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A Short Defense of Southland, Casarotto, and Other Long-Controversial Arbitration Decisions

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A SHORT DEFENSE OF *SOUTHLAND, CASAROTTO*,
AND OTHER LONG-CONTROVERSIAL ARBITRATION
DECISIONS

*Stephen J. Ware**

Scalding criticism of Supreme Court arbitration decisions appeared in the 1990's and is now widespread. Over twenty years ago, Jean Sternlight feared Supreme Court arbitration decisions “placed consumers' and employees' due process, jury-trial, and Article III rights in serious jeopardy.”¹ Professor Sternlight similarly warns nowadays that a 2011 arbitration decision by the Court “will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued.”² Similarly, spanning the decades, 1990's David Schwartz proclaimed “The Supreme Court has created a monster” with its “enthusiastic approval” of pre-dispute arbitration clauses in adhesion contracts as generally enforceable under the Federal Arbitration Act

* Professor of Law, University of Kansas School of Law. Thanks to Imre Szalai, Chris Drahozal, Jean Sternlight, David Schwartz, Luke Norris, and participants in the 2017 Loyola Consumer Law Review Symposium for comments. Thanks also to Amanda Feriante, Bridget Brazil, Elliott Brewer, and Ellen Rudolph for research assistance.

¹ 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 TUL. L. REV. 1, 7 (1997).

² Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704-05 (2012). See also Jean R. Sternlight, *Hurrah for the Consumer Financial Protection Bureau: Consumer Arbitration As A Poster Child for Regulation*, 48 ST. MARY'S L.J. 343, 357 (2016) (“whereas millions of financial consumers who are not subject to pre-dispute arbitration clauses receive benefits through class actions, only a minute portion of consumers covered by arbitration clauses actually choose to bring arbitration claims”).

(“FAA”).³ Professor Schwartz continues in this decade to accuse Supreme Court arbitration decisions of “converting the FAA into a radical claim-suppressing statute.”⁴

Accomplished scholars like Sternlight and Schwartz are not the only sources of strong language opposing the Court’s arbitration decisions. A state supreme court justice’s concurring opinion a generation ago sounded the legal profession’s ultimate alarm—a “threat to undermine the rule of law”⁵—about adhesive arbitration agreements that “in effect, subvert our system of justice as we have come to know it.”⁶ Justice Trieweler went on to assert that “if any foreign government tried to do the same, we would surely consider it a serious act of aggression.”⁷ This sort of dramatic rhetoric, even from normally-circumspect judges, continues over twenty years later. Under the heading “Forced Arbitration Destroys Individual Rights,” a 2015 federal court decision declares:

Today, forced arbitration bestrides the legal landscape like a colossus, effectively stamping out the individual’s statutory rights wherever inconvenient to the businesses which impose them. What is striking is that, other than the majority of the Supreme Court, whose questionable jurisprudence erected this legal monolith, no one thinks they got it right – no one, not the inferior federal courts, not the state courts, not the Equal Employment Opportunity Commission, and ... not the academic community.⁸

³ David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 33 (1997).

⁴ David Schwartz, Symposium, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2012). See also David S. Schwartz, *Justice Scalia’s Jiggery-Pokery in Federal Arbitration Law*, 101 MINN. L. REV. Headnotes 75, 78 (2016) (criticizing “a long series of Supreme Court decisions that authorize claim-suppressing arbitration”).

⁵ *Casarotto v. Lombardi*, 886 P.2d 931, 939–40 (Mont. 1994).

⁶ *Id.*

⁷ *Id.*

⁸ *In re Nexium (Esomeprazole) Antitrust Litig.*, 309 F.R.D. 107, 146–47 (D. Mass. 2015), as amended (Aug. 7, 2015), *aff’d*, 842 F.3d 34 (1st Cir. 2016). The quoted opinion is by United States District Court Judge William G. Young, who

From this alleged consensus of “No one thinks they got it right,” I dissent in significant part. While I have long opposed Supreme Court decisions on arbitration law’s separability doctrine⁹ and judicial review of arbitration awards,¹⁰ and would reduce adhesive arbitration agreements’ impact on class actions,¹¹ I continue to sympathize with some of the Court’s long-controversial arbitration decisions.

I choose the word “sympathize” because I believe much of the criticism of the Court’s arbitration decisions does not sufficiently weigh the difficult position the Court was in when deciding those cases. The FAA was enacted in the 1920’s before the landmark federalism case of *Erie v. Tompkins*,¹² the New Deal’s expansion of the Commerce Clause and thus of federal power to

was appointed to the bench by President Reagan in 1985. He received an A.B. from Harvard University in 1962, and a LL.B. from Harvard Law School in 1967. Source: *Young, William G.*, U.S. D. DIST. OF MASS., <http://www.mad.uscourts.gov/boston/young.htm> (last visited Sep. 16, 2017).

⁹ Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 128-38, 159-60 (1996); Stephen J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 121 (2007); Stephen J. Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, 68 FLA. L. REV. 1227, 1234-48 (2016).

¹⁰ Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999); Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 88 (2006); Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56 (2014); Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, *supra* note 9, at 1248-60.

¹¹ Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, *supra* note 9, at 1259-718.

¹² 304 U.S. 64 (1938).

preempt state law,¹³ the growth of federal employment and consumer law in the 1960's and 1970's,¹⁴ and the ensuing explosion of class actions.¹⁵ Each of these enormous changes to our nation's legal landscape conflicted, as explained below, with the premises underlying the FAA. While Congress could have amended the FAA to accommodate and be more consistent with these enormous

¹³ Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483-484 (1997) (advocates and opponents agree "the constitutional transformation of the New Deal era" was "a nationalist revolution," as the New Deal Court granted "extensive new powers to Congress," especially "under the Commerce Clause," so "the states became constitutionally dependent on the will of Congress through the latter's power of preemption and the operation of the Supremacy Clause.").

¹⁴ Spencer Weber Waller et al., *Consumer Protection in the United States: An Overview*, 2011 EUR. J. CONSUMER L. 853 (2011) ("[T]he modern consumer protection movement began in the 1960s with to the promotion of a Consumer Bill of Rights by President Kennedy, the growth of the so-called 'Great Society' program of the Johnson administration, and the efforts of Ralph Nader and other consumer advocates to highlight the existence of unsafe products and the need for greater government regulation."); Terry Carter, *Should this toy be saved?*, ABA JOURNAL (May 1, 2013, 10:10 AM), http://www.abajournal.com/magazine/article/should_this_toy_be_saved/ ("The consumer movement largely developed by Ralph Nader in the mid-1960s reached a pinnacle with the creation of the CPSC in 1972."); William R. Corbett & Frank L. Maraist, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 91-92 (2003) ("In 1960 only two major federal statutory laws regulated employment. ... Then, for a thirty-year period beginning in 1963, Congress enacted a host of employment laws.").

¹⁵ Edward F. Sherman, *Decline & Fall*, ABA J., June 2007, at 51, http://www.abajournal.com/magazine/article/decline_fall/ ("The rise and fall of consumer class actions is a cycle that began in 1966 when the scope of Rule 23 of the Federal Rules of Civil Procedure was expanded to allow class action suits for damages. ... [I]n addition to causing consternation in the business sector, the increase in class actions ignited an intense debate over whether the social benefits of class actions outweigh their costs."); Douglas Martin, *The Law: The Rise and Fall of the Class-Action Lawsuit*, NEW YORK TIMES (January 8, 1988), <http://www.nytimes.com/1988/01/08/us/the-law-the-rise-and-fall-of-the-class-action-lawsuit.html?pagewanted=all> ("[I]n the 1970's, class actions became the rage of the legal profession. Now they appear to be dying. The surge of class actions, which allow a large group of 'similarly situated' plaintiffs to combine similar claims in a single suit, related to the loosening of rules governing them in 1966. Fees in class actions were high and there seemed no end to what they might accomplish.").

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changes, it did not. So, reconciling an old statute with a half century of law in tension with that statute's premises became the Court's task.

These longstanding issues continue to pervade recent arbitration scholarship, including very recent articles by Margaret Moses¹⁶ and Luke Norris.¹⁷ Like many others,¹⁸ Professor Moses argues that the drafters and adopters of the FAA did not intend for it to preempt state law or to cover consumer and employment arbitration agreements. She writes:

Neither the drafters of the Federal Arbitration Act nor the Congress that adopted it intended for it to cover consumers or workers, or to displace state jurisdiction or state substantive law. The FAA was simply intended to provide a means for resolving disputes among commercial entities that might voluntarily choose to forego their rights to have their disputes settled in court, in favor of what they deemed to be a simpler and more efficient means of dispute resolution. That point has been lost on the Supreme Court.¹⁹

This argument's two main parts are that the drafters and adopters of the FAA did not intend for it to: (1) preempt state law or (2) cover consumer and employment arbitration agreements. The following pages address these arguments in turn.

¹⁶ Margaret L. Moses, *How the Supreme Court's Misconstruction of the FAA Has Affected Consumers*, 30 LOY. CONSUMER L. REV. 1 (2017). Moses' recent piece cites and builds upon her earlier article, Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created A Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006), so both articles are cited herein.

¹⁷ Luke P. Norris, *The Parity Principle*, 93 N.Y.U. L. REV. 249 (2018).

¹⁸ See *infra* notes 25 and 51.

¹⁹ Moses, *How the Supreme Court's Misconstruction*, *supra* note 16, at 1. See also Moses, *Statutory Misconstruction*, *supra* note 16, at 156 ("Despite concerns expressed by members of the 1925 Congress that arbitration not be imposed in a "take-it-or-leave-it" context, the Supreme Court since the 1980s has created a statute which permits businesses to do exactly that.") (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)).

I. *ERIE*'S IMPACT ON FAA PREEMPTION OF STATE LAW

The United States Constitution's Supremacy Clause says that if a federal law is within the scope of federal power then it is supreme over conflicting state law.²⁰ For example, if a defendant who would be liable under state tort law shows enforcement of that state law would conflict with a federal statute, such as the Employee Retirement Income Security Act, then the defendant wins the case.²¹ While federal *substantive* law preempts inconsistent state law, and does so whether the case is heard in federal or state court,²² federal *procedural* law does not necessarily preempt state law.²³ For instance, the Federal Rules of Civil Procedure do not preempt inconsistent state law because the Federal Rules of Civil

²⁰ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

²¹ See, e.g., *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210–14 (2004) ("respondents' state causes of action fall within the scope of ERISA * * * and are therefore completely pre-empted by ERISA") (internal quotations omitted); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45–47 (1987).

²² *Howlett v. Rose*, 496 U.S. 356, 367 (1990) ("Federal law is enforceable in state courts * * * because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure."); *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1381 (2015) ("The Supremacy Clause instructs courts to give federal law priority when state and federal law clash. But it is not the 'source of any federal rights', and certainly does not create a cause of action.").

²³ "No one disputes the general and unassailable proposition * * * that States may establish the rules of procedure governing litigation in their own courts." *Felder v. Casey*, 487 U.S. 131, 138 (1988). However, "Federal law takes state courts as it finds them only insofar as those courts employ rules that do not impose unnecessary burdens upon rights of recovery authorized by federal laws." *Id.* at 150 (internal quotations omitted); *Haywood v. Drown*, 556 U.S. 729, 767 (2009) ("[T]he Supremacy Clause supplies [The Supreme Court] with no authority to pre-empt a state procedural law merely because it 'burdens the exercise' of a federal right in state court.").

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Procedure only apply in federal court and the “inconsistent” state law, the state rules of civil procedure, only apply in state court. No conflict arises because each set of rules governs only in its own forum.

The same was true of federal and state arbitration law prior to the FAA’s 1925 enactment. Federal arbitration law governed only in federal court, while state arbitration law governed only in state court.²⁴ The FAA was designed to continue this pattern of federal arbitration law consisting merely of *procedural* law governing only in federal courts, according to Professor Moses and most other scholars.²⁵ In contrast, the Supreme Court held in *Southland Corp.*

²⁴ IAN R. MACNEIL, AMERICAN ARBITRATION LAW 21–24 (1992); IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW § 10.1 (1994 & Supp.1999).

²⁵ Moses, *How the Supreme Court’s Misconstruction*, *supra* note 16, at 3 (“[the] proposal to Congress was limited – it was for a statute that would apply only to procedure in the federal courts and would not affect state law.”); *Id.* at 1 (“Neither the drafters of the Federal Arbitration Act nor the Congress that adopted it intended it to cover consumers or workers, or to displace state jurisdiction or state substantive law.”) See also David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1219 (2013) (“Most courts and commentators believe that Congress intended the statute to be a mere procedural rule for federal courts. Yet three decades ago, in *Southland Corp. v. Keating*, the Court held that the FAA applies in state court and eclipses contrary state law”); *Id.* at 1227–28 (“Few modern opinions have weathered as much criticism as *Southland*. ... Ironically, FAA preemption, though widely seen as illegitimate, is now well-established.”); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 92–121 (1992); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L. J. 239, 252 (2012) (“The other error was the decision in *Southland Corp. v. Keating* and its progeny to federalize arbitration law by holding that the FAA preempts state law. The manifold implications of this decision include making a needlessly complex hash of arbitration law by interpenetrating federal and state judge-made contract doctrine; creating a jurisdictional anomaly by holding the FAA to be the only “substantive” federal law that creates no federal question jurisdiction; inhibiting the states’ efforts to prevent misuse of arbitration clauses as loopholes in consumer protection law; and, of course, flouting the basic federalism principle, unanimously accepted by the Court in other contexts, that Congress cannot constitutionally make procedural rules for state courts.”); Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 KAN. L. REV. 795, 834–835 (2012) (“the *Southland* majority may have been excessively intent on expanding the Act and embracing arbitration on personal

v. Keating,²⁶ that FAA section 2 is *substantive* federal law governing in both federal and state courts.²⁷ In defense of *Southland*, Christopher Drahozal notes that its holding is consistent with the language of FAA section 2, which “broadly makes ‘valid, irrevocable, and enforceable’ both pre-dispute and post-dispute arbitration agreements. Nothing in the language of the section limits its application to cases in the federal courts.”²⁸ “By contrast,” he writes, “the remaining sections of the FAA by their terms apply only in federal court.”²⁹

Even if the drafters and adopters of the FAA did not intend for any of it to apply in state court and preempt state law, this original understanding of the FAA would not be conclusive because it does not account for the Supreme Court’s 1938 decision in *Erie v. Tompkins*.³⁰ This landmark case held that “federal courts lack the authority to create ‘federal general common law,’ an authority that the Supreme Court had endorsed nearly a century earlier,”³¹ but rather must “apply state law in the same fashion that a state court would.”³² *Erie* is one of the most studied cases ever because of its

preference grounds rather than giving the issue the careful reading of precedent that it deserved.”); Imre S. Szalai, *Directv, Inc. v. Imburgia: How the Supreme Court Used A Jedi Mind Trick to Turn Arbitration Law Upside Down*, 32 OHIO ST. J. ON DISP. RESOL. 75, 88 (2017) (describing *Southland* as “infamous” and “one of the biggest errors in the Court’s history”).

²⁶ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

²⁷ *Id.* at 12 (“the Arbitration Act ‘creates a body of federal substantive law’ and...the substantive law the Act created [is] applicable in state and federal courts.”) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983)).

²⁸ Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 123 (2002).

²⁹ *Id.*

³⁰ 304 U.S. 64 (1938).

³¹ Adam N. Steinman, *What Is the Erie Doctrine - (and what does it mean for the contemporary Politics of Judicial Federalism)*, 84 NOTRE DAME L. REV. 245, 247–48 (2008).

³² Under *Erie*, “a federal court has an obligation to apply state law in the same fashion that a state court would. ... *Erie* represents a broad principle of federal-state relations within our system of federalism.” John D. Echeverria, *Is Regulation of Water a Constitutional Taking?*, 11 VT. J. ENVTL. L. 579, 616–17 (2010). “While *Erie* put state and federal courts on equal footing when it came to

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pervasive importance,³³ and *Erie* posed a strong challenge to interpreting the FAA to apply only in federal courts. As I wrote over twenty years ago:

“When it was enacted in 1925, the FAA was a procedural statute applicable only in federal courts.” During the following decades, there was “universal recognition that the FAA had nothing to do with proceedings in state courts.” This changed when the Supreme Court considered the effects of its landmark decisions in *Erie Railroad v. Tompkins* and *Guaranty Trust Co. v. York*³⁴. *Erie* held that federal courts lack power to create substantive law, so they must decide cases according to state substantive law and federal procedural law. *Erie* thus required a line between “substance” and “procedure.” *Guaranty Trust* provided such a line; it put on the substantive side any law that was “outcome determinative.” The Supreme Court used that line in *Bernhardt v. Polygraphic Co. of America*³⁵ to conclude that the FAA is substantive law. Thus *Erie*, *Guaranty Trust* and *Bernhardt* moved the “FAA from the procedural side of the law, where Congress had put it in 1925, to the substantive

the substantive elements of the litigants' claims and defenses, the conventional wisdom is that it did not eliminate disparities with respect to many aspects of civil procedure.” Steinman, *supra* note 31, at 248.

³³ “*Erie*’s significance and challenging inscrutability have combined to make it the Mount Everest of Supreme Court jurisprudence.” Allan Erbsen, *Erie’s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 588 (2013). See also Steinman, *supra* note 31, at 247-48 (“During its first seven decades, *Erie* has achieved a mythic status, and it has been a constant subject of scholarly debate and analysis. So profound is *Erie*’s mystique that Professor Larry Lessig coined the term ‘*Erie*-effect’ to describe legal developments that radically transform prevailing views of institutional authority. *Erie*’s mandate was that federal courts lack the authority to create ‘federal general common law,’ an authority that the Supreme Court had endorsed nearly a century earlier in *Swift v. Tyson*.”).

³⁴ *Guar. Tr. Co. v. York*, 326 U.S. 99 (1945).

³⁵ *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956).

side, where Congress had most decidedly not put it.”³⁶

Once the FAA became understood as substantive law, a troubling issue arose about the FAA's constitutionality. If the FAA applied only in the federal courts then the Supreme Court “would have had to decide if Congress could legislate where *Erie* had forbidden the federal courts to create common law.”³⁷ In 1967 the Court in *Prima Paint v. Flood & Conklin Mfg. Co.*³⁸ avoided this difficult issue by concluding, against the evidence, that Congress had enacted the FAA pursuant to its power to regulate interstate commerce. “The Court did not quite say that the FAA governs in state court, but its reasoning left little room for any other result.” The Supreme Court eventually concluded that the FAA governs in state court in the 1980s cases of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, and *Southland Corp. v. Keating*.³⁹

To recap, *Erie*'s fundamental change of the relationship between federal and state law—a change that far transcends the FAA or any other statute—may well have made the FAA unconstitutional had the Supreme Court interpreted the FAA as many argue its drafters and adopters originally understood it. In contrast, the Court's different, but still plausible, interpretation of the FAA preserved its constitutionality.

When a statute admits of more than one plausible interpretation, courts routinely choose the interpretation that preserves the statute's constitutionality. The Supreme Court has long followed

³⁶ Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1007–08 (1996) (quoting IAN MACNEIL, RICHARD SPEIDEL & THOMAS STIPANOWICH, FEDERAL ARBITRATION LAW (1994)).

³⁷ *Id.* (quoting Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1320 (1985)).

³⁸ 388 U.S. 395 (1967).

³⁹ Ware, *supra* note 36 (quoting MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 36, § 10.4.2).

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this “avoidance canon,”⁴⁰ so it is quite ordinary that the Court, after

⁴⁰ *Hooper v. Cal.*, 155 U.S. 648, 657 (1895) (“The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.”); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (quoting *Cromwell v. Benson* 285 U.S. 22, 62 (1932)) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); *Gomez v. United States*, 490 U.S. 858, 859 (1989) (“It is the Court’s settled policy, however, to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.”); *Clark v. Suarez Martinez*, 543 U.S. 371, 395 (2005) (Thomas, J. dissenting) (“The modern canon of avoidance is a doctrine under which courts construe ambiguous statutes to avoid constitutional doubts, but this doctrine has its origins in a very different form of the canon. Traditionally, the avoidance canon was not a doctrine under which courts read statutes to avoid mere constitutional doubts. Instead, it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading.”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J. concurring)) (“Justice Holmes made the same point a century later: ‘[T]he rule is that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.’”); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001) (quoting *Jones v. United States*, 526 U.S. 227, 239 (1999)) (“The rule of ‘constitutional doubt’ holds that ‘where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court’s] duty is to adopt the latter.’ That familiar canon of statutory construction...has been ‘repeatedly affirmed’ to the point that it has achieved rare status as a ‘cardinal principle’ that ‘is beyond debate.’”); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1203 (2006) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)) (“Known colloquially as the avoidance canon, it is most commonly described as providing that ‘where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.’”); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016) (“In its original formula-

Erie, preserved the FAA's constitutionality by interpreting its main substantive provision, section 2, to apply in state courts. That this interpretation of the FAA is at least plausible is supported by Professor Drahozal who points out that "The language of [FAA] section 2 broadly makes 'valid, irrevocable, and enforceable' both pre-dispute and post-dispute arbitration agreements. Nothing in the language of the section limits its application to cases in the federal courts."⁴¹ By contrast, Drahozal writes, "the remaining sections of the FAA by their terms apply only in federal court."⁴²

While Professor Moses similarly traces the FAA's history through *Erie*, *Guaranty Trust*, *Bernhardt*, and *Prima Paint*,⁴³ she accuses the Court of "disregarding text and legislative history."⁴⁴ However, as just noted, the text of the FAA is consistent with the Court's conclusion that section 2 of the FAA, but not its other sections, applies in state courts. And while the Court's interpretation of the FAA may have disregarded the FAA's legislative history, such disregard is consistent with mainstream approaches to statutory interpretation that, for good reasons, tend to give little or no weight to legislative history.⁴⁵ So a Supreme Court that disregards

tion—so-called classic avoidance—the canon provides that 'as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.' This means that the reviewing court must first decide that one possible interpretation would make the statute unconstitutional, and only then can it choose a different interpretation to avoid this problem.").

⁴¹ Drahozal, *supra* note 28.

⁴² *Id.*

⁴³ Moses, *Statutory Misconstruction*, *supra* note 16, at 114-18.

⁴⁴ Moses, *How the Supreme Court's Misconstruction*, *supra* note 16, at 8.

⁴⁵ Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1763 (2010) ("Constitutionally, textualists argue that statutory 'purpose' as evinced by legislative history [committee reports, floor statements, etc.] is not permitted to trump enacted text because only enacted text is 'law' - that is, only enacted text goes through the constitutionally prescribed process of bicameralism and presentment. Some textualists also argue that reliance on legislative history works an unconstitutional delegation of lawmaking authority to subportions of Congress [committees], or worse, congressional staffers [who write the reports]. As a result, strict textualists will not consider legislative history to resolve statutory ambiguity."); John F. Manning, Annual Review of Administrative Law, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1538

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legislative history in favor of a textually plausible statutory interpretation that preserves the statute's constitutionality deserves our sympathy. The post-*Erie* Court faced a difficult predicament and worked through it pretty well—certainly better than the alternative of holding that *Erie* had rendered the FAA unconstitutional.

Along these lines, Margaret Moses is not wholly critical of the Court, which she says, “reached a pragmatic result.”⁴⁶ In this regard, the Court's *Prima Paint* decision was key because its holding that Congress enacted the FAA pursuant to its Commerce power presaged *Southland*'s holding that the FAA preempts state law.⁴⁷ Professor Moses writes that *Prima Paint* “may appear to be a good example of dynamic statutory interpretation,” which is the view that “a judge may legitimately interpret a statute in a way that goes beyond-or even against-the original purpose or intent if justified by changes in current circumstances or mores.”⁴⁸ Moses rightly says “the *Prima Paint* Court appears to have adapted the FAA to a change in circumstances-the sea change brought about

(2014) (“The Court now works hard to ascertain whether the text is clear, exhausting semantic resources before turning to legislative history. Perhaps most importantly, if the Court finds the statutory text to be clear, that is the end of the matter; legislative intent, as revealed by the legislative history, can no longer trump the unambiguous import of the statutory text. As the Court has written, ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 67 (1994) (“statutory text and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for meaning.”) See also *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring) (“The Constitution gives legal effect to the “Laws” Congress enacts, Art. VI, cl. 2, not the objectives its Members aimed to achieve in voting for them. (Citation omitted). If § 3730(e)(4)(A)'s text includes state and local administrative reports and audits, as the Court correctly concludes it does, then it is utterly irrelevant whether the Members of Congress intended otherwise. Anyway, it is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the *only* remnant of “history” that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.”).

⁴⁶ Moses, *Statutory Misconstruction*, *supra* note 16, at 121.

⁴⁷ See *supra* notes 37-39.

⁴⁸ Moses, *Statutory Misconstruction*, *supra* note 16, at 121.

by *Erie* and *Guaranty Trust*—and interpreted the statute in a way that preserved the intent of the enacting Congress to apply the statute in federal court in diversity cases.⁴⁹

II. FAA SECTION 2'S APPLICATION TO CONSUMERS

A. Statutory Text Trumps Legislative History

The previous section reviews the Supreme Court's *Erie*-related, constitutionality-preserving interpretation of FAA section 2 as substantive federal law preempting inconsistent state law. Section 2 states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract,

⁴⁹ *Id.* After *Guaranty Trust* and *Bernhardt*, the Supreme Court applied *Erie* in *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988). Professor Moses writes that only the latter of these cases, decided long after *Prima Paint* and even after *Southland*, might have led to a different result in *Prima Paint* had it by then replaced *Guaranty Trust*; Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created A Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 117–18 (2006) (“Language in *Erie* suggested that the Article III power to control federal courts did not give Congress the right to create rules which affected substantive areas of state law. It was only in *Ricoh* that those concerns were resolved in favor of congressional power. Thus, as the courts in *Bernhardt* and its progeny viewed *Erie*, for the FAA to apply in a diversity case, the statute must have been based on Congress' power under the Commerce Clause.”) See also Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 81–82 (1998) (quoting 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 4505 (2d ed. 1996)) (“Together, the *Bernhardt* and *Prima Paint* cases imply that there may be some matters that, although they are ‘rationally capable of classification as procedural’ within the meaning of *Hanna*, nevertheless are so substantive that Congress cannot displace state law in the area other than through an exercise of Article I powers.”).

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transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁵⁰

Despite the breadth of FAA section 2's language, "transaction involving commerce," Professor Moses (like several others⁵¹) argues: "Neither the drafters of the Federal Arbitration Act nor the Congress that adopted it intended it to cover consumers or workers. . . . The FAA was simply intended to provide a means for resolving disputes among commercial entities."⁵² However, the text of FAA section 2 did not make enforceable only arbitration agreements between "commercial entities" or "merchants" or "businesses." It

⁵⁰ 9 U.S.C. § 2 (2012).

⁵¹ Hiro N. Aragaki, *The Federal Arbitration Act As Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1973 (2014) (FAA intended "to simplify business disputing procedure and to improve the administration of justice."); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 308 (2015) (Congress "intended the FAA to allow enforcement only of arbitration agreements between merchants. Congress did not intend the FAA to apply to consumer contracts."); Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 729–30 (2001) ("the Federal Arbitration Act was never intended to permit companies to impose arbitration on unknowing consumers and employees, but rather was merely intended to allow two sophisticated businesses to enter into predispute arbitration agreements."); Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 118 (2016) (the FAA "was enacted to cover privately-negotiated arbitration agreements between merchants...the Supreme Court has expanded the statute to...compel arbitration of...consumer disputes...") See also Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging "Anti-Reform" Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469, at 469 (2015) (the "Supreme Court has been on a bit of a pro-arbitration tear recently, upholding ever-more draconian dispute resolution clauses inserted in standard-form contracts against all sorts of legal and policy-based challenges"); David Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1001-02 (2017) ("Although the Court's doctrine has repeatedly stressed the benefits of arbitration, that doctrine makes no serious effort to identify or police arbitration's costs. . . . If there are problems with arbitration, they are not apparent from reading the Court's majority opinions.").

⁵² Moses, *How the Supreme Court's Misconstruction*, *supra* note 16, at 1; Moses, *Statutory Misconstruction*, *supra* note 16, at 111–12 ("The FAA was a bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength").

made enforceable all arbitration agreements in all sorts of contracts “involving commerce” between all sorts of parties, except for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁵³

While the FAA’s legislative history reflects concerns about non-employment adhesion contracts, such as insurance policies,⁵⁴ these concerns did not find their way into the statute’s text. So, under mainstream approaches to statutory interpretation that, for good reasons, prioritize statutory text far above legislative history,⁵⁵ it is enough to say Congress knew how to except types of parties from FAA section 2 and chose to except some employees but not any consumers. Consequently, if consumers make arbitration agreements “involving commerce,” then those agreements are covered by the FAA.⁵⁶

Accordingly, the Supreme Court applied FAA section 2 to enforce a consumer’s adhesive arbitration agreement in the 1995

⁵³ 9 U.S.C. § 1 (2012) (“‘commerce’, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”).

⁵⁴ See A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce; and A Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions or Commerce Among the States or Territories or With Foreign Nations: Hearing on S. 4213 and S. 4214 Before the Senate Comm. on the Judiciary, 67th Cong. 9-11 (1923) (statement of Senator Walsh) (“The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily [sic] things at all. Take an insurance policy. ... You can take that or you can leave it. ... It is the same with a good many contracts of employment.”). See also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting) (footnotes omitted) (Sen. Walsh “was emphatically assured by the supporters of the bill that it was not their intention to cover such cases.”).

⁵⁵ See *supra* note 45 and accompanying text.

⁵⁶ See discussion *infra* Section II.D., discussing the argument that applying FAA section 2 to consumer contracts is inconsistent with the intent of the Congress that enacted it.

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case of *Allied-Bruce Terminix Cos. v. Dobson*.⁵⁷ The following year, in *Doctor's Associates v. Casarotto*,⁵⁸ the Court held that parties relying on state law to oppose enforcement of arbitration agreements were limited to arguments based in general contract law, as opposed to state laws designed to protect parties from arbitration clauses in particular. *Casarotto* involved a Montana statute requiring that notice of an arbitration clause be given on the first page of a contract.⁵⁹ The Court held that this Montana statute directly conflicted with FAA section 2's command that arbitration agreements be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract" because the Montana statute "condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally."⁶⁰

This seems to me the best interpretation of FAA section 2's language, as a matter of pure statutory interpretation.⁶¹ However, I confess to liking its consequences more than most progressives do. This difference about the desirability of *Casarotto*'s consequences may reflect different beliefs about the facts—what consequences

⁵⁷ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74, 77 (1995) (stating that "[a]fter examining the statute's language, background, and structure, we conclude that the word 'involving' is broad and is indeed the functional equivalent of 'affecting'" and thus "signals an intent to exercise Congress' commerce power to the full.").

⁵⁸ *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686 (1996).

⁵⁹ Mont. Code Ann. § 27–5–114(4) (1995) ("Notice that a contract is subject to arbitration...shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.") This language was deleted from the statute in 1997.

⁶⁰ *Casarotto*, 517 U.S. at 687.

⁶¹ Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1008–1014 (1996) ("The Supreme Court correctly held that the Montana statute is preempted by the FAA because the Montana statute 'conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.' In other words, the Montana statute is preempted because it creates a ground for the revocation of an arbitration agreement—failure to include a capitalized, underlined, page-one notice—that does not 'exist at law or in equity for the revocation of any contract.' The FAA 'precludes States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.'").

flow from routine enforcement of adhesive arbitration agreements—as I do not share the belief of many progressives that the most relevant empirical evidence shows such enforcement tends to harm consumers.⁶² That topic is discussed next.

B. Consequences of Routine Enforcement of Adhesive Arbitration Agreements

Professor Moses writes: “There are a number of good studies, books, and articles about the adverse impact of forced arbitration on consumers. They point out that mandatory arbitration leads to fewer claims brought by consumers, as well as lower recoveries and less deterrence of corporate wrongdoing.”⁶³ In contrast, my writings argue not only that “forced” and “mandatory” are inaccurate rhetoric for adhesive arbitration agreements,⁶⁴ but also that the most relevant empirical data does show that such agreements tend to have the consequences alleged by Professor Moses.⁶⁵ For instance, she cites data collected by Theodore Eisenberg and Geoffrey Miller to suggest that “firms that impose arbi-

⁶² Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 65-119 (2017).

⁶³ Moses, *How the Supreme Court's Misconstruction*, *supra* note 16, at 16–17 (citing Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POLICY REVIEW 329 (2015); Theodore Eisenberg, Geoffrey Miller, Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 883-85 (2008); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*” 104 GEORGETOWN L. J. 57 (2015); Margaret Radin, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHT AND THE RULE OF LAW* (2013); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87 (2012); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L. J. 239 (2012); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 17 (2004).

⁶⁴ Ware, *supra* note 62, at 43-51.

⁶⁵ *Id.* at 65-119.

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tration on their customers and employees tend not to put arbitration contracts in their negotiated contracts,”⁶⁶ from which she concludes “companies prefer litigation when dealing with peers.”⁶⁷ However, Professor Moses does not cite a (in my view, persuasive,) reply to Eisenberg and Miller contending that Eisenberg and Miller’s data “likely significantly understates the use of arbitration clauses in contracts between sophisticated parties” because “Eisenberg and Miller focus on types of contracts that are unlikely to include arbitration clauses [and] either do not consider, or pay little heed to, the types of contracts that the arbitration literature commonly identifies as likely to include arbitration clauses.”⁶⁸

Similarly, Professor Moses describes a series of *New York Times* articles as “informing the public of the harms of forced arbitration.” In contrast, I do not think those articles even-handedly portray arbitration, with charges that arbitrators “commonly consider the companies their clients” and “have twisted or outright disregarded the law” to rule favorably towards the companies,⁶⁹ and “the rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators.”⁷⁰

Following others, Professor Moses cites other nations’ refusal to enforce adhesive arbitration agreements as support for her

⁶⁶ Moses, *How the Supreme Court's Misconstruction*, *supra* note 16, at 18 (citing Theodore Eisenberg, Geoffrey Miller, Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Non-consumer Contracts*, 41 U. MICH. J. L REFORM 871, 883-85 (2008).

⁶⁷ *Id.*

⁶⁸ Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 463-64 (2010).

⁶⁹ Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>; Jessica Silver-Greenberg & Michael Corkery, *A Privatization of the Justice System*, N.Y. TIMES, Nov. 2, 2015, at A1; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1; Michael Corkery & Jessica Silver-Greenberg, *When Scripture is the Rule of Law*, N.Y. TIMES, Nov. 3, 2015, at A1.

⁷⁰ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=1.

arguments that the U.S. should do likewise. She writes that U.S. enforcement of consumers' adhesive arbitration agreements "has reduced their access to court systems, which means no right to a jury trial, no right to a class action," and other consequences.⁷¹ However, the civil jury and class action have long been nearly unique to the U.S. and barely exist elsewhere,⁷² so I have written:

Much of what makes civil litigation in the United States materially different from civil litigation elsewhere in the world can plausibly be traced back to the jury. By contrast, enforcement of consumer and employment arbitration agreements affects only a few categories of cases and, within those categories, af-

⁷¹ Moses, *How the Supreme Court's Misconstruction*, *supra* note 16, at 19; For an earlier similar argument see, e.g., Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 839 (2002).

⁷² Stephen J. Ware, *Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury*, 56 U. MIAMI L. REV. 865, 867 (2002) ("The United States is the only major nation to make extensive use of jury trials in civil cases.") (citing Richard A. Posner, *The Federal Courts: Challenge and Reform 193-94* n.1 (1996) (referring to the abolition of the civil jury as 'a course that the rest of the civilized world took long ago'); Konrad Zweigert & Hein Kotz, *An Introduction to Comparative Law* 267 (1977); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the EU and the US*, 28 N.C. J. INT'L L. & COM. REG. 357 (2002)). See also Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 193 (2005) ("Duke Law School professor Neil Vidmar reports that fifty-four countries currently provide for trial by jury, fifty-three of them in criminal cases only. The United States is the only country in the world that routinely employs juries in civil trials.") (citing Neil Vidmar, *A Historical and Comparative Perspective On the Common Law Jury*, in *World Jury Systems* 1, 3 (Neil Vidmar ed., 2000)); Richard J. Peltz-Steele, *Wrongs, Rights, and Remedies: A Yankee Romp in Recent European Tort Law*, 26 IND. INT'L & COMP. L. REV. 102, 160-61 (2016) ("Europe has been slow to develop collective action, and conventional wisdom states that perceived excesses against enterprise in the U.S. have been cautionary."); Linda S. Mullenix, *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 401 (2014) ("[U]ntil fairly recently, the class action device was a uniquely American innovation, resisted (if not rejected) by most foreign legal systems.").

fects only those cases in which an enforceable arbitration agreement has been formed. The civil jury is a mountain; enforcement of consumer and employment arbitration agreements is a molehill. Those who value uniformity across nations and seek to bring U.S. law into the international mainstream should be far more troubled by the civil jury than by enforcement of consumer and employment arbitration agreements.

Bringing the United States into the mainstream on the civil jury might even bring it into the mainstream on arbitration. It may not be a coincidence that the only nation with the civil jury is the only nation that enforces consumer and employment arbitration agreements. Eliminating the civil jury might eliminate the three aforementioned peculiarities of U.S. litigation: costly and intrusive discovery, theatrical trials, and complex evidence law. While each of these peculiarities may please U.S. lawyers, avoiding these peculiarities may be a common reason why businesses flee U.S. courts for arbitration. After all, arbitration is generally thought to eliminate costly and intrusive discovery, theatrical trials, and complex evidence law. Perhaps eliminating these peculiarities from U.S. litigation would substantially reduce the desire of businesses to flee U.S. courts for arbitration.⁷³

Much the same might be said of the class action since businesses' desire to avoid consumer class actions is widely thought to be one of the largest factors motivating businesses to put arbitration clauses in their consumer form contracts.⁷⁴

Whatever one thinks of the consequences flowing from widespread enforcement of adhesive arbitration agreements, all can agree that *Casarotto* contributed greatly to that enforcement

⁷³ Ware, *supra* note 72, at 870–71.

⁷⁴ Ware, *The Centrist Case for Enforcing*, *supra* note 62, at 74–82

and those consequences. While Professor Moses writes that *Casarotto* means “states are not permitted to protect their citizens from perceived abuses arising from a ‘take-it-or-leave-it’ arbitration requirement,”⁷⁵ *Casarotto* permits states to do exactly that if they do so by using unconscionability and other contract-law doctrines in ways that do not discriminate against arbitration clauses compared to other contract clauses.⁷⁶ However, contract law generally enforces most terms of adhesion contracts, so it is unsurprising that contract-law-based challenges to adhesive arbitration agreements often lose and, since *Casarotto*, courts have routinely enforced countless arbitration clauses in a wide variety of consumers’ adhesion contracts.⁷⁷

⁷⁵ Moses, *Statutory Misconstruction*, *supra* note 16, at 156 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)).

⁷⁶ *Casarotto*, 517 U.S. at 682 (“Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2, but courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)). See also STEPHEN J. WARE & ARIANA LEVINSON, *PRINCIPLES OF ARBITRATION LAW* § 25 (2017) (citing cases holding arbitration agreements unconscionable and discussing FAA’s constraint on breadth of unconscionability doctrine as applied to arbitration agreements).

⁷⁷ Amanda R. James, *Because Arbitration Can be Beneficial, It Should Never Have to be Mandatory: Making a Case Against Compelled Arbitration Based Upon Pre-Dispute Agreements to Arbitrate in Consumer and Employee Adhesion Contracts*, 62 *LOY. L. REV.* 531, 541 (2016) (“[A]dhesion contracts with an arbitration clause may pose unique problems for the weaker party, because they are routinely upheld by courts.”); Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 *DEPAUL L. REV.* 1991, 1219 (2001) (“Courts often resolve the issue of enforceability of arbitration clauses in adhesion contract in favor of the corporation.”) See also Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 *MARQ. L. REV.* 751, 802 (2014) (identifying “quite a bit of variety in how state courts view the unconscionability doctrine in general, as well as how they apply the doctrine to both arbitration and non-arbitration provisions”).

C. Concepcion and Class Actions

The significance of routine enforcement of adhesive arbitration agreements further increased in 2011 when the Court's decision in *AT&T Mobility v. Concepcion*⁷⁸ significantly weakened one of consumers' most powerful threats to business defendants, the class action. *Concepcion* enforced an adhesive arbitration agreement's provision requiring individual, rather than class, adjudication.⁷⁹ Such "class waivers" are unconscionable under California law if "'found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.'"⁸⁰ The Supreme Court held that even though this California rule apparently applied both to waivers concerning class litigation as well as waivers concerning class arbitration,⁸¹ the California rule "interfer[ed] with fundamental attributes of arbitration thus creat[ing] a scheme inconsistent with the FAA."⁸²

While Margaret Moses is very critical of *Concepcion*, I am

⁷⁸ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011).

⁷⁹ *Concepcion*, 563 U.S. at 336 ("The contract provided for arbitration of all disputes between the parties but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'").

⁸⁰ *Id.* at 339–340 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

⁸¹ *Id.* at 341 ("The *Concepcions* argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that 'exist[s] at law or in equity for the revocation of any contract' under FAA § 2. Moreover, they argue that even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well."); *Id.* at 341–42 ("But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration...because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by § 2 of the FAA.").

⁸² *Id.* at 341, 344.

less critical of it. Professor Moses characterizes *Concepcion* as an unprincipled exception to *Casarotto*, which she says:

Gives the Supreme Court a basis for intruding on a core state law function (such as contract law) any time a provision appears to limit the enforceability of an arbitration agreement, if contracts generally are not limited in the same way. However, when it suits, the Court has ignored this rule, in favor of striking a limitation on arbitration even though the same limitation is also applied to litigated matters, as we see in a class action waiver case decided by the Court in 2011—*AT&T Mobility LLC v. Concepcion*.⁸³

In contrast, I believe “*Concepcion* correctly interprets FAA § 2's use of the word ‘arbitration’ to make § 2 more than just a prohibition against discriminating against arbitration agreements.”⁸⁴

“Arbitration” is widely understood to mean a form of binding adjudication that is not litigation. However, if a state could hold unconscionable any agreement for binding adjudication that does not use the same procedural and evidentiary rules as litigation and the same trier of fact (jury) as litigation, then the so-called “arbitration” left enforceable in that state would be too close to litigation to qualify as “arbitration” as that term is used in FAA § 2. The only significant difference between this so-called “arbitration” and litigation would be that the parties would select and pay for the “judge” conducting the jury trial under the same rules of procedure and evidence that a governmentally selected and paid judge in litigation would use. So § 2 must be interpreted to prevent states from holding unconscionable agreements to use a form of binding adjudication that differs from litigation more

⁸³ Moses, *How the Supreme Court's Misconstruction*, *supra* note 16, at 12.

⁸⁴ Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, *supra* note 9, at 1277–78.

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profoundly than merely selecting and paying for the judge.

How much more profoundly? A form of binding adjudication that significantly differs from litigation by having (1) less discovery, (2) fewer evidentiary rules, and (3) no jury should be different enough to qualify as “arbitration,” and thus immune from characterization as per se unconscionable or otherwise unenforceable. *Concepcion*'s interpretation of FAA § 2 adds a fourth difference required to be different enough to qualify as “arbitration”: (4) no class actions. ...[T]his conclusion of *Concepcion* is plausible as an interpretation of the FAA, but, as a matter of policy, I think the enforceability of arbitral class waivers ought to conform to non-arbitration law on class waivers.⁸⁵

In other words, while my policy preference would treat arbitral class waivers like non-arbitral class waivers, I believe *Concepcion*'s legal analysis is at least plausible.

In sum, *Casarotto* and *Concepcion* have their critics and defenders, but all can agree these two cases importantly affect many consumer disputes and these effects would not occur but for FAA section 2's language reaching consumer transactions “involving commerce.”

D. The Post-FAA Expansion of the Commerce Clause

When the FAA was enacted, “very few” consumer transactions “would have involved interstate commerce and thus fallen under the jurisdiction of the FAA.”⁸⁶ The vast increase in consumer transactions now held to involve commerce under the FAA reflects not only an increase in long-distance consumer transactions, but also the Supreme Court's expansion of the U.S. Constitution's

⁸⁵ *Id.*

⁸⁶ Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. REV. 637, 647 (1996).

Commerce Clause⁸⁷ to cover transactions previously considered intra-state and thus beyond the reach of federal legislation.⁸⁸ So, if applying FAA section 2 to consumer contracts is inconsistent with the intent of the Congress that enacted it, that inconsistency is more properly blamed on the Court's post-FAA broadening of the Commerce Clause than on the Court's interpretation of the FAA.⁸⁹

The key moment in the Court's post-FAA broadening of the Commerce Clause was 1937 when, during the Great Depression, the Court abandoned original understanding of the Constitution to permit what would otherwise have been unconstitutional—the New Deal. In 1935 and 1936, the Court struck down several key pieces of New Deal legislation.⁹⁰ President Franklin Delano Roosevelt thought “a recalcitrant Court was preventing the country from achieving necessary recovery and reform,”⁹¹ and he “chastise[d] the Justices for their ‘horse and buggy interpretation’ of the Commerce Clause.”⁹² After his landslide 1936 reelection, Roosevelt announced in February 1937 his plan to enlarge the Court's membership from nine to fifteen, which would have allowed him to appoint enough justices to reverse the Court's recent decisions, and thus uphold the New Deal.⁹³ “[T]he 1936 elections had given the Democrats dominant supermajorities in both the House and the Senate,” which gave Roosevelt “good reason to hope” that his “court-packing” bill

⁸⁷ U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

⁸⁸ See Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 459 (1992).

⁸⁹ Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. L. REV. 167, 180 n.76 (2004) (“If applying the FAA to consumer contracts is inconsistent with the intent of the Congress that enacted it, that inconsistency is more properly blamed on the Court's interpretation of the Commerce Clause than on the Court's interpretation of the FAA.”).

⁹⁰ Barry Cushman, *The Court-Packing Plan as Symptom, Casualty, and Cause of Gridlock*, 88 NOTRE DAME L. REV. 2089, 2090 (2013).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 2093.

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would be approved.⁹⁴ “In April, however, before the bill came to a vote in Congress, two Supreme Court justices came over to the liberal side and by a narrow majority upheld as constitutional the National Labor Relations Act and the Social Security Act.”⁹⁵

This “switch in time that saved nine” “provided the basis for a profound shift from federalism to nationalism [that has] effectively given Congress a police power...to regulate any matter under the guise of the original Commerce Clause.”⁹⁶ As Professors Eskridge and Ferejohn explain:

The Court's switch in time averted a constitutional showdown between the Court and the political system, and between 1937 and 1943 Roosevelt remade the Court with nine nominees. The immediate agenda of the New Deal Court was to interpret the Commerce Clause broadly enough to embrace regulatory legislation with incidental (but demonstrable) effects on interstate commerce, and with this the coalition consolidated the new Commerce Clause jurisprudence with unanimous majorities by 1942.⁹⁷

⁹⁴ *Id.* at 2094.

⁹⁵ Roosevelt announces “court-packing” plan, HISTORY (2010), <http://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan>. See also *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act due to a swing vote by Justice Owen Roberts); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding Social Security Act due to a swing vote by Justice Owen Roberts); Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. OF LEGAL ANALYSIS 69, 70 (2010) (“The prevailing popular...account of the ‘switch in time that saved nine’ begins with a Court of four stalwart conservatives who battled with three liberal ‘musket-eers’ for the survival of the New Deal. Holding the balance were the swing votes of Chief Justice Hughes and Justice Roberts, who in the 1934-1935 terms sided with the four conservatives to successively demolish New Deal infrastructure. When Roosevelt unveiled the court-packing plan, the story has it, the Court--or more specifically Justice Roberts—caved. ... Thus, in a somersault of constitutional history, the switch in time resurrected the New Deal and spared the Court from packing.”) *Id.* at 72 (“Roberts shifted sharply (and statistically significantly) to the left in the 1936 term” which includes the 1937 cases listed above).

⁹⁶ Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 163 (1998).

⁹⁷ William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause:*

In sum, “The New Deal inverted the basic orientation of Commerce Clause doctrine. As of 1932, it was still possible to say that the Commerce Clause was one of several limited and enumerated federal regulatory powers. A decade later it seemed fairer to say that the Commerce Clause gave the federal government unlimited and general powers.”⁹⁸

The previous paragraph explained that much of the New Deal—perhaps the nation’s most important progressive economic legislation—would have been unconstitutional had the 1937-Era Court adhered to the narrower understanding of (interstate) commerce prevalent during the FAA’s 1925 enactment. The same can likely be said of—perhaps the nation’s most important progressive social legislation—the Civil Rights Act of 1964,⁹⁹ including Title

A Political Theory of American Federalism, 47 *VAN. L. REV.* 1355 (2007).

⁹⁸ Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause after Lopez and Morrison*, 11 *WM. & MARY BILL OF RTS. J.* 403, 425 (2002). See also Steven A. Delchin, *Viewing the Constitutionality of the Access Act Through the Lens of Federalism*, 47 *CASE W. RES. RES.* 553, 567 (1997) (“During the early years of the Great Depression the Court was still clinging to a restrictive view of commerce power. Yet the dam holding back federal power...broke under the weight of a true constitutional revolution brought on by the New Deal. ... The later New Deal cases confirmed the near evisceration of any substantive limits on Congress’ Commerce Clause power.”); Jordan Goldberg, *The Commerce Clause and Federal Abortion Law: Why Progressives Might be Tempted to Embrace Federalism*, 75 *FORDHAM L. REV.* 301, 309-10 (2006) (“A massive about-face occurred in 1937, substantially changing the purpose and use of the Commerce Clause. In response to the New Deal, the Court redefined Congress’s power to regulate some commerce that began with intrastate activity. ... This...opened the door to a line of cases that gradually increased Congress’s power under the Commerce Clause until it appeared to be plenary.”).

⁹⁹ Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 *U. PA. J. CONST. L.* 11, 35-37 (2012) (“A Court bound by a limiting principle that prohibited congressional regulation of wholly intrastate activities that did not have a close and substantial relation to interstate commerce, would not have found the Civil Rights Act of 1964 constitutional.”); *Id.* (“but for the substantial effects doctrine of the New Deal Commerce Clause, the effort [to prohibit eradicate private segregation] would have been unsuccessful.”); *Id.* (describing Court’s holding that the Civil Rights Act of 1964 was constitutional as “nothing left with which to do the right thing other than to manipulate the Constitution through the Commerce Clause. ... The manipulation took

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VII prohibiting employment discrimination,¹⁰⁰ and of important federal consumer protection statutes.¹⁰¹ In other words, many employment and consumer claims would not exist but for the same

place and the theoretical underpinnings for it came straight out of the New Deal.”); See also 1 Rodney A. Smolla, *Federal Civil Rights Acts* § 1:19 (3d ed. 2017) (“Beginning in 1937 with *NLRB v. Jones & Laughlin Steel Corp.*, however, the epoch of the ‘modern’ Commerce Clause began, resulting in a series of cases that seemed to virtually eliminate any meaningful restraints on the power of Congress to use the Commerce Clause as a device for sweeping federal criminal, civil rights, social, and welfare legislation. For the purposes of federal civil rights laws, of course, this expansive interpretation of the Commerce Clause received its most important application in the cases that upheld the constitutionality of the Civil Rights Act of 1964.”) (citing *U.S. v. Darby*, 312 U.S. 100, (1941); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Perez v. U.S.*, 402 U.S. 146 (1971)).

¹⁰⁰ Eric K. Yamamoto et al., *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 550 (2001) (“Title VII is a key provision of the Civil Rights Act of 1964 and the most important federal legislation outlawing employment discrimination.”); Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 359 (“Title VII of the Civil Rights Act of 1964, [was passed by Congress] on the basis of its Commerce Clause powers.”); Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court’s ‘Strict Scrutiny’ of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091, 1094-95 (2001) (“Federal laws prohibiting discrimination in employment have generally been passed under both the Commerce Clause and section 5 of the Fourteenth Amendment. At the moment, it remains well-settled that Congress can pass these laws pursuant to its Commerce Clause authority.”).

¹⁰¹ *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 378 (1973) (The Truth in Lending Act “is within the power granted to Congress under the Commerce Clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evils sought to be remedied could better have been regulated in some other manner.”). Stephen Lamson, *The Impact of the Federal Arbitration Act and the McCarran-Ferguson Act on Uninsured Motorist Arbitration*, 19 CONN. L. REV. 241, 261 (1987) (“Congressional power under the Commerce Clause, however, clearly extends to essentially local transactions, including contracts between residents of the same state. An example of the exercise of such power is the Truth-in-Lending Act. The Act has been upheld as within the power of Congress under the Commerce Clause, and has been applied to a wide variety of creditors in essentially local transactions, including automobile dealers, home repair companies and sellers of real estate.”); Arthur B. Mark, III, *Currents in Commerce Clause Scholarship since Lopez: A Survey*, 32 CAP. U. L. REV. 671, 679-81 (2004) (“The final case in the New Deal trilogy is *Wickard v. Filburn*. In *Wickard*, the Court approved Congress’s use of a virtually unlim-

post-FAA expansion of “commerce” that enables FAA section 2 to enforce agreements to arbitrate those claims.

In sum, the Court’s broadening of “commerce” since 1937 gave un-originalist breadth to countless areas of federal law, usually toward progressive ends. The un-originalist breadth of FAA section 2 is a rare conservative (contract-enforcing) consequence of this broadening. So, asking courts to turn back the clock to a narrow, pre-1937 understanding of “commerce” for the FAA, but not for the many other areas of broadened federal law, smacks of result-oriented inconsistency discriminating in favor of progressive statutes and against conservative statutes.

III. FAA’S § 1’S EMPLOYMENT EXCLUSION

The previous sections defended the Court’s application of FAA section 2 to consumer transactions “involving commerce,” as both (1) supported by the statutory text, and (2) implied by—or at least a by-product of—the Court’s post-FAA broadening of “commerce.” In contrast, the Court’s application of the FAA to most employment arbitration agreements is less clearly supported by statutory text and post-FAA broadening of “commerce.”

FAA section 1 says “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹⁰² The Supreme Court’s 2001 *Circuit City* decision inter-

ited power under the Commerce Clause over intrastate activity. ... Once *Wickard* established the aggregation doctrine, there were no effective limits on Congress’s power under the Commerce Clause and the Court approved federal reach into a range of intrastate activities. ... Later, in *Perez v. United States*, the Court approved federal prohibition of loan sharking or “extortionate credit transactions” even while acknowledging that the conduct was “purely intrastate.” The conduct at issue in *Perez* was a loan of approximately \$3,000 and extortion involving threats against the debtor and his family for non-payment or payment in insufficient amounts. Emphasizing Congress’s findings that extortionate loan transactions “tie-in” to interstate commerce and that loan-sharking was a nationwide problem, the Court upheld the constitutionality of Title II of the Consumer Credit Protection Act.”).

¹⁰² 9 U.S.C. § 1 (2012) (“‘commerce’, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the

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prets this provision to exclude from the FAA's scope only the employment arbitration agreements of transportation workers, like seamen and railroad employees, but not of other employees.¹⁰³ Lower courts have followed this interpretation,¹⁰⁴ which produces what I have described as the "strange result of a *federal* statute governing employees *less* closely connected to interstate commerce, while *state* law governs employees *most* closely connected to it."¹⁰⁵

This strange result could have been avoided by emphasizing that section 1 excludes from the FAA's coverage, not only "seamen" and "railroad employees," but also "any other class of workers engaged in foreign or interstate commerce," and then interpreting "workers engaged in ... commerce" flexibly to broaden along with the Court's broadening of "commerce" in post-FAA constitutional decisions.¹⁰⁶ Under this statutory interpretation, as the types of jobs in "commerce" expanded to bring employees under FAA section 2,

United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

¹⁰³ *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

¹⁰⁴ Compare, e.g., *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 351–52 (8th Cir. 2005) (customer service representative for interstate trucking company, who fielded calls from customers regarding their shipment orders, was not a transportation worker and thus was governed by FAA); *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289–90 (11th Cir. 2005) (an account manager who as part of his job duties transports merchandise across the Georgia/Alabama border was not a transportation worker), with *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004) (employee was a "transportation worker" because "she was responsible for 'monitoring and improving the performance of drivers under [her] supervision to insure [sic] timely and efficient delivery of packages.' Such direct supervision of package shipments makes Palcko's work "so closely related [to interstate and foreign commerce] as to be in practical effect part of it."); *In re Villanueva*, 311 S.W.3d 475, 479 (Tex. Ct. App. 2009) (FAA inapplicable to truck driver).

¹⁰⁵ WARE & LEVINSON, *supra* note 76, at 178 n.9 (citing Richard A. Epstein, *Fidelity Without Translation*, 1 GREEN BAG 2d 21, 27–29 (1997)). The statement in the text refers to law governing *employment* arbitration as opposed to *labor* arbitration. That distinction is discussed in WARE & LEVINSON, at 176–82. Many transportation workers are governed by federal labor arbitration law. *Id.* at 304.

¹⁰⁶ See *supra* text at notes 99–102.

the types of employees excluded from the FAA by section 1 would have similarly expanded, thus leaving most employment arbitration agreements excluded from the FAA. This interpretation of section 1 was advocated, before *Circuit City*, by Matthew Finkin, who wrote: “As the commerce power has been expanded by the United States Supreme Court, the [FAA section 1 employment] exemption has expanded along with it, leaving the status of these employees’ contracts in practical effect just as they were when the Act was passed.”¹⁰⁷

While this interpretation has much appeal, *Circuit City*’s counter-argument is also coherent. The *Circuit City* Court distinguished FAA section 2’s “involving commerce”—construed as extending to the full reach of Congress’s Commerce power—from section 1’s “in commerce”—a term of art the Court has, in several contexts, construed more narrowly.¹⁰⁸ *Circuit City* said, “the word ‘involving,’ like ‘affecting,’ signals an intent to exercise Congress’ commerce power to the full. Unlike those phrases, however, the general words ‘in commerce’ and the specific phrase ‘engaged in commerce’ are understood to have a more limited reach.”¹⁰⁹ This distinction was not fabricated by the *Circuit City* majority, as the Court cited non-arbitration cases reading “in commerce” more narrowly than the full reach of Congress’s Commerce power.¹¹⁰

In addition, *Circuit City* cited non-arbitration cases declining to “afford significance, in construing the meaning of the statutory jurisdictional provisions ‘in commerce’ and ‘engaged in commerce,’ to the circumstance that the statute predated shifts in the

¹⁰⁷ Matthew W. Finkin, *Workers’ Contracts” Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 298 (1996) (“As the commerce power has been expanded by the United States Supreme Court, the [FAA section 1 employment] exemption has expanded along with it, leaving the status of these employees’ contracts in practical effect just as they were when the Act was passed.”)

¹⁰⁸ 532 U.S. at 115-19.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing *United States v. American Building Maintenance Industries*, 422 U.S. 271, 279–280 (1975) (phrase “engaged in commerce” is “a term of art, indicating a limited assertion of federal jurisdiction”); *Jones v. United States*, 529 U.S. 848, 855 (2000) (phrase “used in commerce” “is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce”).

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Court's Commerce Clause cases."¹¹¹ *Circuit City* rejected giving FAA section 1 “a broader construction than justified by its evident language simply because it was enacted in 1925 rather than 1938.”¹¹² The Court concluded:

While it is of course possible to speculate that Congress might have chosen a different jurisdictional formulation [in FAA section 1] had it known that the Court would soon embrace a less restrictive reading of the Commerce Clause, the text of § 1 precludes interpreting the exclusion provision to defeat the language of § 2 as to all employment contracts.

As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision.¹¹³

However confident one is that Congress would have written FAA section 1 differently had it anticipated the Court's 1937 broadening of “commerce,”¹¹⁴ *Circuit City* can at least be defended on the ground that it is consistent with mainstream approaches to statutory interpretation that, for good reasons, prioritize statutory text over legislative history,¹¹⁵ and with non-arbitration decisions declining to give significance, in construing statutory text, to its enactment before 1937's constitutional change.¹¹⁶

¹¹¹ *Id.* (citing *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349 (1941); *United States v. American Building Maintenance*, 422 U.S. 271, 277–283 (1975); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199–202 (1974)).

¹¹² *Id.* at 118.

¹¹³ 532 U.S. at 119.

¹¹⁴ *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 128 (2001) (Stevens, J., dissenting) (“no one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts.”); Norris, *supra* note 17.

¹¹⁵ *See supra* note 45. For reasons to consider legislative history, see, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132–33 (2001) (Stevens, J., dissenting).

¹¹⁶ In contrast, Justice Souter's dissent in *Circuit City* would “look beyond the four corners of the statute” and distinguish the non-arbitration cases as not “deal[ing] with the question here, whether exemption language is to be read as

In sum, *Circuit City's* strange result has a defensible basis in statutory text and the Court's post-FAA broadening of "commerce." Whether defensible enough to outweigh Professor Finkin's argument seems to me a close call.

IV. CONCLUSION

Even the Supreme Court's current (conservative) interpretation of the FAA still significantly permits contract-law doctrines, such as unconscionability, to protect consumers and employees from harsh adhesive arbitration agreements.¹¹⁷ And the centrist interpretation of the FAA I advocate—abolishing the separability doctrine, increasing judicial review of arbitrators' decisions on mandatory law and softening enforcement of class waivers—would enable contract-law doctrines to protect parties from harsh adhesive arbitration agreements as fully as they protect parties from other harsh terms of adhesion contracts.¹¹⁸ But this is not enough for progressives who want non-contract law to give consumers and employees more protection against harsh adhesive arbitration agreements than contract law does. Some progressives would make adhesive arbitration agreements harder to enforce than other adhesive terms by requiring "knowing consent"¹¹⁹—perhaps the goal of the statute overturned in *Casarotto*. Other progressives would go even further by prohibiting all adhesive arbitration agreements.¹²⁰

Today's progressives—long accustomed to non-contract laws protecting consumers and employees from harsh adhesion contract terms drafted by businesses—understandably oppose dis-

petrified when coverage language is read to grow." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 137 (2001) (Souter, J. dissenting).

¹¹⁷ See, e.g., WARE & LEVINSON, *supra* note 76, § 25 (citing cases holding arbitration agreements unconscionable).

¹¹⁸ Ware, *supra* note 62, at 56-59.

¹¹⁹ Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 734 (2016) ("the Moderately Progressive Position would enforce an individual's pre-dispute arbitration agreement if it is non-adhesive"); *id.* at n.101 (citing commentators advocating that position).

¹²⁰ *Id.* at 733-34.

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placement of these post-1937 laws by a pre-1937 statute, FAA section 2. And they make a strong argument that this displacement would not occur but for the Supreme Court interpreting that statute more broadly than its drafters and adopters intended. But that un-originalist breadth is merely a part of a much broader un-originalist breadth (expansion of the Commerce Clause in and after 1937) that, along with the near-simultaneous *Erie* decision, fundamentally re-ordered federal/state relations. So, unless progressives shockingly reverse course by arguing to shrink federal power back to pre-1937 levels, consistency requires them to seek reduced enforcement of adhesive arbitration agreements through legislation, rather than Supreme Court reversal of *Southland*, *Casarotto*, and related decisions.