

2005

Privatized Justice

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Recommended Citation

Moses, Margaret L., Privatized Justice, 36 Loy. U. Chi. L.J. 535 (2004-2005)

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Privatized “Justice”

Margaret L. Moses*

Arbitration agreements remove disputes from our court system to a private system of justice, paid for by the participants. Although arbitration can have certain advantages over litigation, such as confidentiality, speed, flexibility, and ability of the parties to choose the arbitrators, such a forum also has disadvantages. At particular risk of being disadvantaged is the consumer, who may be unaware that by agreeing to an arbitration clause she has given up her right to a jury trial, and she will pay higher fees for the arbitral process than she would have to pay as court fees in litigation. Moreover, she will have no right to an appeal on the merits of the case, and may be prohibited from bringing her action as a class action.¹

Although a party’s consent is supposed to be required in order for the dispute to be resolved in a private forum, in many consumer transactions, there is no willing and knowing consent to arbitration. Adhesion contracts that are imposed on consumers by banks, telephone companies, credit card companies, pest control companies, and a myriad of other vendors and service providers are neither read nor signed by most consumers. Nonetheless, the arbitration provisions in such contracts—referred to as pre-dispute arbitration clauses—are regularly upheld by the courts.² This article will focus on how the Supreme Court has interpreted the Federal Arbitration Act in a way that undermines

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1. See generally Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) [hereinafter Sternlight, *Class Action*].

2. See generally Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996) (commenting on five Supreme Court decisions in 1994 and 1995 concerning commercial arbitration law); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996) (discussing the role of consent in arbitration agreements); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001) [hereinafter Sternlight, *Mandatory Binding*] (discussing cases that have upheld such provisions); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 707 (1996) [hereinafter Sternlight, *Panacea*] (suggesting congressional changes to the FAA to protect the weaker parties in arbitration).

consumer protection, in particular by holding that states' attempts to limit arbitration abuses will in most instances be preempted by the Federal Arbitration Act.³

I. THE SUPREME COURT'S EXPANSIVE INTERPRETATION OF THE FEDERAL ARBITRATION ACT

The imposition of an arbitration requirement by adhesion contracts appears to go far beyond what the drafters of the Federal Arbitration Act ("FAA" or "Act") envisioned when the Act was passed in 1925. At that point, courts were refusing to enforce arbitration agreements. The FAA was passed in order for written arbitration agreements to be "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁴ Legislative history suggests that the drafters of the FAA envisioned arbitration between merchants of roughly equal bargaining power, and specifically did not believe the Act provided for imposition of arbitration through adhesion contracts.⁵

Despite Congress' concern over limiting the scope of the FAA, the United States Supreme Court, over the last few decades, has greatly expanded that scope. First, the Court has announced a federal policy favoring arbitration and requiring that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁶ Second, it has held that the FAA's coverage extends to the full extent of Congress' power under the commerce clause.⁷ Third, it has held that the FAA applies to actions brought in state court.⁸ Fourth, the Court has found that even statutory rights such as those under employment

3. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that the FAA preempts a state law requiring that a notice of arbitration be given on the first page of a contract).

4. 9 U.S.C. § 2 (2000 & West Supp. 2004).

5. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting). Justice Black discussed legislative history of the FAA as follows:

[Members of Congress] expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. He noted that such contracts 'are really not voluntarily [sic] things at all' because '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' He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases.

Id.

6. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

7. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995).

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

discrimination laws,⁹ anti-trust laws¹⁰ and securities laws, are arbitrable.¹¹ Finally, it has interpreted the FAA to preempt state laws protective of weaker parties subject to pre-dispute arbitration clauses in adhesion contracts.¹²

The effect of this expansion of the FAA's scope is dramatic. Large portions of our society have lost access to the courts and to juries for many kinds of disputes. In many cases, arbitration clauses either expressly prohibit, or are found to prohibit class actions,¹³ which sometimes provide the only economically effective way to bring a small consumer claim. A consumer who loses an arbitration has no right to an appeal on the merits, which means that as to errors of fact or law, the arbitral process is not subject to any supervisory function by our court system.¹⁴ Moreover, the Supreme Court has held that states cannot challenge this major displacement of disputes into the private sector, except through those contract defenses common to all contracts.¹⁵ Where arbitration is part of the bargain between parties of equal strength, it can be assumed that the parties have determined that the advantages of arbitration outweigh the disadvantages. This is not true, however, when one side simply imposes arbitration upon the other.¹⁶

9. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–28 (1991) (enforcing agreement to arbitrate employment discrimination claim under Age Discrimination in Employment Act of 1967).

10. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that anti-trust claims could be arbitrated in international transactions).

11. *See generally* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (holding that securities claims are arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that claims under the Securities Exchange Act are arbitrable under the FAA); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (holding that an alleged trademark violation under the Securities Exchange Act is arbitrable).

12. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). *See generally* *Sternlight, Panacea*, *supra* note 2 (extensively discussing the Supreme Court's decisions expanding the scope of the FAA).

13. *See generally* *Sternlight, Class Actions*, *supra* note 1 (discussing the growing trend of arbitration agreements prohibiting class actions in any venue).

14. *See* 9 U.S.C. § 10 (2000 & West, Supp. 2004) (stating that a court may only vacate an arbitration award on grounds of procedural inadequacy or arbitrator misconduct). *But see* JACK J. COE, JR., *INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT* 303–06 (1997) (noting that courts have created, although rarely applied, some additional grounds for overturning an award, such as manifest disregard of the law and an arbitrary and capricious award).

15. *See generally* *Doctor's Assoc., Inc.*, 517 U.S. at 685–86 (holding that only generally applicable contract defenses, such as fraud, duress, and unconscionability can invalidate an arbitration agreement).

16. There are numerous articles suggesting that this privatized system of justice, when imposed through adhesion contracts, is inferior to our court system of justice. *See, e.g.*, *Carrington & Haagen*, *supra* note 2, at 402 (stating that if legislation resembling the Supreme Court's current interpretation of the FAA had been presented to the 1925 Congress, it would not

II. PREEMPTION OF STATE LAW

This Article will focus on one aspect of the Supreme Court's expansive interpretation of the FAA which undermines consumer protection: its holding that arbitration agreements must be enforced unless there is a ground for non-enforcement that applies to all contracts, such as fraud. This interpretation severely restricts a state's ability to regulate potential abuses of arbitration. If state legislation singles out arbitration for special treatment, according to the Supreme Court, the legislation is preempted by the FAA. In *Doctor's Associates, Inc. v. Casarotto*,¹⁷ for example, the Supreme Court found that the FAA preempted a state law in Montana that required notice of arbitration to be "typed in underlined capital letters on the first page of the contract."¹⁸ Casarotto, a Subway franchisee in Montana, sought to litigate a dispute arising under a franchise agreement that contained an arbitration clause, but lacked the required notice.¹⁹ The Montana Supreme Court found the notice requirement was valid, and was not preempted by the FAA, because application of Montana's notice requirement would not undermine the goals and policies of the FAA.²⁰ The purpose of the Montana law was simply "that before arbitration agreements are enforceable, they be entered knowingly."²¹

The Supreme Court disagreed, holding that the FAA pre-empted Montana's law.²² The language of Section 2 of the FAA provides that written arbitration agreements are enforceable except upon grounds for the revocation of any contract.²³ According to the Court, this language means that state laws cannot single out arbitration provisions for any

have been assured of a single vote; and further noting that current interpretation enables those with economic power to diminish enforceability of the rights of consumers, patients, employees, investors, franchisees and shopkeepers); Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1092 (1998) (finding that reform is needed to make arbitration agreements truly voluntary); Sternlight, *Mandatory Binding*, *supra* note 2 (noting that courts fail to employ traditional jury trial waiver analysis when deciding arbitration cases); Sternlight, *Panacea*, *supra* note 2, at 712 (stating that Congress should act "to prevent companies from using arbitration as a tool of oppression, rather than to achieve justice"); Eric Weiner, *Even in Victory: Darcy Ting Defeated AT&T, Yet the Consumer-At-Large Again Has Lost*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 1 (2002), available at <http://www.cardozoicr.com/vol4no1/notes02.html> (stating that arbitration process available to consumers is fundamentally unfair).

17. *Doctor's Assoc., Inc.*, 517 U.S. at 685-86.

18. Mont. Code Ann. § 27-5-114(4) (1999).

19. *Casarotto v. Lombardi*, 886 P.2d 931, 932-33 (Mont. 1994).

20. *Id.* at 938-39 (citing *Volt Info. Sci. v. Stanford Univ.*, 489 U.S. 468 (1989)).

21. *Id.* at 939.

22. *Doctor's Assoc., Inc.*, 517 U.S. at 685-86.

23. 9 U.S.C. § 2 (2000 & West Supp. 2004).

special treatment.²⁴ Rather, the only defenses to enforcing an arbitration clause are the generally available contract defenses, such as fraud, duress, or unconscionability.²⁵ The Court indicated it was complying with the intent of Congress to place arbitration clauses "upon the same footing as other contracts."²⁶

A. The Supreme Court's Interpretation Does Not Treat Arbitration Clauses Like Any Other Contract

The premise of this Article is that the Supreme Court's interpretation of the FAA does not place arbitration on the same footing as other contracts. The Court's view that the Montana law was preempted because it singled out arbitration for special treatment ignores four important considerations. First, the Court looked at the Montana law in isolation, rather than considering whether the law was consistent with the state's policy and practice of regulating contracts generally. Second, it did not consider the intent of the legislation. Third, it did not

24. *Doctor's Assoc., Inc.*, 517 U.S. at 687.

25. *Id.* (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)); *Rodriguez de Quijas, v. Shearson/American Express, Inc.* 490 U.S. 477, 483-84 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 222-26 (1987).

26. *Doctor's Assoc., Inc.*, 517 U.S. at 687 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting H.R. REP. NO. 68-96, at 2 (1924); S. REP. NO. 68-536 (1924))).

The decisions leading up to *Doctor's Associates, Inc.* include the following: First, in *Southland Corporation v. Keating*, the Court held that Section 2 of the FAA applied in state as well as federal courts, and that Congress "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." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (finding that a state legislature had no power to designate an area of law—such as claims for wages—where parties were prohibited from resolving their disputes by arbitration). Second, in *Perry v. Thomas*, in a dispute over a sales commission, the Court found that the Federal Arbitration Act pre-empted a California statute which permitted the plaintiff to sue for wages despite an agreement to arbitrate. *Perry v. Thomas*, 482 U.S. 483 (1987). Section 229 of the California Labor Code provided that actions for the collection of wages could be maintained "without regard to the existence of any private agreement to arbitrate." CAL. LAB. CODE § 229 (West 1971). The Court held that state law can only govern issues of the validity, revocability and enforceability of contracts generally, but cannot focus solely on the agreement to arbitrate. *Perry*, 482 U.S. at 492. Finally, in *Allied-Bruce Terminix Cos. v. Dobson*, 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." 9 U.S.C. § 2 (emphasis added). 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.

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (citing *Volt Info. Sci. v. Stanford Univ.*, 489 U.S. 468, 474 (1989)).

recognize the right of the state to deal with the perceived harms of adhesion contracts that impose an arbitration requirement, and that deprive consumers of the right to a jury trial, without their knowledge or consent. Fourth, the Court did not appear to give the same deference to core federalism principles that it has claimed to espouse in other contexts.

1. Treating Arbitration Clauses Differently from Other Contract Clauses

In holding that a Montana law requiring a conspicuous notice of arbitration was preempted by the FAA, the Supreme Court did not treat arbitration the same as other contracts. States have typically required certain provisions in contracts to be conspicuous. In the Uniform Commercial Code (“UCC” or the “Code”) for example, a number of contract provisions are required to be conspicuous. Any attempt to exclude or modify the implied warranty of merchantability, for example, must be conspicuous.²⁷ The UCC even defines “conspicuous” in Article 1 so that it can be interpreted uniformly throughout the Code, whenever the law requires a contract provision to be conspicuous.²⁸ In determining that the FAA preempted a state statute from making the notice of an arbitration provision conspicuous, even though a state could require any other provision of a contract to be conspicuous, the Court has put arbitration provisions on a very different footing from other contract provisions. The Court’s position seems at odds with its earlier statement, in *Prima Paint Corporation v. Flood & Conklin Manufacturing*, that “the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.”²⁹ If states can require other contract provisions to be conspicuous,

27. U.C.C. § 2-316(2) (2004) (“[T]o exclude . . . the implied warranty of merchantability . . . the language must mention merchantability and in case of a record must be conspicuous.”). A number of other requirements of conspicuousness are found either in the Code provisions or in the Official Comments. Section 2A-214(2) of the Uniform Commercial Code on leases requires that exclusion of any warranty be “in a record and be conspicuous.” U.C.C. § 2A-214(2) (2004). Section 2A-303(8) provides, “In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a record, and conspicuous.” U.C.C. § 2A-303(7) (2004). Other requirements of conspicuousness are found in U.C.C. §§ 3-104(d); 3-311(b),(c)(1), as well as in Articles 7 and 8.

28. Section 1-201(10) provides as follows:

“Conspicuous”: A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of the form is “conspicuous” if it is in larger or other contrasting type or color

U.C.C. § 1-201(10) (2004).

29. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

but not arbitration provisions, then arbitration provisions are more enforceable than other contract provisions, because states cannot put the same limitations on their enforceability. The Montana law, therefore, appeared to put arbitration on the same footing as other contract notice provisions. States can, and do, require that particular contract provisions be made conspicuous, based on a state's own view of what its state contract law should be.

The Supreme Court, however, has provided a very strained interpretation of Section 2 of the FAA. In a number of decisions interpreting the FAA, it has italicized "any," so the final clause of Section 2 is written as follows: "save upon such grounds as exist at law or in equity for the revocation of *any* contract."³⁰ The word "any" is in italics to emphasize the Court's view that "any" actually means "all." In other words, the Court's position is that for grounds to be available to render an arbitration provision unenforceable, such grounds must be "applicable to contracts generally,"³¹ and therefore potentially applicable to all contracts. Thus, grounds such as fraud, unconscionability, and duress could be applied to invalidate arbitration agreements, because they could also be applied to invalidate contracts generally.³² Montana's conspicuousness requirement, on the other hand, according to the Court, "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally."³³

In enacting the FAA, Congress specifically used the term "any," not "all." Therefore, a requirement of conspicuousness could condition the enforcement of an arbitration agreement, because it is a requirement that also conditions enforcement of other contracts. Conspicuousness—when required by law to put parties on notice of certain provisions—is certainly a ground that exists at law or equity and is applied to many types of contract clauses, not just to arbitration. The result of the Supreme Court's rule, however, is that while any other term of a contract can be required by a state legislature to be made conspicuous, an arbitration provision cannot. This does not put arbitration on the same footing as other contracts, but gives more protection to arbitration provisions than to other provisions under contract law.

30. *Doctor's Assoc., Inc.*, 517 U.S. at 686; *Allied-Bruce Terminix*, 513 U.S. at 281; *Perry*, 482 U.S. at 492 n.9; *Southland Corp.*, 465 U.S. at 16.

31. *Doctor's Assoc., Inc.*, 517 U.S. at 687.

32. *Id.*

33. *Id.*

2. Ignoring the Intent of the Legislation

What is disturbing about the Court's rationale in *Doctor's Associates* is that the Court made no attempt to see if the particular statute impeded or interfered with the purpose of the FAA, which is to render arbitration agreements as enforceable as other contracts. Nor did the Court make any effort to avoid federal encroachment in an area such as contract law that has been typically a matter of state law. The intent of the Montana legislature was not to interfere with the enforcement of arbitration agreements, but to make sure that its citizens knew when an arbitration provision was included in a contract.³⁴ This intent is consistent with promoting arbitration, since a core principle underlying arbitration is that it is consensual.³⁵ The Montana notice requirement does not conflict with the goals and policies of the FAA by simply trying to ensure "that before arbitration agreements are enforceable, they be entered knowingly."³⁶

3. Not Acknowledging the Special Characteristics of Adhesion Contracts

Courts have traditionally treated adhesion contracts (standard form contracts), differently from other contracts. When the parties do not negotiate the terms of standard form contracts, but rather the stronger party imposes terms upon the weaker, courts may deny effect to terms that are unexpected.³⁷ Courts recognize that parties may not read detailed mass-produced standard form contracts, nor understand them if they do.³⁸ The common law has developed a doctrine of reasonable expectations, to the effect that a party should not be held to a term of an adhesion contract if the term is unexpected.³⁹ In adhesion contracts, courts determine unexpectedness to some extent by whether the term is conspicuous. Because of the general contract principle that inconspicuous unexpected clauses are not enforceable, a legislature's determination, like the determination by a common law court, that an arbitration provision should be conspicuous appears to be within the scope of applicability of general contract principles.

This argument was made but not accepted in *Doctor's Associates*. The Court acknowledged the argument in a footnote, but stated that the

34. Uniform Arbitration Act, MONT. CODE ANN. § 27-5 (2003).

35. *Volt Info. Sci. v. Stanford Univ.*, 489 U.S. 468, 489 U.S. 468, 477 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so.")

36. *Casarotto v. Lombardi*, 886 P.2d 931, 939 (Mont. 1994).

37. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169 (Iowa 1975).

38. *See id.* at 175 (discussing use of boiler-plate clauses in form contracts).

39. *Id.* at 176; RESTATEMENT (SECOND) OF CONTRACTS § 211, cmt. f (1981).

Montana Supreme Court had not asserted as a basis for its decision "a generally applicable principle of 'reasonable expectations' governing any standard form contract term."⁴⁰ Whether or not the Montana Supreme Court asserted the doctrine as a basis for decision, it should still be relevant to an analysis of the language of Section 2 of the FAA. The doctrine of reasonable expectations, requiring certain provisions to be conspicuous to be enforceable, certainly appears to fit within the requirements of Section 2 that written arbitration provisions are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁴¹

Another issue which should be considered with respect to adhesion contracts is that when a party "agrees" to arbitration, that party is giving up a constitutional right to a jury trial. Many commentators have argued that the standard for waiving the right to a jury (when that right is given up via an arbitration agreement), should be voluntary and knowing.⁴² The Supreme Court has never recognized the relevance of the Seventh Amendment to arbitration, and lower courts tend to ignore the issue of whether parties to an arbitration agreement found in an adhesion contract have validly waived their constitutional right to a jury trial. Lower courts have enforced standard form contracts containing arbitration clauses even if the parties have not read the agreements.⁴³ The rationale for not requiring a knowing and voluntary consent to such waiver, if one is given, tends to be either that arbitration is "favored,"⁴⁴ or that once parties agree to have their dispute resolved in a non-arbitral forum, a court does not have to apply normal waiver criteria.⁴⁵

40. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687–88 n.3 (1996) (suggesting possibly that a state could enact a law that would pass muster under the FAA by asserting as a basis for the law a generally applicable principle of contract law).

41. 9 U.S.C. § 2 (2000 & West Supp. 2004). Of course one could argue that having an arbitration clause in an adhesion contract is not unexpected. Yet, that depends upon the sophistication of the consumer. A state should have the power to determine whether an arbitration clause in an adhesion contract is one which is expected by the average consumer.

42. See, e.g., *Carrington & Haagen*, *supra* note 2, at 331 (commenting on five Supreme Court decisions on commercial arbitration); *Stempel*, *supra* note 2, at 1381 (discussing the role of consent in arbitration agreements); *Sternlight*, *Mandatory Binding*, *supra* note 2, at 669 (discussing arbitration agreements in relation to the Seventh Amendment); *Sternlight*, *Panacea*, *supra* note 2, at 707 (analyzing potential changes in the FAA to protect weaker parties).

43. See, e.g., *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984), (noting that "though *perhaps* not contemplated by the Piersons when they signed the contract, loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate").

44. See, e.g., *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285–87 (9th Cir. 1988) (discussing the federal policy favoring arbitration).

45. See *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310 (7th Cir. 1987) (holding that Congress intended to require mandatory submission to customer-oriented

Yet, contract disputes resolved by arbitration are typically matters for which there is a right to trial by jury. The drafters of the FAA assured Congress that the FAA would not impair the right to a jury trial, because that right must be voluntarily and validly waived when disputes are submitted to arbitration.⁴⁶ For that constitutional right to be taken away without the knowledge or understanding of the individual is quite a significant diminution in a protection that is supposed to be constitutionally guaranteed.⁴⁷ State law should be able to ensure that a party validly gave its consent to waive a jury trial right before it permits enforcement of an arbitration clause. Even if the state law does not have the same consent requirement for other contract clauses, such as clauses governing warranties or limitations of liability, it should be able to require closer scrutiny of consent to arbitration because the consequences of an agreement to arbitrate have a constitutional dimension not present in the consent to any other clause in the contract, or in the consent to the contract as a whole.

4. Not Giving Deference to Core Federalism Principles

In infringing upon the state power to regulate contracts containing arbitration clauses, the Court appears to be in conflict with its own declared policy of respecting the core principles of federalism.⁴⁸ That policy provides that if federal statutes are ambiguous, they are not interpreted to displace state law.⁴⁹ Rather, the Court should be

arbitration); *see also* Sternlight, *Mandatory Binding*, *supra* note 2, at 669 (further discussing whether courts should be required to apply normal waiver criteria).

46. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting).

47. The right to a civil jury is protected in federal courts by the Seventh Amendment to the U.S. Constitution, and in almost all state courts by state constitutions, with two exceptions, Louisiana and Colorado. In those states the right to a civil jury in state court is provided respectively by state law and by court rule. COLO. REV. STAT. § 5 (2003) (updating civil procedure rule 38); LA. CODE CIV. PROC. ANN., arts. 1731, 1732 (West 1990); *Setchell v. Dellacroce*, 454 P.2d 804, 806 (Colo. 1969) (*en banc*).

48. The present Court has, in the name of federalism, limited the power of Congress under the commerce clause, and under section 5 of the Fourteenth Amendment. *United States v. Lopez*, 514 U.S. 549 (1995) (limiting Congressional power under the Commerce Clause); *United States v. Morrison*, 529 U.S. 598 (2000) (limiting Congressional power under section 5 of the Fourteenth Amendment). Further, the court has created a doctrine of state sovereign immunity well beyond the Eleventh Amendment. *Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that a law adopted by Congress exceeded the scope of Congress's section 5 power and thus could not be used to sue state governments).

49. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 292 (1995) (Thomas & Scalia, JJ., dissenting) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460, 464 (1991)). *See also Allied-Bruce Terminix*, 513 U.S. at 283 (O'Connor, J., concurring) (noting that "'where . . . the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.'" (citations

"absolutely certain" that Congress intended such displacement before giving preemptive effect to a federal statute.⁵⁰

It is difficult to understand how the Court can be absolutely certain that the FAA should displace a law requiring notice for an arbitration provision, when there is substantial legislative history suggesting that the FAA was not even intended to apply to the states.⁵¹ Moreover, the legislative history also strongly indicates that the FAA was never intended to apply to arbitration provisions in adhesion contracts.⁵²

B. *Extent to Which States Can Regulate Arbitration*

Given the Supreme Court's position, however, that a law singling out arbitration for special treatment will be preempted by the FAA, to what extent, if any, can states regulate arbitration? The Court has acknowledged that in the FAA, Congress did not foreclose the states from all regulation of arbitration.⁵³ As it noted in *Allied-Bruce Terminix v. Dobson*, "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles."⁵⁴

Thus, under the Supreme Court's formulation, would it be possible

omitted)).

50. *Allied-Bruce Terminix*, 513 U.S. at 292 (Thomas & Scalia, JJ., dissenting) (quoting *Gregory*, 501 U.S. at 464).

51. See *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O'Connor & Rehnquist, JJ., dissenting) ("One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts"). But see Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 165 (2002) (arguing that the Supreme Court correctly decided *Southland*). Although Professor Drahozal provides support from the legislative history of the FAA for the majority decision in *Southland*, which applies the FAA in state courts, he acknowledges that he "do[es] not claim that the legislative history of the FAA unambiguously demonstrates that Congress intended the Act to apply in state court." *Id.*

52. See *supra* notes 4–5 and accompanying text (citing legislative history of the FAA and Federal policy favoring arbitration).

53. *Allied-Bruce Terminix*, 513 U.S. at 281.

54. *Id.* In *Volt Information Sciences v. Stanford*, the Court, in deciding that California arbitration law, chosen by the parties, was not preempted by the FAA, stated:

The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' The question before us, therefore, is whether application of Cal. Civ. Proc. Code Ann. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, would undermine the goals and policies of the FAA. We conclude that it would not.

Volt Info. Sci. v. Stanford Univ., 489 U.S. 468, 477–78 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

for a state to make the requirement of conspicuousness applicable to arbitration in a way that would not offend the FAA? If one followed the logic of the Court's reasoning, it would seem that for the conspicuousness requirement to apply to contracts generally, the state law would have to provide that most, if not all contract terms be conspicuous. Making every term conspicuous, of course, renders no term conspicuous, undercutting the purpose of the requirement, and making the "general applicability" doctrine ludicrous in this context.

What if the state amended the UCC, as adopted in that state, to include arbitration as one of the provisions—like disclaimers of warranties—that must be conspicuous? As part of the sales law of that state, would the provision pass muster under the FAA? Is the state sales law sufficiently "generally applicable" to contracts so that the arbitration provision would not be preempted? The answer should be that states have the power to regulate matters affecting contracts within their states, and should be able to protect consumers from oppressive provisions imposed on them by adhesion contracts with respect to arbitration as well as other contract provisions. In the Court's view, its holding in *Doctor's Associates* focused on a state law that singled out arbitration for special treatment.⁵⁵ This holding should not be extended to apply to every provision in a statutory scheme that would happen to mention arbitration, when that statutory scheme also deals with contracts generally.

Moreover, could a state enact a law which says that all waivers of a constitutional right to a jury trial must be conspicuous, in writing and signed in order for the waiver to be effective? Such a law would not specifically target arbitration. It would be generally applicable to all contracts which contained such a waiver, either by a clause that specifically stated that the right to jury trial was waived, or that said the dispute was to be resolved by arbitration. Because the law would not mention arbitration, it should escape the reach of *Doctor's Associates*. But it is not clear from *Doctor's Associates* whether a court would find such a law preempted by the FAA. A court could find that such a law had an effect on arbitration, and that it was not "generally applicable" to contracts.⁵⁶ Extending *Doctor's Associates* to preempt such a law

55. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687–88 (1996).

56. For example, the Ninth Circuit found that the FAA preempted a California statute that prohibited resolution of franchise disputes outside California, even though the statute applied to both arbitration and litigation. *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890–92 (9th Cir. 2001). The court noted that since the California provision "applies only to forum selection clauses and only to franchise agreements; it therefore does not apply to 'any contract.'" *Id.* at 890.

would, however, be a dramatic interference with a state's attempt to protect a right that is constitutionally guaranteed under the federal constitution and the constitution of almost every state.⁵⁷

III. POSSIBLE LEGISLATIVE REFORM

The Supreme Court and the lower courts appear to have imperfectly sorted out Congress' desire to have arbitration be on the same footing as other contracts. The drafters of the FAA simply wanted arbitration agreements which were freely and knowingly entered into between parties of equal bargaining power to be enforced by the courts, just like other contracts. This rather straight-forward aim has been distorted to permit arbitration to displace court proceedings without the knowledge or consent of the weaker party to an adhesion contract, thereby denying court access and jury trials for an enormous segment of disputes.

The Supreme Court claims to treat arbitration agreements the same when it in fact treats them differently. It is not treating arbitration agreements the same when it refuses to allow states to require that notice of arbitration be conspicuous, although the state could legally require any other contract provision to be conspicuous.

The courts are permitting the removal of large numbers of disputes from our system of justice into private forums, without the consent, agreement, or knowledge of the participants. While privatized justice may function well enough when the parties choose it, knowing full well what their options are, when it is imposed upon unwitting participants, it thwarts both our system of justice and the intentions of Congress.

Considering the Court's unwillingness to permit regulation of arbitration in adhesion contracts, the next logical step is legislative reform. A number of scholars have suggested proposals to reform the FAA.⁵⁸ Various kinds of federal legislation could help realign the FAA with its drafters' original goals, and thereby limit the oppressive use of arbitration clauses in adhesion contracts. The following are potential workable solutions:

57. See *supra* notes 42–47 and accompanying text (discussing the right to a civil trial by jury).

58. See, e.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001) (suggesting reform of arbitration to avoid the destruction of consumer rights); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241 (2003) (suggesting that the FAA should separate domestic and international arbitration); Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275 (1999) (suggesting a change in the FAA that balances consumers being forced to arbitrate with the benefits of arbitration); Speidel, *supra* note 16, at 1069 (suggesting that the FAA be revised to provide incentives for improvement in transactions between individuals and corporations).

A. Adopt a European-Style System

Congress could adopt legislation that would protect consumers from adhesion contract arbitration agreements by prohibiting such agreements unless both parties agreed to arbitrate post-dispute. This is the approach taken in Europe. The EU Directive on Unfair Terms in Consumer Contracts essentially prevents companies from requiring a consumer to resolve future disputes through binding arbitration, by providing that except for subject matter and price, any non-negotiated term in a consumer contract can be challenged as unfair.⁵⁹

B. Limit the Scope of the FAA

Alternatively, federal legislation could clarify the scope of the FAA's preemption of state laws, limiting preemption to instances where a state law seriously interfered with making arbitration agreements enforceable. Such legislation should specifically permit states to protect their citizens against the harms of arbitration in any areas where the state found such safeguards were needed.

C. Limit Applicability of the FAA

Federal legislation could also restrict the application of the FAA to federal courts. The Supreme Court's decision in *Southland Corporation v. Keating* to make the FAA applicable in state courts was highly controversial in light of legislative history strongly indicating that Congress' intent was "to require federal, not state, courts to respect arbitration agreements."⁶⁰ At this point, most states have their own state arbitration laws, and state courts no longer resist enforcement of arbitration agreements.⁶¹ Freeing the states from possible preemption by the FAA would permit them to institute proper controls on the use of

59. Council Directive 93/13/EEC, 1993 O.J. (L 095) 29; see also Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT'L L. & COM. REG. 357 (2002) (discussing consumer arbitration in the European Union); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002) (discussing whether or not the United States' approach to arbitration is a method for corporations to control public policy).

60. *Southland Corp. v. Keating*, 465 U.S. 1, 23 (1984) (O'Connor, J., dissenting).

61. See David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 31, and n.55 (2004) (noting that "most states have rigorously enforced arbitration agreements under state statutes" and that "[f]orty-seven states and the District of Columbia have arbitration-enforcement statutes creating mechanisms similar to the FAA") (citing 5 Ian R. McNeill, et al., *Federal Arbitration Law: Agreements, Awards & Remedies under the Federal Arbitration Act* 41-44 app. I (5th ed. 1994)).

arbitration in an adhesion contract.

D. Require Express Consent to an Arbitration Clause

Federal legislation could require that no arbitration agreement is valid unless the agreement is in writing and signed by the other party. This is a requirement found in the UNCITRAL Model Law on International Commercial Arbitration, which has been adopted by many countries.⁶² The FAA currently requires arbitration agreements to be in writing, but there is no requirement that the agreement be signed. The lack of a signature requirement permits credit card companies and others to impose an arbitration requirement in the fine print they send out with billing inserts or other information, without any need for the customer to even read the “agreement.” A signature requirement might at least alert parties to the fact of the arbitration agreement, particularly if it were combined with a conspicuousness requirement, similar to the requirement in the Montana law struck down in *Doctor’s Associates*.

E. Allocate the Costs of Arbitration

Finally, federal legislation could require that any business choosing to include an arbitration clause in its standard form contract with a consumer must pay the cost of the arbitration.⁶³ Imposing costs on the stronger party would still not alleviate many of the problems associated with arbitration clauses in adhesion contracts, but if combined with other kinds of legislation, such as the proposals discussed above, it could help level the playing field.

IV. CONCLUSION

Depriving large numbers of consumers of access to our court system without their consent could not have been the intent of the drafters of the FAA. Permitting contracts of adhesion to displace our system of justice with a privatized system not chosen by the parties, not subject to review on the merits, with costs imposed on a party who never chose the system, with constitutionally based jury trial rights deemed to be waived despite a lack of knowledge or consent—this is the current state of the law under the FAA. This does not appear to be the state of the

62. U.N. Comm’n on Int’l Trade Law, UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, Article 7(2) (June 21, 1985), available at <http://www.uncitral.org/en-index.htm>.

63. See Julia A. Scarpino, *Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers*, 10 AM. U. J. GENDER SOC. POL’Y & L. 679, 680 (2002) (proposing a court rule that would require businesses that forced consumers to arbitrate to pay the costs involved in mandatory arbitration).

law intended by the Congress which adopted the FAA. It is time for legislation that gives consumers a choice as to which system of justice they prefer. Privatized justice, when not chosen by the parties, is not justice.