COMMENT

PRIMA PAINT TO *FIRST OPTIONS*: THE SUPREME COURT'S PROCRUSTEAN APPROACH TO THE FEDERAL ARBITRATION ACT AND FRAUD*

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I. INTRODUCTION

Arbitration is becoming an increasingly popular means of dispute resolution.[1] As a result, the law governing arbitration is a flourishing area of jurisprudence.[2] The development of arbitration law in the United States, however, has not been free of conflicting or misinterpreted rulings.[3] Additionally, the adoption of the Federal Arbitration Act (FAA) offers a prime example of how legislative history becomes distorted when written through the adversary process.[4] According to Professor William Wiecek, "For the past half-century, historians, judges, and lawyers have bemoaned the ways that the Court has misunderstood, misapplied, or otherwise abused the past on its way to formulating doctrines for the present."[5] When the courts distort legislative history, historical public policy is distorted as well.[6] The reverse is, of course, equally problematic. When Congress fails to fully consider the constitutional problems inherent in its legislative efforts, the courts are left to deal with Congress's mess.[7] The FAA is a case in point. Indeed, there is disagreement over whether Congress was acting under its Article I powers[8] or its Article III powers[9] when it enacted the FAA.[10]

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1. G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 517 (1989) (noting an increasing use of arbitration in securities cases); Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305 n.7 (1985) (citing figures published by the American Arbitration Association (AAA) reflecting an increase across a variety of arbitration cases).

2. IAN R. MACNEIL, AMERICAN ARBITRATION LAW vi (1992) (discussing the importance of the historical development of arbitration law upon modern decisions).

3. David P. Pierce, Comment, *The Federal Arbitration Act: Conflicting Interpretations of Its Scope*, 61 U. CIN. L. REV. 623, 623–24, 636 & nn.110–11 (1992) (discussing the lower courts' differing interpretations of the Federal Arbitration Act's scope and the questions left unresolved by the Supreme Court's *Volt* decision).

4. *Id.* at 623–24, 636.

5. William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 227–28 (1987–1988) (illuminating a number of cases in which the Supreme Court misinterpreted or ignored legislative and constitutional history).

6. Hirshman, *supra* note 1, at 1308 (observing that the Supreme Court's efforts to resolve the difficulties created by the FAA's passage were partially responsible for a broad reading of the FAA).

7. *Id.*

8. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce "among the several States").

9. *Id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

10. *See* Comment, *Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 YALE L.J. 847, 858 (1959–1960) (asserting that Congress, in enacting the Federal Arbitration Act, relied upon both its power to control "interstate commerce and admiralty" and its power "to

This Comment examines the Supreme Court's interpretation of the FAA as applied in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[11] and its progeny, with respect to claims of fraudulent inducement in contracts containing arbitration clauses. The discussion revolves around three troubling aspects of the Court's interpretation of the FAA. The first problem discussed is the Court's adoption of the separability doctrine regarding a charge of fraud in the inducement of a contract containing an arbitration clause.

The importance of this doctrine and the breadth of its impact are difficult to overstate. The types of contracts containing arbitration clauses that end up in dispute over a charge of fraudulent inducement include everything from a basketball player's contract to computer sales, construction contracts, rental and sales contracts, and union and labor disputes.[12]

The second problematic aspect to be discussed is whether the Court's reasoning in *Prima Paint* is consistent with the Court's stated emphasis on the importance of adhering to and respecting legislative intent.[13] The third difficulty created by *Prima Paint* and its progeny is the Court's subsequent usurpation of both state arbitration and state general contract law.[14]

Part II of this Comment covers briefly the FAA's development with particular attention paid to relevant excerpts from the congressional record. Part III examines the Court's adoption in *Prima Paint* of the separability doctrine and the problems that followed. Of great importance to this examination

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regulate the courts"); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275 (1925–1926) (rejecting assertions that Congress relied only upon its authority to regulate interstate commerce and admiralty). *But see* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270–71 (1995) (discussing the various opinions about whether Congress was acting under its Article I or Article III power); Hirshman, *supra* note 1, at 1314–15 (observing that the Court's *Erie* decision raised questions about the proper scope of the Federal Arbitration Act). Hirshman lists the following as potential sources of authority under which Congress passed the FAA:

> First, Congress may have been issuing a procedural edict under its article III powers . . . . Second, Congress may have enacted a rule of substantive federal law under article III directed only to cases before the federal courts. Third, acting pursuant to its powers over admiralty and commerce, Congress may have made substantive federal law . . . .

Id. (footnote omitted).

11. 388 U.S. 395 (1967).

12. *See generally* Jay M. Zitter, J.D., Annotation, *Claim of Fraud in Inducement of Contract as Subject to Compulsory Arbitration Clause Contained in Contract*, 11 A.L.R. 4th 774 (1982) (collecting cases in which an allegation of fraud was a central issue).

13. 388 U.S. at 407–08 (Black, J., dissenting) (concluding that the majority opinion conflicts with a reasoned reading of the "Act's language and history").

14. *See* Hirshman, *supra* note 1, at 1353 (describing the FAA's current status as a "substantive federal law, pre-emptive and binding on the states").

is Justice Black's dissent, in which he challenged the majority's interpretation of both the language and legislative intent of the Act. Part IV examines more recent Supreme Court holdings regarding the interplay of the FAA and state general contract law. The Comment concludes with a recommendation that the Supreme Court revisit its earlier interpretations of legislative intent regarding the FAA and overturn *Prima Paint*, *Moses H. Cone*, and *Southland*. By so doing, the Court will correct its course to once again be in harmony with both the original legislative intent of the FAA and the traditional doctrine of federalism that has allowed states to adjudicate contracts within their own boundaries.

II. A BRIEF HISTORY OF THE FEDERAL ARBITRATION ACT

Arbitration, in practice and in law, has been present in major business centers since the early part of this century.[15] Incorporating both statutory and common law, arbitration in the early 1900s has been described as "robust and active," with most states having arbitration statutes on their books.[16] While a detailed history of the development of modern arbitration law is beyond the scope of this article, it is instructive to review the genesis of arbitration law.

Prior to World War I, arbitration law in America differed from state to state.[17] During this time, the federal courts adopted the practice of applying federal arbitration law rather than state arbitration law despite the fact that "no distinctive body of federal arbitration law existed."[18] By the 1920s, proponents of expanding and strengthening the existing arbitration laws had made significant strides in pressing for the acceptance of state and federal arbitration statutes.[19] The United States Arbitration Act ("nonmodern FAA") was passed in 1925.[20]

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15. *See* MACNEIL, *supra* note 2, at 15 (discussing the state of arbitration law prior to attempts at modernizing it).

16. *Id.*

17. *Id.* at 21 (stating that arbitration law was "a great hodgepodge of English, state, and federal cases").

18. *Id.* at 22 (describing federal arbitration law as developing along both remedial and jurisdictional lines).

19. *Id.* at 25–47 (detailing the efforts of the New York State Chamber of Commerce and the New York State Bar Association, as well as the activities of the Chicago Association of Credit Men, and the American Bar Association, in drafting and promoting arbitration laws at the state and federal level).

20. *Id.* at 47 (discussing efforts at the state and federal level to enact arbitration statutes).

The nonmodern FAA had its critics. As long ago as 1924, politicians and commentators expressed concern "about the adhesive aspects of arbitration contracts."[21] One American Bar Association committee member, remaining unconvinced by arguments that arbitration agreements were entered into freely, remarked, "[W]e all know from a practical experience that the fine type of contracts whilst entirely binding, is seldom read, and we do feel that it is a giving up [of sacred] rights" that belong to the American people.[22]

Other commissioners were concerned about the potential "'long arm'" effect of the proposed arbitration statutes, which would compel people to travel "from coast to coast to participate involuntarily in arbitrations."[23] Despite these concerns, the conference, by a vote of twenty-three to six, approved the nonmodern FAA in 1924.[24]

The Federal Arbitration Act,[25] now codified at 9 U.S.C. §§ 1–16, includes three key statutory provisions.[26] Section 2 provides that a written provision for arbitration "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[27] Section 3 requires a federal court in which suit has been brought "upon any issue referable to arbitration under an agreement in writing for such arbitration" to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement.[28] Finally, Section 4 provides a federal remedy for a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration," and it directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and not honored.[29]

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21. *Id.* at 50–51 (chronicling the debate surrounding the nonmodern FAA).

22. *Id.* at 51 (quoting Joseph Francis O'Connell). According to Macneil, O'Connell's views were typical of the majority view on the committee. *Id.*

23. *See id.* at 51–52 ("[A]t least one commissioner . . . thought that enactment of uniform arbitration laws would have precisely that result.").

24. *See id.* at 52.

25. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994). The modern Federal Arbitration Act (originally entitled the Uniform Arbitration Act) replaced the "much scorned" nonmodern FAA in 1955. *See* MACNEIL, *supra* note 2, at 55.

26. 9 U.S.C. §§ 2–4 (1994).

27. *Id.* § 2.

28. *Id.* § 3.

29. *Id.* § 4.

III. *PRIMA PAINT* AND ITS PROGENY—THE COURT USES ITS PROCRUSTEAN BED

Much like Procrustes,[30] the Supreme Court, through arbitrary reasoning,[31] and with occasionally unconscionable results,[32] has forced the victims of fraudulently induced contracts to lay upon its Procrustean bed for their remedy. The Court has also forced its method upon states,[33] which, like the travelers along the road to Athens, were in no need of such a remedy.

A. The Court Places the FAA on a Rack

In *Prima Paint*,[34] the Court seized the chance to interpret the FAA in broad terms.[35] *Prima Paint* involved a New Jersey manufacturer and wholesaler of paint and paint products

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30. In Greek mythology, Procrustes was a robber who lived on a road between Megara and Athens. He kept a house in which he offered hospitality to passing strangers. Procrustes lured his potential victims with descriptions of his magical bed, which would fit perfectly all who lay upon it. What he did not disclose was his method of achieving this wondrous fit. Procrustes would instruct the travelers to lie down in one of two beds he owned: the tall were forced to lie upon a short bed, and the short upon a long bed. He adjusted his "guests" to fit their bed. Procrustes' method of achieving this "fit" was to stretch his short guests on a rack, or to chop off the legs of his tall guests. In either event, the guest died. Procrustes met his demise at the hands of Theseus, a young hero who went around the countryside slaying robbers. Theseus used one of Procrustes' own infamous beds to kill him. PIERRE GRIMAL, THE PENGUIN DICTIONARY OF CLASSICAL MYTHOLOGY 374 (Penguin Books 1991) (1951).

31. *See* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 729 (1991) (describing the *Southland* Court's reasoning as a "doctrinal conflation and confusion" and as "circumvent[ing] the formal preemption decisional framework").

32. *See* Michael D. Donovan & David A. Searles, *Preserving Judicial Recourse for Consumers: How to Combat Overreaching Arbitration Clauses*, 10 LOY. CONSUMER L. REV. 269, 269–70 (1998) (observing that the Court has granted preferential status to arbitration and detailing situations in which a party with less bargaining power than its opponent may be bound to arbitrate). For example, some consumer-financing contracts contain arbitration agreements wherein the lender retains the right to go to court. *Id.* at 269. Moreover, employment contracts, in which the employer is free to choose the arbitrator and the employee is excluded from the process, have been upheld, as has a health care plan that permits the care provider to unilaterally reject an arbitration award if it is not satisfied with the result. *Id. See also* Casarotto v. Lombardi, 886 P.2d 931, 939–40. (Mont. 1994) (Trieweiler, J., specially concurring) (worrying that, despite the fact that "[i]n Montana, we are reasonably civilized and have a sophisticated system of justice," the system can be "avoided by any party with enough leverage to stick . . . an arbitration provision in its pre-printed contract and require [a] party with inferior bargaining power to sign it"), *rev'd sub nom.* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 689 (1996).

33. *See Casarotto*, 886 P.2d at 941 ("[I]f the [FAA] is to be interpreted as broadly as some of the decisions from our federal courts would suggest, . . . [some] major corporations . . . [will be] immunize[d] . . . from accountability under the laws of the states where they do business.").

34. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

35. *See id.* at 406 ("This contractual language is easily broad enough to encompass Prima Paint's claim . . . .").

("F&C") that entered into a contract with a Maryland corporation ("Prima"), wherein F&C would perform consulting and other services related to the transfer of operations from F&C to Prima.[36] Their agreement included a non-compete clause and an agreement by Prima to pay F&C a percentage of profits over a six-year period—the life of the contract.[37] The contract, which stated that it "'embodies the entire understanding of the parties,'" contained a broad arbitration clause[38] providing that "'[a]ny controversy . . . arising out of . . . this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules . . . of the American Arbitration Association.'"[39]

About a year after the contract was signed, Prima was to make its first payment to F&C. Instead of making the payment, Prima accused F&C of breaching the consulting agreement and an earlier agreement involving Prima's purchase of F&C.[40] Prima's main complaint was that F&C was insolvent and had planned to file a bankruptcy petition shortly after executing the consulting agreement, that it had failed to disclose these facts to Prima, and had, therefore, fraudulently represented itself as able to perform its obligations.[41]

F&C responded by filing a notice of intention to arbitrate, whereupon Prima filed a diversity action in federal court to rescind the consulting agreement based upon the alleged fraudulent inducement.[42] Prima contemporaneously sought to enjoin F&C from proceeding with arbitration.[43]

The District Court granted F&C's motion to stay the action pending arbitration.[44] The court found that a charge of fraud in the inducement of a contract containing a broad arbitration clause was a matter for the arbitrators rather than for the court.[45] The Court of Appeals for the Second Circuit agreed with the District Court and dismissed Prima's appeal.[46] The court held that the contract in question involved interstate commerce, and

36. *Id.* at 397.

37. *Id.*

38. *Id.* at 397–98.

39. *Id.* at 398.

40. *Id.* Prima Paint did not make its first payment on the contractual due date, but did place the payment in escrow seventeen days later. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 399.

44. *Id.*

45. *Id.*

46. *Id.* at 399–400 (citing Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959)).

that "a claim of fraud in the inducement of the contract generally—as opposed to the arbitration clause itself—is for the arbitrators and not for the courts" when the arbitration clause is written broadly.[47] The Second Circuit went on to define the FAA as a rule of "'national substantive law'" that "governs even in the face of contrary state" law.[48]

In deciding *Prima Paint*, the Supreme Court's first, and seemingly most straightforward, task was to decide whether Sections 1 and 2 of the FAA covered the agreement at issue.[49] The Court decided that the contract clearly evidenced "a transaction in interstate commerce."[50] The following facts were cited by the Court: Prima Paint acquired a New Jersey company with over 175 "wholesale clients in a number of States"; it sought to transfer the manufacturing and selling operations to Maryland from New Jersey; and the consulting agreement at the heart of the dispute was inextricably tied to the interstate transfer and continuing operation of the interstate business.[51]

The Court then turned to the central issue of "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators."[52] In deciding this issue, the Court had to resolve a split of authority among the federal circuit courts of appeals.[53]

The Second Circuit had held that, except where parties otherwise intended, arbitration clauses as a matter of federal law were "separable" from the contracts in which they were embedded.[54] Under the Second Circuit's analysis, if no claim of fraud against the arbitration clause itself were made, "a broad arbitration clause [would] be held to encompass arbitration of the claim that the contract itself was induced by fraud."[55] Conversely, the First Circuit had taken the stance that the

47. *Id.*
48. *Id.*
49. *Id.* at 401.
50. *Id.*
51. *Id.*
52. *Id.* at 402.
53. *Id.* at 402–03.
54. *See In re* Kinoshita & Co., 287 F.2d 951, 952–53 (2d Cir. 1961) (holding that an arbitration clause containing the language "'[i]f any dispute . . . should arise under this [c]harter'" was not "sufficiently broad to encompass a dispute or controversy about an alleged fraudulent inducement" to enter into the contract); *see also* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410–11 (2d Cir. 1959) (holding that a claim of fraud in the inducement of the contract is for the arbitrators to decide).
55. *Prima Paint*, 388 U.S. at 402.

question of "severability" of the arbitration clause from the rest of the contract was one of state law.[56]

The Court made a problematic choice. Citing the statutory language of Section 4 of the FAA, the Court ruled that the arbitration clause was separable from the contract in which it was placed and, absent a claim of fraudulent inducement to arbitrate, the entire contract was subject to arbitration.[57] In so doing, the Court circumvented the *Erie* doctrine[58] by reasoning that "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate."[59]

Justice Black's dissent, in which Justices Douglas and Stewart joined,[60] focused on three problems resulting from the majority's interpretation of the FAA.[61] The first problem Justice Black addressed was the denial of due process arising from a court's holding that the FAA, as a matter of substantive law, could compel a party to arbitrate the very contract that a court might find to be void because of fraudulent inducement.[62] He also took issue with the probability that in arbitration a nonlawyer, "wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so" would be deciding the legality of a contract.[63] Accordingly, Justice Black found that "a reasonable and fair reading" of the FAA and its history showed that Congress and the framers of the Act took "great pains to emphasize that nonlawyers designated to adjust and arbitrate

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56. *See* Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 923–24 (1st Cir. 1960).

57. *Prima Paint*, 388 U.S. at 403–04 ("Congress has provided an explicit answer."); 9 U.S.C. § 4 (1994) (instructing federal courts to order arbitration to proceed once they are satisfied that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue").

58. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71, 73, 78 (1938) (holding that, where a case is in federal court solely because of diversity of citizenship, federal courts are bound to follow state rules of decision in matters deemed "substantive" rather than "procedural"); *see also* Guaranty Trust Co. v. York, 326 U.S. 99, 109, 111–12 (1945) (holding that, in diversity cases, federal courts must follow state law where the matter is "outcome determinative").

59. *Prima Paint*, 388 U.S. at 405 (reasoning that, because "the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty,'" the answer to the question of whether a ruling that ignored state law in a diversity case was constitutional was "yes").

60. *Id.* at 407 (Black, J., dissenting).

61. *See id.* at 407–25 (Black, J., dissenting) (addressing in detail the legislative history and language of the FAA).

62. *Id.* at 407 (Black, J., dissenting) (expressing satisfaction that Congress did not intend what the majority asserted).

63. *Id.* (Black, J., dissenting) (asserting that under the majority's interpretation, a party would be denied due process).

factual controversies arising out of *valid* contracts" would not infringe on the courts' right to adjudicate whether a legally binding contract exists upon which to arbitrate.[64]

Addressing the specific wording of the Act, Justice Black pointed out that the language used by Congress—a "'contract evidencing a transaction involving commerce'"[65]—was intended to have "limited application" to merchants' contracts "for the interstate shipment of goods."[66] Congress failed to use language making the Act "applicable to all contracts which 'affect commerce,' the statutory language Congress normally uses when it wishes to exercise its full powers over commerce."[67]

Justice Black then took the majority to task for its "'explicit answer'" interpretation of Section 4 of the Act,[68] which provides that "the court must order arbitration if it is 'satisfied that the making of the agreement for arbitration . . . is not in issue.'"[69] Justice Black asserted that, "far from providing an 'explicit answer'" to the "question of whether [an] arbitration clause is 'separable,'" the language of the statute "merely poses the further question" of what puts the agreement to arbitrate at issue.[70] By adopting the Second Circuit's view that the arbitration clause is separable, the Court took a procedural remedy and fashioned it into a substantive law[71] that could and did interfere with state substantive law to the contrary.[72] Justice Black expressed additional concern that the Court's new version of the FAA flew in the face of the well-established *Erie* doctrine,[73] a problem with which the majority appeared barely concerned.[74]

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64. *Id.* at 407–08 (Black, J., dissenting) (emphasis added).

65. *Id.* at 409 (Black, J., dissenting).

66. *Id.* at 408–10 (Black, J., dissenting) (discussing the fact that "Prima brought th[e] action in federal district court to rescind the entire consulting agreement on the ground of fraud").

67. *Id.* at 410 (Black, J., dissenting) (emphasizing that the plaintiffs were challenging the consulting agreement signed with F & C, not the contract that involved the transfer of the manufacturing operations from New Jersey to Maryland, nor the wholesale interstate sales operations, which were also being transferred).

68. *Id.* (Black, J., dissenting).

69. *Id.* (Black, J., dissenting) (alteration in original) (quoting 9 U.S.C. § 4 (1994)).

70. *Id.* (Black, J., dissenting).

71. *See id.* at 411 (Black, J., dissenting) (criticizing the Court for ignoring the "serious constitutional problem[s]" created by its decision).

72. *See id.* (Black, J., dissenting).

73. *See id.* (Black, J., dissenting).

74. *See id.* (Black, J., dissenting).

> Finally, the Court summarily disposes of the problem raised by *Erie R.R. Co. v. Tompkins*, recognized as a serious constitutional problem in *Bernhardt v. Polygraphic Co.*, by insufficiently supported assertions that it is "clear beyond dispute" that Congress based the Arbitration Act on its power to regulate commerce and that "[i]f Congress relied at all on" its power to create federal law

Turning to the language of the statute again, Justice Black focused on Section 2, "the key provision of the Act,"[75] which states that an agreement to "settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[76] Section 3 was also relevant to Justice Black, providing, in part, that "[i]f any suit . . . be brought . . . *upon any issue referable to arbitration* under an agreement in writing for such arbitration, the court . . ., *upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement*, shall . . . stay the trial."[77] Justice Black interpreted these sections to mean an arbitration agreement is enforceable "by a federal court unless the court . . . finds grounds, 'at law or in equity for revocation of the contract.'"[78]

Justice Black supported his interpretation of the FAA with ample citations to the legislative history of the Act.[79] Justice Black concluded that the legislators understood the Act to cover contracts between merchants of equal bargaining power, and that their understanding of the Act's function never included the issue of fraud in the inducement, but instead recognized the special advantages of arbitration.[80] These advantages include arbitrator expertise in deciding "day-to-day" contract performance issues that are factual in nature and more rapid resolution of disputes in situations in which the parties are

for diversity cases, such reliance "was only supplementary."

Id. (Black, J., dissenting) (citations omitted).

75. *Id.* at 412 (Black, J., dissenting).

76. 9 U.S.C. § 2 (1994) (emphasis added); *Prima Paint*, 388 U.S. at 412 (Black, J., dissenting).

77. 9 U.S.C. § 3 (1994) (emphasis added); *Prima Paint*, 388 U.S. at 412 (Black, J., dissenting).

78. *Prima Paint*, 388 U.S. at 412–13 (Black, J., dissenting) (stating that fraud is one of the most common grounds for contract revocation and that, unless the party claiming fraud "elects to affirm" the contract, "there is absolutely no contract, nothing to be arbitrated"); *see also* RESTATEMENT (SECOND) OF CONTRACTS ch. 7, introductory note (1979) ("The most common of the three possible effects of a misrepresentation under the rules stated in this Chapter is that of making the resulting contract voidable.").

79. *See Prima Paint*, 388 U.S. at 413–15 (Black, J., dissenting) (quoting senators, representatives of the American Bar Association, and the draftsman of the bill, Mr. Cohen). Mr. Cohen assured the members of Congress that:

> the Act would not impair the right to a jury trial, because [the Act] deprives a person of that right only when he has voluntarily and validly waived it by agreeing to submit certain disputes to arbitration. The court and a jury are to determine both the legal existence and scope of such an agreement.

Id. at 413–15 (Black, J., dissenting) (footnote omitted).

80. *Id.* at 415 & n.13 (Black, J., dissenting).

contemplating continued performance under the contract and seek to mitigate damages.[81]

"Finally," Justice Black continued, "there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts or to provide an independent federal-question basis for jurisdiction in federal courts apart from diversity jurisdiction."[82] The absence of these two effects, he argued, "militate[s]" against the majority's finding that Congress was enacting "a body of federal substantive law."[83]

B. The Court 'Shortens' the States' Legs

Justice Black's dissent was prescient. It took fewer than twenty years for the Court to decide, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[84] and *Southland Corp. v. Keating*,[85] that the FAA pre-empted state statutes invalidating arbitration agreements otherwise covered by the FAA.[86]

In *Moses H. Cone*, the Court considered whether a federal court may properly abstain from deciding a petition—seeking enforcement of a commercial arbitration agreement brought under Section 4 of the Arbitration Act—when the party resisting arbitration has brought a parallel action in state court.[87] The resisting party claimed, inter alia, that the underlying dispute was not arbitrable under the parties' arbitration agreement.[88] In deciding the principal issue of the propriety of the district court's decision to stay the petitioner's federal suit out of deference to the parallel state action brought by the resisting party, the Court identified as "persuasive guidance" the "exceptional-circumstances test" for abstention by a federal district court in the face of concurrent state action[89] set down in *Colorado River Water Conservation District v. United States*.[90]

81. *Id.* at 415 (Black, J., dissenting) (stating that the legislation's sponsors neither intended nor understood the function of arbitration to be one of resolving an allegation of fraud in the inducement of a contract).

82. *Id.* at 420 (Black, J., dissenting) (footnote omitted).

83. *Id.* (Black, J., dissenting).

84. 460 U.S. 1 (1983).

85. 465 U.S. 1 (1984).

86. *Id.* at 10–11 (citing the Supremacy Clause in striking down the California Supreme Court's decision denying enforcement of an arbitration agreement because it violated disclosure requirement statutes relating to franchise investments).

87. 460 U.S. at 4.

88. *See id.* at 7–9 (deciding that the stay order was final for the purposes of appellate review).

89. *See id.* at 13–16.

90. 424 U.S. 800 (1976).

In *Colorado River*, the Court stated, "Abstention from the exercise of federal jurisdiction is the exception, not the rule."[91] Declining to adopt a "mechanical checklist" for "the decision whether to dismiss a federal action because of parallel state"[92] litigation, the *Colorado River* Court held that such a determination must be based upon a balancing of several relevant factors, "with the balance heavily weighted in favor of the exercise of jurisdiction."[93]

Applying the *Colorado River* factors, the *Moses H. Cone* Court concluded "there was no showing of the . . . exceptional circumstances" necessary to warrant abstention.[94] It deemed the district court's refusal to adjudicate the Section 4 petition to compel arbitration "plainly erroneous" and in conflict with the clear intentions of Congress—as expressed in the FAA—"to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."[95]

The Court characterized Section 2 as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[96] According to the Court, the FAA constitutes "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the [FAA]."[97] Citing with approval the body of federal appellate case law that was built upon its *Prima Paint* decision, the Court stated, "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."[98]

The final reason cited by the Court in holding that abstention was not justified was its belief that the state court proceedings would provide inadequate protection to the petitioner's right under Section 4 of the FAA to have its contractual agreement to arbitrate enforced.[99] The Court feared

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91. *Id.* at 813.

92. *Moses H. Cone*, 460 U.S. at 16.

93. *Id.* at 15–16 (quoting *Colorado River*, 424 U.S. at 818–19). The *Colorado River* factors include the following: "the inconvenience of the federal forum," the benefits of "avoiding piecemeal litigation," and "the order in which [concurrent] jurisdiction was obtained." 424 U.S. at 818.

94. 460 U.S. at 19 (stating that the first two *Colorado River* factors were not present in the case at bar).

95. *Id.* at 21–22.

96. *Id.* at 24.

97. *Id.*

98. *Id.* at 24–25.

99. *Id.* at 26–27 ("[I]t suffices to say that there was, at a minimum, substantial room for doubt that Mercury could obtain from the state court an order compelling

that because of the apparent inadequacy of the state court as a vehicle for enforcing that Section 4 right, the petitioner would face the "pointless and wasteful burden" of subsequently returning to federal court to obtain a Section 4 order—a result clearly contrary to the "supposedly summary and speedy procedures prescribed by the Arbitration Act."[100]

The *Moses H. Cone* dissenters pointed out that the majority had zealously provided arbitration to "a party it [thought] deserving."[101] Furthermore, they argued that in so doing, the majority had ignored "established rules of procedure."[102] The dissenters also noted that Section 4 of the FAA gave the plaintiffs a right to trial by jury, something the Court's decision denied them.[103]

The FAA reached its zenith, or nadir, depending on one's point of view,[104] in 1984 with the *Southland* decision.[105] It is in this decision that the FAA attained its final "bizarre transformation."[106] The FAA was now a "regulatory federal statute superseding state law and, hence, govern[ing] in state courts," but carrying no federal jurisdiction.[107]

As in *Moses H. Cone*,[108] the Supreme Court's *Southland*[109] opinion involved a threshold question of appellate procedure raised by a party's resistance to arbitration through a parallel state lawsuit—here, a claim that statutory rights under relevant California law were not arbitrable and, instead, required adjudication in a judicial forum.[110] The California court found no conflict between the California statute and the FAA.[111]

[arbitration].").

100. *Id.*

101. *Id.* at 30 (Rehnquist, J., dissenting).

102. *Id.* (Rehnquist, J., dissenting).

103. *Id.* at 36 (Rehnquist, J., dissenting) (disagreeing with the appellate court's actions that effectively granted a nonexistent motion for summary judgment).

104. MACNEIL, *supra* note 2, at 139, 231 n.44.

105. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984).

106. MACNEIL, *supra* note 2, at 139 (describing the evolution of the FAA from a system in which federal law was an adjunct to the foundation that was state law—a change that occurred with little debate).

107. *Id.*

108. 460 U.S. 1 (1983).

109. 465 U.S. 1 (1984).

110. *See id.* at 4–5 (noting that all claims not based on the California Franchise Investment Law were sent to arbitration).

111. *See* Keating v. Superior Court, 645 P.2d 1192, 1203–04 (Cal. 1982) (in bank) (stating that federal law is not "so unyielding" as to circumvent California's policy of protecting wage earners), *rev'd in part sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984).

Nevertheless, in *Southland Corp. v. Keating*,[112] Chief Justice Burger, writing for the majority, found an opportunity to even further truncate state contract laws.

The decision by the California Supreme Court, according to Chief Justice Burger, would "nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration."[113] Chief Justice Burger ignored the fact that the plaintiffs had alleged fraud in the inducement of the contract, along with charges of misrepresentation, breach of contract, and violation of the disclosure requirements of a state statute.[114] Additionally, he found that the California Franchise Investment Law,[115] which voided agreements to waive compliance with provisions of the act if the California Supreme Court decided the claims required judicial consideration and refused to enforce the arbitration agreement, was in direct conflict with Section 2 of the FAA.[116] Therefore, reasoned Chief Justice Burger, the franchise law "violat[ed] the Supremacy Clause."[117]

Chief Justice Burger went on boldly, and inexplicably, to claim that in enacting Section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[118]

Relying upon the Court's *Prima Paint*[119] and *Moses H. Cone*[120] decisions, the *Southland* Court held the state franchise statute unconstitutional.[121] The Court asserted that the FAA was premised upon Congress's Commerce Clause authority and pointed to its earlier opinion in *Prima Paint*,[122] characterizing that case as holding that, "notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract 'is for the arbitrators and not for the courts.'"[123] In the same original paragraph quoted by Chief Justice Burger, however, was

112. 465 U.S. 1 (1984).
113. *Id.* at 7.
114. *See id.* at 7–8 (discussing the importance of adhering to federal policy, regardless of a state law that limits arbitrability in the face of fraud).
115. CAL. CORP. CODE § 31512 (West 1977).
116. *Southland*, 465 U.S. at 10–11.
117. *Id.* at 10.
118. *Id.*
119. 388 U.S. 395 (1967).
120. 460 U.S. 1 (1983).
121. 465 U.S. at 10.
122. *Id.* at 11.
123. *Id.* (quoting *Prima Paint*, 388 U.S. at 400).

an explicit statement that "the act pertained to questions of procedure to be determined by the forum court and was not substantive law."[124] Chief Justice Burger's opinion makes no mention of this further statement.

This declaration of the procedural nature of the FAA makes perplexing the *Southland* Court's declaration that, by holding in *Prima Paint* that "the Arbitration Act was an exercise of the Commerce Clause power," the *Prima Paint* Court "clearly implied that the substantive rules of the Act were to apply in state as well as federal courts."[125]

The Court also referred to its assertion in *Moses H. Cone* that the FAA "'creates a body of federal substantive law,'" to imply that the law established by the act is "applicable in state and federal courts."[126] The *Southland* opinion went on to confirm its view that the issue of arbitrability of the California law claim in dispute was "a question of substantive federal law . . . [which] 'governs that issue in either state or federal court.'"[127]

The remainder of the majority opinion in *Southland* analyzed the legislative history of the FAA, finding a clear indication that Congress intended the rule to have a broad reach "unencumbered by state-law constraints."[128] The Court reached this conclusion by shrugging off the fact that "the legislative history is not without ambiguities."[129] The Court gave two reasons for not confining the reach of the substantive law created by the FAA to the federal courts. First, the Court found that such a restriction would frustrate the intent of Congress to fashion a statutory scheme that would ameliorate the problems of common law hostility to arbitration.[130] Second, a broad reach would circumvent the failure of state arbitration acts to require the enforcement of contractual agreements to arbitrate.[131]

In conclusion, the *Southland* opinion submitted that failure to find a conflict between the FAA and the California Supreme Court's interpretation of the California Franchise Investment

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124. MACNEIL, *supra* note 2, at 140 (claiming that Burger "conveniently" ignored key sections of the report).

125. 465 U.S. at 12.

126. *Id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)).

127. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 24).

128. *Id.* at 12–13 (inferring from Congress's actions a desire to affect not just those cases in federal court on diversity grounds).

129. *See id.* at 12 (quoting only select portions of the House Report).

130. *Id.* at 14.

131. *Id.* at 14–15 (dismissing Justice O'Connor's view, which she supported with a detailed history of the FAA's passage into law, that the FAA was intended as a procedural remedy).

Law as requiring judicial decision in lieu of arbitration would encourage forum shopping and effectively limit the reach of Section 2 of the FAA to the relatively small number of diversity cases that are brought in federal courts.[132] Rejecting such a result, 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."[133] Thus, *Southland* unmistakably established that, when a conflict arises between state law and the FAA, pursuant to the rule of federal pre-emption, the FAA prevails both in state and federal courts.[134]

Justice Stevens disagreed with the majority's view that it was "'clear beyond question that if this suit had been brought as a diversity action in federal district court, the arbitration clause would have been enforceable.'"[135] Justice Stevens, like Justice Black in *Prima Paint*, was influenced by the limiting language of Section 2 of the Act.[136] Justice Stevens also recognized that the lower courts generally "look to state law" to interpret questions of arbitration agreement formation.[137]

Justice O'Connor and then-Justice Rehnquist, reading the legislative history of the FAA as "unambiguous,"[138] believed that Congress intended the Act as a procedural statute to be applied in federal courts.[139] They reiterated much of Justice Black's *Prima Paint* dissent.[140]

The majority opinion in *Southland* also failed to provide adequate reasoning for a substantive FAA. When Justice O'Connor pointed out the FAA's original meaning,[141] the majority

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132. *See id.* at 15 (justifying a broad interpretation of the FAA by the paltry number of cases brought in federal court on diversity grounds).

133. *Id.* at 16 (footnote omitted).

134. *Id.* at 13.

135. *Id.* at 17 (Stevens, J., concurring in part and dissenting in part) (quoting the majority).

136. *See id.* at 17–19 (Stevens, J., concurring in part and dissenting in part) (observing that the limited purpose of the FAA was to abrogate common-law resistance against enforcing arbitration agreements). "[I]t is by no means clear that Congress intended entirely to displace state authority in this field. . . . [I]t must surely be true that given the lack of a 'clear mandate from Congress' . . ., we must be cautious in construing the act . . . ." *Id.* at 18–19 (Stevens, J., concurring in part and dissenting in part).

137. *Id.* at 19 (Stevens, J., concurring in part and dissenting in part) (finding room under the current FAA for the implementation of substantive state-law policies).

138. *Id.* at 25 (O'Connor, J., dissenting) ("One rarely finds a legislative history as unambiguous as the FAA's.").

139. *Id.* at 22–23 (O'Connor, J., dissenting).

140. *See id.* at 30 (O'Connor, J., dissenting) (criticizing the *Prima Paint* majority for not stating that its separability holding was limited to federal courts).

141. *See id.* at 25–30.

offered only one real response: If Section 2 had been considered a purely procedural provision, Congress would have extended it to all contracts rather than simply to maritime transactions and contracts evidencing a transaction involving interstate and foreign commerce.[142] This explanation is inadequate. Congress might have thought that even if it could have called upon federal courts to enforce arbitration agreements in every case, there was no federal interest in doing so unless interstate commerce or maritime transactions were involved. This conclusion is far more plausible than the *Southland* majority's idea that Congress both viewed Section 2 as a statement of substantive law and believed that it created no "federal-question jurisdiction."[143]

Since these four cases were decided, most courts have followed the Supreme Court's holdings. The acquiescence has not been absolute. A number of state and federal courts have taken the view that arbitration agreements are not separable from the container contract when a party alleges fraud in the inducement of the contract.[144]

IV. THE SUPREME COURT BACKS AWAY FROM ITS PROCRUSTEAN APPROACH

A. *The Effects of* Volt

The Supreme Court's alteration of the original FAA left the lower courts, both state and federal, with some difficulties—not the least of which was the long-established rule that the FAA created no federal jurisdiction.[145] This rule was incongruous with the substantive, regulatory FAA created by the Supreme Court,[146] and it left open the possibility that certain sections of the Act would not be enforceable in state court while other sections would.

142. *See id.* at 14.

143. *See id.* at 15 n.9.

144. *E.g.*, Labib v. Younan, 755 F. Supp. 125, 129 (D.N.J. 1991) (reasoning that, if a contract is found to be invalid, the arbitration clause contained within it necessarily falls); Sun Drilling Prods. Corp. v. Rayborn, 703 So. 2d 818, 819 (La. Ct. App. 1997) (deciding that fraud in the inducement of a contract with "a mandatory arbitration clause is a matter to be decided by [state] courts . . ., even where the contract is subject to the [FAA]"); Shaw v. Kuhnel & Assocs., Inc., 698 P.2d 880, 881–82 (N.M. 1985) (holding that a court determines the issue of fraud in the inducement of a contract); Shaffer v. Jeffery, 915 P.2d 910, 918 (Okla. 1996) (concluding that the court must resolve allegations of fraud in the inducement prior to compelling arbitration).

145. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) (explaining that this rule makes the FAA "something of an anomaly").

146. Refer to Part III *supra* (describing the Supreme Court's refashioning of the FAA into a substantive federal law).

In *Volt Information Sciences, Inc. v. Board of Trustees*, the Court confronted another problem created by *Prima Paint* and its progeny.[147] The *Volt* Court dealt with the question of whether parties are free to choose state law to govern their arbitration agreements when the FAA would govern absent the choice of state law.[148] This issue reveals the inconsistent results created by treating the FAA "as a full-scale regulatory statute."[149] The Court had previously stressed that congressional intent in enacting the FAA was to allow freedom of contract regarding arbitration.[150] Therefore, *Volt* presented the Court with a real dilemma. If congressional intent is to allow freedom of contract regarding arbitration agreements, disallowing the parties' the choice of state law flies in the face of "freedom to contract."[151]

Although *Volt* did not involve a charge of fraud in the inducement of a contract, it is important to the present discussion because of the potential sea change hinted at by the Court in its opinion. The eight Justices participating in the *Volt* opinion[152] agreed that parties may choose to have state law govern an arbitration agreement that would otherwise be covered by the FAA.[153] The majority pointed to the absence of an express pre-emptory provision in the FAA and asserted, citing *Bernhardt v. Polygraphic Co. of America*,[154] that the FAA does not "reflect a congressional intent to occupy the entire field of arbitration."[155] The Chief Justice went on to say that application of the California statute would not conflict with the FAA because

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147. *See* 489 U.S. 468 (1989) (construing the pre-emptive scope of the FAA narrowly).

148. *Id.*

149. *See* MACNEIL, *supra* note 2, at 150 (citing Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1269 (7th Cir. 1976)). *Gulf Oil* held that parties "are not free to burden the arbitration process under the Federal Act by adopting state law which shifts the determination of disputes from arbitrators to courts." 541 F.2d at 1269. The problem with this reasoning is that arbitration statutes operate only when parties have agreed to arbitrate in the first place. MACNEIL, *supra* note 2, at 150.

150. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985) (stating that "passage of the Act was motivated . . . by a . . . desire to enforce" parties' agreements to arbitrate).

151. *Volt*, 489 U.S. at 474–75 (explaining that Section 4 of the FAA confers the right to an order compelling arbitration "*in the manner provided for in [the parties'] agreement*," which can include the parties' choice of state law (alteration in original)).

152. Those Justices participating were Chief Justice Rehnquist, and Justices Brennan, White, Marshall, Blackmun, Stevens, Scalia, and Kennedy. Justice O'Connor did not participate in the consideration or decision. *Id.* at 469.

153. *See id.* at 476–77 (limiting application to those state laws not in conflict with the FAA).

154. 350 U.S. 198, 202–04 (1956) (holding that, in diversity cases, the state law applicable under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), governs arbitration of an intrastate contract).

155. *Volt*, 489 U.S. at 477.

Congress's primary purpose was to make parties' arbitration agreements enforceable.[156]

The Court also rejected the argument that the choice-of-law provision was a waiver of a "'federally guaranteed right'" and therefore governed by state law.[157] Instead, the Court found that no right had been created in the first place.[158] Having agreed to be governed by California law, the parties had simply not agreed to arbitration where California law did not provide for arbitration.[159] Additionally, the *Volt* Court declined to extend its prior *Moses H. Cone* pro-arbitration principles.[160]

The *Volt* opinion leaves unanswered the question of whether the Court has come down in favor of a facilitative, freedom-of-contract FAA at the expense of a regulatory FAA. In spite of appearing to have adopted a "parties-can-opt-out" rule, the majority asked whether, regardless of the choice of California law by the parties, the FAA would be undermined by application of California law to the arbitration agreement.[161] Although the Court concluded that it would not,[162] the very asking of the question raises doubts about the status of the parties' freedom to choose state arbitration law to govern contracts otherwise subject to the FAA, especially where state law rejects the separability doctrine adopted in *Prima Paint*.

If parties choose to be governed by such state law, they would be at odds with the holding in *Prima Paint*. Nevertheless, they would not necessarily be thwarting the intent of the FAA—according to recent, pared down Supreme Court interpretations of the FAA.[163] There is surely a change of sentiment reflected in *Volt*, but how much of a change is far from clear. The ruling falls short of undoing the damage previously wrought by a Supreme Court anxious to place the FAA on stronger footing than state general contract law.

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156. *See id.* at 477–79 (stating that the purpose of the FAA was to overcome judicial hostility to arbitration agreements).

157. *See id.* at 474 (opining that such an argument misconstrues the nature of FAA-created rights).

158. *Id.* at 475.

159. *See id.*

160. *Id.* at 475–76. *See generally* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983) (finding that "relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement").

161. *Id.* at 476.

162. *Id.* at 477 ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.").

163. Refer to Part IV.B *infra*.

B. First Options *and* Doctor's Associates—*A Partial Restoration of Truncated State Contract Law*

Several years after deciding *Volt*, the Supreme Court handed down three important—and inconsistent—arbitration agreement decisions, two of which have been interpreted by state courts as giving back to them previously truncated contract rights.[164]

In the first of these three decisions, *Allied-Bruce Terminix Cos. v. Dobson*,[165] the Court refused to overrule its *Southland* holding.[166] Instead, the Court found that a homeowner's contract with a termite exterminator involved interstate commerce within Congress's definition when it passed the FAA.[167] Dissatisfaction with the Court's arbitration jurisprudence had been growing at the state level, as evidenced by the amicus briefs filed by twenty state attorneys general requesting that the Court overturn its *Southland* holding.[168] Nonetheless, the Court declined the invitation.[169]

Justices Thomas and Scalia dissented in *Allied-Bruce*.[170] In a thorough interpretation of the FAA within its historical context,[171] Justice Thomas reiterated his opposition to applying the FAA in state courts.[172] This historical context is important to any discussion of Congress's intent at the time of the FAA's passage. Moreover, it is an essential component of any serious attempt to interpret laws according to legislative intent, a goal that the Supreme Court repeatedly claims to value.[173] Justice Thomas argued quite persuasively that, "because the FAA was enacted against [the] general background [of the Constitution's limits on Congress's ability to regulate state courts' procedural

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164. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–87 (1996) (affirming states' rights to regulate contracts, including arbitration clauses, under general contract law principles); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 940–41 (1995) (discussing whether it is the arbitrator or the court who decides if parties agreed to arbitrate a particular issue).

165. 513 U.S. 265 (1995).

166. *Id.* at 272 (noting there were no significant changes that might prompt reconsideration).

167. *Id.* at 281 (deciding that, regardless of the parties' actual failure to consider "an interstate commerce connection," the Court would accept such an interpretation).

168. *See id.* at 272.

169. *Id.* at 272, 282 (upholding the *Southland* decision and reversing the Alabama Supreme Court's denial of a stay pending arbitration).

170. 513 U.S. at 285.

171. *See id.* at 285–94 (Thomas, J., dissenting) (describing the judicial context in which the FAA was passed).

172. *Id.* at 285–86 (Thomas, J., dissenting).

173. *See id.* at 292–93 (Thomas, J., dissenting) (reciting past Supreme Court opinions in which the Court emphasized the importance of being "'absolutely certain' that Congress intended" pre-emption of state law).

rules], no one read it" as an attempt to prescribe those rules.[174] Justice Thomas opined that an arbitration agreement can be viewed as procedural—"a species of forum-selection clause"—because it hands down no rules of decision but only "identifies the adjudicator of disputes."[175]

It is true that the distinction between "substance" and "procedure" obtained new meaning after *Erie*[176]—leading the Court, in 1956, to hold that, for *Erie* purposes, the question of whether a court should stay litigation brought in breach of an arbitration agreement is one of substantive law.[177] Still, it does not follow that the Court's statement to that effect in *Bernhardt*[178] means that arbitration clauses were understood to be substantive in 1925, or that Congress extended the FAA's reach beyond the federal courts.[179]

Shortly after deciding *Allied-Bruce*, the Court, in *First Options of Chicago, Inc. v. Kaplan*,[180] asserted that the decision regarding whether parties agreed to settle their dispute through arbitration is governed by "ordinary state-law principles that govern the formation of contracts."[181] *First Options* involved a "workout" agreement governing debt payment to a self-clearing broker-dealer firm.[182] One of the party's objected to arbitration on the grounds that it had not signed any such agreement to arbitrate.[183] Because there were no allegations of fraud in *First Options*, its applicability to such cases has been questioned.[184] Its pertinent language, however, is certainly broad enough to apply to arbitration cases involving allegations of fraudulent inducement.

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174. *Id.* at 288 (Thomas, J., dissenting).

175. *Id.* at 289 (Thomas, J., dissenting) (comparing forum selection clauses to Federal Rules of Civil Procedure 73, which states that a district court may, with consent of the parties, refer issues to a magistrate; and 53, stating that a district court may refer issues to a special master).

176. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

177. Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 202 (1956).

178. *Id.* at 202–03.

179. *See Allied-Bruce*, 513 U.S. at 291–92 (Thomas, J., dissenting) (arguing that *Bernhardt* "could not change the original meaning of the statute that Congress enacted in 1925" and that Congress did not intend the FAA to be substantive law binding on the states).

180. 514 U.S. 938 (1995).

181. *Id.* at 944 (reiterating that courts should not assume parties have agreed to arbitration unless they have clear evidence that the parties so intended).

182. *Id.* at 940.

183. *Id.* at 941.

184. Refer to note 195 *infra*.

In *Doctor's Associates, Inc. v. Casarotto*,[185] decided in 1996, the Court reiterated its *Allied-Bruce* holding that "[s]tates 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.'"[186] The Court also noted that states were limited in finding grounds for revocation that had the effect of putting arbitration agreements on unequal footing with other contracts—action that, according to this pro-arbitration Court, would be directly contrary to the FAA's language and congressional intent.[187]

The Court's reason for striking down the Montana Supreme Court's ruling in *Doctor's Associates* was that the Montana statute at issue singled out arbitration agreements by requiring special notice—not applicable to contracts generally—as a condition of arbitration agreement enforcement.[188] In distinguishing its *Volt* decision, the Court pointed out that "*Volt* involved an arbitration agreement that incorporated state procedural rules," not rules affecting the "enforceability of the arbitration agreement itself."[189]

The *Doctor's Associates* and *First Options* opinions have been interpreted by lower courts in a manner that once again leaves room for state law to govern contracts containing arbitration agreements. For example, in *Sun Drilling Products Corp. v. Rayborn*,[190] a Louisiana appellate court upheld the trial court's decision to adjudicate the claim rather than compel arbitration because a claim of "[f]raud in the inducement is a generally applicable contract defense in Louisiana" rather than a defense applicable only to arbitration agreements.[191]

Other courts, however, have failed to find co-existence possible. In *Investment Management & Research, Inc. v.*

185. 517 U.S. 681 (1996).

186. *Allied-Bruce*, 513 U.S. at 281. Citing *Allied-Bruce*, *Doctor's Associates* paraphrased the quoted language and then emphasized that "[c]ourts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." 517 U.S. at 687.

187. *See Doctor's Associates*, 517 U.S. at 686 ("'What States may not do is decide that a contract is fair enough to enforce all its basic terms . . ., but not fair enough to enforce its arbitration clause.'") (quoting *Allied-Bruce*, 513 U.S. at 281).

188. *Id.* at 686–87 (citing 9 U.S.C. § 2 (1994)).

189. *Id.* at 686–88 ("The state rule examined in *Volt* determined only the efficient order of proceedings . . . .").

190. 703 So. 2d 818 (La. Ct. App. 1997).

191. *Id.* at 819 (holding that, in light of the Supreme Court's decision in *Doctor's Associates*, the state was free to apply its general contract law to a contract containing an arbitration agreement).

Hamilton,[192] a state court withdrew an initial opinion in which the court denied a motion to compel arbitration following an allegation by one of the parties that the contract at issue was fraudulently induced.[193] In the original opinion's stead, the court remanded the cause, holding that the dispute was subject to arbitration.[194] The court interpreted *Prima Paint* as holding that even in a state court proceeding, and regardless of state law to the contrary, the separability doctrine must be applied.[195]

V. CONFUSION REIGNS

The Supreme Court has only itself to blame for the confusion and contradictory holdings that have followed its FAA rulings of the last forty years. *Prima Paint* adopted the principle of separability under the FAA despite state law that the Court interpreted to stand oppositionally, thereby vitiating long-standing contract law.[196] *Moses H. Cone* extended the Court's pro-arbitration interpretation of the FAA so that any doubts about the scope of the arbitrability of issues would be "resolved in favor of arbitration" and, as a consequence (or perhaps as a motive), all but eradicated Article III rights.[197]

The Court's interpretation of the key words in Section 2 of the FAA—that provisions for arbitration "'shall be valid, irrevocable, and enforceable'"—is the foundation for understanding *Southland*'s impact on state law.[198] The Court interpreted those words broadly, stating that it discerned "only two limitations on the enforceability of arbitration provisions governed by the [FAA]:" the contract must be either a "written maritime contract or a contract 'evidencing a transaction

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192. 727 So. 2d 71 (Ala. 1999).

193. *Id.* at 72–73.

194. *Id.* at 78.

195. *See id.* at 75–76 (claiming that *First Options*, because it made no mention of *Prima Paint*, has no bearing on cases of fraudulent inducement in the contract generally).

196. Refer to notes 50–57 *supra* and accompanying text.

197. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22–25 (1983). *See also* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TULANE L. REV. 1, 17–19 (1997) ("The Court has not made any attempt to reconcile the . . . policy favoring arbitration with the Constitution's mandate of jury trials, due process, and decisions by life-tenured judges.").

198. *See* Southland Corp. v. Keating, 465 U.S. 1, 10–12 (1984) (quoting 9 U.S.C. § 2 (1994)). Several later cases applied *Southland*'s basic principle. Those cases are *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686–88 (1996) (reiterating the principle in the face of state court nullification efforts); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (emphasizing the expansiveness of FAA coverage); and *Perry v. Thomas*, 482 U.S. 483, 489–92 (1987) (clarifying the relationship between state law and the FAA).

involving commerce.'"[199] The Court claimed it saw "nothing in the Act indicating that the [broad enforceability principle was] subject to any additional limitations under state law."[200] The Court's analysis presents two basic questions: (1) What is the proper scope of "grounds as exist at law or equity for the revocation of any contract?"; and (2) What does the proposition that provisions for arbitration "shall be valid, irrevocable, and enforceable" encompass?

In considering these questions—especially as they relate to the ultimate conclusion of this Comment—it is important to approach the analysis with a clear distinction of what constitutes general contract law, general state contract law, and arbitration law. Arbitration law is a variety of contract law.[201] As such, neither the FAA nor any of the various other American arbitration statutes is a complete code of the relevant law governing arbitration agreements.[202] The purpose of Section 2, according to the *Prima Paint* Court, "was to make arbitration agreements as enforceable as other contracts, but not more so."[203] Of course, the result of *Prima Paint*, and the cases that followed its holding, was that arbitration agreements eventually came to occupy a superior position.[204]

The FAA depends upon the general law of contracts to provide its "infrastructure."[205] The FAA does not, however, need to rely upon state arbitration law.[206] Failure to make this distinction can cause confusion, and has done so in the lower courts.[207] In deciding arbitration cases, courts must always turn to some general contract law.[208] The same is not true for state arbitration law vis-à-vis the FAA.[209]

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199. *Southland*, 465 U.S. at 10–11.

200. *Id.* at 11.

201. *See* IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 10.6.2.1 (Supp. 1999) [hereinafter MACNEIL ET AL.] (drawing distinctions among various laws pertinent to arbitration).

202. *Id.* ("The FAA also presupposes the existence of a whole corpus juris of general law: property, torts, agency . . . .").

203. 388 U.S. 395, 404 n.12 (1967).

204. Refer to Part III.B *supra*.

205. MACNEIL ET AL., *supra* note 201, § 10.6.2.1 (describing the hierarchy between federal and state law as placing the FAA and general federal arbitration law that flows from it at the top, both superseding general contract law, regardless of its source, followed by state arbitration law). According to Macneil, the FAA's policy of broad interpretation of the scope of arbitration agreements supersedes the neutral principles found in general contract law. *Id.* § 10.6.2.2. nn.23, 25.

206. *Id.* § 10.6.2.1 ("[G]eneral contract law . . . whatever its source, . . . supersedes [the lowest law in the hierarchy—]state arbitration law.") (footnotes omitted).

207. *Id.* § 10.6.2.2.

208. *Id.* (observing that, for the FAA to operate, either state contract law or a

The Supreme Court has recently made it clear that the law of a particular state is to govern, rather than generally accepted contract law principles, when determining contract law in interpreting an arbitration agreement and any related disputes.[210] Furthermore, the Court has been scaling back its interpretation of the FAA to more closely fit the FAA's true history—its history prior to transformation into a federal regulatory statute on the Court's Procrustean bed.[211]

Setting the stage for these Thesean cases was *Perry v. Thomas*,[212] in which the Court stated that, when defenses such as unconscionability are asserted,

> the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute . . . . 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.[213]

According to the *Perry* decision, a court may not, in assessing litigants' rights to enforce an arbitration agreement, construe that agreement in a manner inconsistent with the way in which it construes nonarbitration agreements under state law.[214]

Perry's apparent call for application of the general contract law of a particular state was clarified and reconfirmed in *Volt*.[215] As previously discussed, the *Volt* Court held that whether a general choice of law clause encompasses choice of arbitration law is a question of state law.[216] The Court apparently reached this result by starting with the proposition that "the interpretation of private contracts is ordinarily a question of

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"distillate" of all states' general contract law would govern the parties' relationship).

209. *Id.* (explaining that, in those cases, the FAA, and "its penumbra," can be treated as plenary).

210. *See* First Options of Chi. v. Kaplan, 514 U.S. 938, 944 (1995).

211. *See id.* at 944–45.

212. 482 U.S. 483 (1987).

213. *Id.* at 492 n.9 (citation omitted). Chief Justice Burger's language in *Southland* follows:

> We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California [statute] is not a ground that exists at law or in equity "for the revocation of *any* contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California [statute].

Southland Corp. v. Keating, 465 U.S. 1, 16 n.11 (1984).

214. 482 U.S. at 493 n.9.

215. Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 478–79 (1989).

216. *Id.* at 474, 476.

state law," which the Supreme Court does not review.[217] Without discussion, the Court assumed this meant the law of a particular state, in this case California, applied rather than generally accepted principles of contract law.[218] This result is important to the discussion of an allegation of fraud in the inducement of a contract containing an arbitration clause. If the particular state law appropriate to the interpretation and further governance of a contract in dispute allows for vitiating the entire contract and not subjecting the dispute to arbitration via a separability doctrine, these recent Supreme Court cases appear to allow for such an interpretation without running afoul of the FAA.

The Court's *First Options*[219] decision further eliminated any remaining doubt about which contract law—that of a particular state or generally accepted principles—would govern. After noting that the issue before it was governed by "ordinary state-law principles," the Court gave considerable attention to the issue of how the question of arbitrability should best be handled.[220] Lower courts, however, have not been unified in following the holding of *First Options*.[221]

There appears to be a tendency on the part of some courts to either confuse or fail to distinguish FAA pre-emption of state arbitration law with an assumption that the FAA also pre-empts state contract law.[222] The Supreme Court bears responsibility for a significant share of this confusion. Because the Court has, to

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217. *Id.* at 474.

218. *Id.* at 476. Earlier cases such as *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), are not contrary to this reasoning. *Moses H. Cone's* pro-arbitration resolution about the scope of the arbitration clause in favor of arbitration would have superseded either the general contract law of a particular state or generally accepted principles of contract law. *See* MACNEIL ET AL., *supra* note 201, § 10.6.2.1. Therefore, the outcome of *Moses H. Cone* does not depend upon a choice between the two, nor does any of its language imply that it does.

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

220. *See id.* at 944–47.

221. *Compare* Avedon Eng'g, Inc. v. Seatex, 126 F.3d 1279, 1287 (10th Cir. 1997) (holding that, because general state contract laws are not pre-empted by the FAA, the lower court's inquiry ought to begin with a choice of law determination), *with In re* Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 554, 558 (2d Cir. 1995) (rejecting New York case law that interprets arbitration clauses as choice of law provisions). The *In re Salomon* court further stated, "[W]e have long held that '[o]nce a dispute is covered by the [FAA], federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability.'" *Id.* at 559 (all but first alteration in original); *see also* Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 938 (6th Cir. 1998) (refusing, despite an Ohio choice-of-law clause, to apply state law that made the issue of fraudulent inducement nonarbitrable).

222. Refer to Part IV *supra* (citing cases reaching contrary interpretations of the Court's current analysis of the FAA's breadth).

date, failed to explicitly overturn its prior erroneous holdings[223] or to clarify what is by now clearly misleading dicta,[224] lower courts may, understandably, be unsure about which laws should be applied to contracts containing arbitration agreements and when these laws should be applied.

VI. Areas of Consistency in Spite of the Confusion

Federal courts *have* refused to enforce arbitration clauses included in contracts obtained by fraud in the factum. Fraud in the factum occurs "[w]here [there is] misrepresentation of the character or essential terms of a proposed contract."[225] When such essential terms are misrepresented, the other party's manifestation of assent is ineffective because that party believed he was agreeing to something different from what was presented.[226] A material misrepresentation is one that "would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."[227] A failure to disclose material terms is tantamount to a misrepresentation.[228]

An example of fraud in the factum is the classic two-contract deceit. For example, a contractor will first have a consumer agree to some repair work—in the form of a written contract. Later, the contractor will force the consumer to agree to the financing in the standard form contract under the guise that the two agreements are essentially the same. The second contract containing the arbitration clause, however, is not the same and bears no relation to the agreement promised to the consumer. Because of the contractor's misrepresentations regarding the essential character and terms of the standard form contract, the consumer's assent is ineffective, and the contract should be void.[229] The consumer's

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223. Refer to Part III *supra* (detailing the Court's misreading of the FAA beginning with *Prima Paint*).

224. Refer to Part IV *supra* (opining that the Court has generated further confusion with its decision in *Volt*).

225. Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998, 1000 (11th Cir. 1986) (finding no compelling arbitration agreement in the instance where assent to the contract was obtained by misrepresentation).

226. Restatement (Second) of Contracts § 163 cmt. a (1979).

227. *Id.* § 162(2).

228. *Id.* § 160.

229. *See id.* § 163.

> If a misrepresentation as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.

signature on the standard form contract has no meaning because the consumer did not assent to those terms.[230]

For example, in *Cancanon*, the plaintiffs signed what was represented as a money market account but was, instead, a general securities account with a binding arbitration agreement.[231] Their stockbroker then engaged in high volume, speculative trades that resulted in substantial losses.[232] The court held that where the allegation "is one of fraud in the factum, i.e., ineffective assent to the contract, the issue is not subject to resolution pursuant to an arbitration clause contained in the contract documents."[233]

Another case in which the court refused to enforce an arbitration clause involved a plaintiff who barely read or spoke English.[234] She was required to sign documents in English for a commodities account that contained a binding arbitration clause.[235] After her account sustained serious losses, litigation ensued and the defendant sought to compel arbitration pursuant to the arbitration provision.[236] The plaintiff resisted, alleging the defendant knew she could not read English and that the agreement was presented "for her signature as a mere 'administrative' document."[237] She also contended that the defendant "affirmatively concealed from her" the fact that the document was a "contract setting forth the terms of a binding agreement."[238] The court held that arbitration could not be compelled because fraud in the factum as to the entire agreement voided the contract.[239] Additionally, the court stated that the majority of courts "confront[ing] this question directly have held

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Id.

230. *See* Langley v. FDIC, 484 U.S. 86, 93 (1987) (stating that fraud in the factum is "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents"); Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 (3d Cir. 1980) (stating that "[t]he mere execution of a document . . . does not negate the factual assertion that such signature" was not intended to be a contractual undertaking).

231. Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998, 999 (11th Cir. 1986) (noting additionally that the contract was written in a language foreign to the consumer).

232. *Id.*

233. *Id.* at 1000.

234. Kyung In Lee v. Pac. Bullion (New York) Inc., 788 F. Supp. 155, 155–58 (E.D.N.Y. 1992).

235. *Id.* at 155.

236. *Id.* at 156.

237. *Id.* at 157.

238. *Id.*

239. *Id.* at 158 (stating that, "pursuant to 9 U.S.C. § 4," the court was required to hold a trial to determine the validity of the disputed arbitration agreement).

that a *bona fide* claim of fraud in the factum as to the entire contract takes a case outside the rule of *Prima Paint*."[240]

VII. CONCLUSION: THE COURT MUST BE ITS OWN THESEUS

The lack of clarity resulting from the Court's more recent opinions interpreting the FAA's proper reach into areas of traditional state jurisdiction, combined with its emphasis on stare decisis, has produced less than satisfying, or even predictable, results.[241] Some courts have handed down decisions in which legitimate choice-of-law provisions agreed to by the parties are ignored.[242] Some states have interpreted the recent Supreme Court rulings in *Volt*[243] and *First Options*[244] to mean that their general contract laws regarding rescission of an entire contract, including those containing arbitration agreements (state laws that run counter to the ruling in *Prima Paint*[245]), are once again valid.[246]

In the wake of the Supreme Court's holding in *First Options*, several courts have recognized that, because the assumption that an agreement to arbitrate was voluntarily made is essential to the *First Options* inquiry, the related and antecedent question of whether the agreement is a product of fraud, unconscionability, or coercion must be an issue for the courts as well.[247]

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240. *Id.* at 157 (citing cases supporting the court's finding); *see also* PMC, Inc. v. Atomergic Chemetals Corp., 844 F. Supp. 177, 181 (S.D.N.Y. 1994) (reasoning that, before a party can be compelled to arbitrate, judicial determination of assent to an agreement containing an arbitration clause is necessary).

241. *See* Sternlight, *supra* note 197, at 9 ("The Court, far from engaging in neutral legal analysis that simply allows parties to contract for arbitration that is mutually advantageous, has in recent decisions stretched and twisted traditional canons of construction to favor arbitration over litigation."). Sternlight contends that the application of a federal preference to establish the existence of a valid arbitration agreement constitutes state action that results in the deprivation of constitutional rights. *See id.* at 40–47, 78–100.

242. Refer to note 205 *supra* and accompanying text.

243. 489 U.S. 468, 471–73 (1989) (affirming the lower court's opinion that an arbitration agreement containing a choice of law provision incorporates the arbitration rules of that forum).

244. 514 U.S. 938, 944, 947 (1995) (deciding that courts should generally apply state-law principles of contract formation to determine whether parties agreed to arbitrate a matter, but that courts should not find such intent without clear and unmistakable evidence).

245. 388 U.S. 395, 403–04, 425 (1967) (holding that a federal court may consider only issues pertinent to the making and performance of an arbitration agreement when considering a Section 3 application for a stay).

246. Refer to note 247 *infra*.

247. *See* Aviall, Inc. v. Ryder Sys., Inc., 913 F. Supp. 826, 831 (S.D.N.Y. 1996) (calling into question the continuing validity of the *Prima Paint* approach), *aff'd*, 110 F.3d 892 (2d Cir. 1997); *see also* Berger v. Cantor Fitzgerald Sec., 942 F. Supp. 963, 965 (S.D.N.Y. 1996) (stating that the court must first evaluate the enforceability of the

There is an additional reason for urging that the Supreme Court re-assess its line of FAA decisions. In the civil context, Supreme Court case law implicitly adopts a four-factor balancing test to decide when courts should accept or reject a claim of waiver of civil rights.[248] Courts should examine the following: (1) "the visibility and clarity of the waiver itself," (2) "the relative knowledge and economic power possessed by the parties," (3) "the degree of voluntariness of the purported agreement," and (4) "the substantive fairness of the purported agreement."[249] Because arbitration clauses represent a waiver of civil rights, the Court should proceed more cautiously in upholding arbitration clauses. A more measured approach would also increase internal consistency on the Court's part.

The current state of federal arbitration law demands clarification by the Court. Where it intersects with the contract law of individual states, the current body of Supreme Court law is confusing. Clarity can only come at the expense of previous rulings. As previously stated, in *Allied-Bruce*, no fewer than twenty attorneys general submitted an amicus brief asking the court to restore to the states the right to more fully govern those contract disputes within their respective jurisdictions.[250]

The current Supreme Court is as likely a body to perform the necessary Thesean task as any. Justices Kennedy, Scalia, Thomas, O'Connor, and Chief Justice Rehnquist comprise a majority that often pushes for expansion of states' rights.[251] Additionally, Justice Scalia has made it known that he is prepared to overrule the Court's *Southland* decision.[252] Justice Scalia, in expressing his unwillingness to follow stare decisis, stated he did not believe that proper application of the doctrine "prevents correction of the

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arbitration agreement); Allstar Homes, Inc. v. Waters, 711 So. 2d 924, 937–38 (Ala. 1997) (ordering judicial proceedings to determine the validity of an arbitration clause in a mobile home purchase contract); Frizzell Constr. Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79, 81 (Tenn. 1999) (holding "that the parties did not intend to arbitrate a claim of fraudulent inducement" because Tennessee law disallows arbitration of contract formation issues), *cert. denied*, 120 S. Ct. 2679 (2000).

248. *See* Sternlight, *supra* note 197, at 57–58; *see also* Erie Telecomms. v. City of Erie, 853 F.2d 1084, 1094–96 (3d Cir. 1988) (noting that "'the question of a waiver of a federally guaranteed constitutional right is . . . controlled by federal law'").

249. Sternlight, *supra* note 197, at 57–58.

250. 513 U.S. 265, 272 (1995).

251. *See* Linda Greenhouse, *States' Rights Adherents on Top Court Appear to Be Given Pause*, N.Y. TIMES, Nov. 11, 1999, at A21 (listing the Justices who usually advocate states' rights).

252. *Allied-Bruce*, 513 U.S. at 285 (Scalia, J., dissenting) ("I shall not in the future dissent from judgments that rest on *Southland*. I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time . . . .").

mistake."[253] "Adhering to *Southland* [would otherwise] entail[] a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes."[254]

The reader will recall that the *Southland* majority concluded that Section 2 of the FAA "appl[ies] in state as well as federal courts,"[255] and "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[256]

In stark contrast to the *Southland* Court's statements quoted above is the reality that, at the time Congress enacted the FAA, laws governing the enforceability of arbitration agreements were generally thought to deal exclusively with procedural rather than substantive matters because they were directed solely to the mechanisms for resolving the underlying disputes. As then-Judge Cardozo explained, "Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow."[257] It would have been most unusual for Congress to attempt to dictate procedural rules for state courts.[258] A number of other sources concur with this assessment.[259]

One need not be a federalist to advocate the resolution of the FAA's pre-emption of state courts and general state contract laws in favor of the states.[260] Consumer advocates also support such an interpretation,[261] and seek an overruling of *Prima Paint*[262]

253. *Id.* at 284 (Scalia, J., dissenting).

254. *Id.* at 284–85 (Scalia, J., dissenting).

255. 465 U.S. 1, 12 (1984).

256. *Id.* at 10.

257. Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 290–91 (N.Y. 1921) (holding the New York arbitration statute of 1920, from which the FAA was copied, to be purely procedural).

258. *See, e.g.*, *Ex parte* Gounis, 263 S.W. 988, 990 (Mo. 1924) (in banc) (describing the rule that "Congress cannot . . . regulate or control . . . [state courts'] modes of procedure" as one of the "general principles which have come to be accepted as settled constitutional law").

259. *See, e.g.*, Atl. Fruit Co. v. Red Cross Line, 276 F. 319, 323 (S.D.N.Y. 1921) ("Arbitration statutes or judicial recognition of the enforceability of such provisions do not confer a substantive right, but a remedy for the enforcement of the right which is created by the agreement of the parties."), *aff'd*, 5 F.2d 218 (2d Cir. 1924); Cohen & Dayton, *supra* note 10, at 276. Cohen and Dayton go on to state:

> [W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought. That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts.

Id.

260. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 292 (1995) (Thomas, J., dissenting) (advocating settling the uncertainty about the original meaning of the FAA "in light of [the] core principles of federalism").

261. *See* Donovan & Searles, *supra* note 32, at 287 (concluding that "the trend to

and *Southland*.[263] Still others maintain the position that the Court's application of a federal preference to establish the existence of a valid arbitration agreement constitutes state action that results in the deprivation of constitutional rights.[264]

It remains to be seen whether the current Supreme Court will be willing to rescue from its Procrustean beds both the states and the Federal Arbitration Act and allow them to once again occupy their rightful spheres.

Nancy R. Kornegay

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insert unfair and overreaching arbitration clauses into standard form consumer contracts appears to be on the rise").

262. 388 U.S. 395 (1967).

263. 465 U.S. 1 (1984).

264. *See* Sternlight, *supra* note 197, at 40–47, 78–100.