Congress should enact very specific rules regarding the type and placement of the clause. Congress may also enact other rules designed to alert the parties to the clause, such as requiring the parties to initial the clause or requiring the parties to sign a statement acknowledging that he or she has read the clause. See Speidel, supra note 16, at 1093 (author proposed a Federal Consumer Arbitration Act, which, among other things, would require conspicuous notice of the arbitration provision); see also Paul Carrington, Regulating Dispute Resolution Provisions in Adhesion Contracts, 35 HARV. J. ON LEGIS. 225 (1998)(proposing legislation regulating the enforceability of arbitration provision in certain adhesion contracts, including agreements between franchisees and franchisors).

569. See Sternlight, supra note 3, at 638 (discussing arbitration clauses that, for example, limit remedies or require arbitration in inconvenient forums).

570. Due to the "take it or leave it" basis of most arbitration provisions in consumer and employment contracts, other amendments to the FAA may be in order to ensure a fair process. For example, in order to ensure a neutral decisionmaker, the FAA should be amended to prohibit only one party from choosing the arbitrator. To ensure access to the process, the FAA should be amended to prohibit the practice of requiring arbitration in a distant forum. These are only a few examples of the changes that are needed if arbitration provisions in adhesion contracts remain enforceable and states remain powerless to intervene through their arbitration law.
The third place to look is to the arbitration service providers. As it did with employment arbitration, the AAA and JAMS/Endispute, among others, can refuse to administer an arbitration if the arbitration clause does not meet certain requirements. Such a course, while providing no guarantees, can be effective if uniformly applied and followed by, at the very least, the major arbitration service providers. There are, however, two dangers with this approach. First, it may encourage businesses to select arbitration service providers who do not impose such requirements to administer the arbitration; indeed it may actually create a market for such providers. Second, it may cause businesses to “go underground” and administer their own arbitration programs.

The final place to look is to the parties who insist on the inclusion of the predispute arbitration clause. The only impetus, however, for these parties to change their behavior is if they recognize that it is in their self-interest to do so. If these parties insist on arbitration because they believe it is a qualitatively better method for all parties involved for the resolution of the dispute (and not because they believe their pay out will be less than it would be if the case were to be litigated), then these parties should be willing to stand by arbitration by drawing attention to the clause, explaining it, and negotiating it. This approach will ultimately benefit these very same parties by restoring confidence in the arbitral process, a confidence that has been shaken due to their unwillingness to openly and candidly discuss and negotiate the predispute arbitration clause and their abuse of the arbitral process to gain an unfair advantage. The most difficult aspect of this option, however, is getting this message across.

Amendment to the FAA requiring specific notice of the predispute arbitration clause appears to be the most effective method to protect the weaker party from unwittingly waiving his or her right to a judicial forum. Such an amendment would also have the additional benefit of redeeming arbitration as a dispute resolution process.

571. See supra note 7.