

2013

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### Recommended Citation

Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 *Y.B. Arb. & Mediation* 1 (2013).

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# ASYMMETRIC DYNAMISM AND ACCEPTABLE JUDICIAL REVIEW OF ARBITRATION AWARDS

Jeffrey W. Stempel\*

## I. INTRODUCTION

Law aspires (at least in large part) to consistency and predictability.<sup>1</sup> The genius of the common law was in part the benefits of treating like cases alike.<sup>2</sup> Although the post-modern, multi-faceted legal profession of today may not always agree on the similarity or difference of cases,<sup>3</sup> much less correct outcomes,<sup>4</sup> one would expect at least

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<sup>1</sup> Law of course also has many other aspirations as well: fact-finding; enforcing legal rights; justice; fostering adequate incentives and sounder public policy, to name a few. Rank ordering them is well beyond the scope of this article. But without doubt, a substantial segment of the legal community places consistency and predictability high on the list of laws goals. *See, e.g.*, WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 60-65 (2007) (claiming that law favors objective standards that enhance predictability and minimize discretion and attendant costs); Kelly Casey Mullally, *Legal (Un)Certainty, Legal Process, and Patent Law*, 43 *LOY. L.A. L. REV.* 1109, 1112 (2010) (“Concern for certainty is ubiquitous in the law. Some degree of determinacy in the content and application of governing rules is necessary for individuals to identify the scope of their rights and to ensure that their conduct conforms to legal constraints, at least in contexts where ex ante decision making is possible. The law forms the basis for many social and economic expectations, and legal thinkers naturally have some interest in certainty. Certainty, in terms of predictability of results, is necessary to view law-making institutions as legitimate sources of authority. Lawyers should be able to use the law as a guide to what courts will do in future cases; otherwise, a lack of certainty can cause the public to abandon legal institutions.”); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 423 (1999) (“A virtue of the common law method is that it enables us to proceed without resolving fundamental questions of value by limiting the issues on which conflicts in values are worked out to a manageable set that is fluid over time. A useful way to think of the common law is as a set of institutional mechanisms for resolving private disputes that attempts to be at once stable and mutable: stable, because of the high value placed within the system on tradition and conformity; mutable, because of the ineffable and fluid character of its rules, standards, and principles.”); Keith N. Hylton, *Fee Shifting and Predictability of Law*, 71 *CHI.-KENT L. REV.* 427 (1995).

<sup>2</sup> *See* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 13 (1982).

<sup>3</sup> *See* Richard S. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 *HARV. L. REV.* 761, 765 (1987) (noting “remarkable political consensus of the late 1950s and early 1960s” that was in tune with the strong consensus of the law as reflected in the Harvard Legal Process school championed by Hart and Sacks).

Since 1940, and especially since 1952, there had been little ideological difference between the major parties. At least in the academy, the radical right had been discredited, first by its isolationism and then by its racism, and the radical left had been squashed by the Cold War. Secular, humanistic, patriotic, and centrist, the American intellectual scene in the late 1950s and early 1960s was remarkably free from ideological strife.

that courts would hew to roughly the same methodology across cases, aspects of a single case, or sections of a specific statute. This is not to say that there will never be jurisprudential differences between “mainstream” judges.<sup>5</sup> We know, for example, that Justice Scalia is a textualist when approaching statutes (and legal texts generally)<sup>6</sup> while Justice Breyer gives substantial consideration to legislative intent and the views of administrative agencies.<sup>7</sup> But despite these differences, one would expect the Supreme Court as a whole to be at least relatively consistent when addressing the same statute.

However, since the Court’s embrace of arbitration in the mid-1980s, it has tended to apply a dynamic, expansive model of statutory construction when considering the question of when to enforce pre-dispute arbitration clauses but applied a different standard to questions regarding the conduct of arbitration and review of arbitration awards, a standard grounded more in history and tradition.<sup>8</sup>

When deciding whether to require arbitration, the court has not been very concerned, if at all, about achieving the legislature’s intent or even the language of the statute. Instead, the Court has applied a highly relaxed notion of consent in enforcing even the most boilerplate of arbitration clauses upon unsophisticated disputants who had little bargaining power in the transaction that led to the contract containing the arbitration

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[Even] many of the leading [legal] realists had been coopted into the judiciary and into the drafting of uniform laws and other mainstream legal activities, [and] it was widely believed that the law had been restored to a position of political neutrality.

*Id.* at 765-766. See also DANIEL BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES (1960).

<sup>4</sup> In the quarter-century since Posner commented on the decline of law as an autonomous discipline, American politics has if anything become more discordant. See Thomas B. Edsall, *Studies: Conservatives Are From Mars, Liberals Are From Venus*, THE ATLANTIC (Feb. 6, 2012, 7:00 PM), <http://www.theatlantic.com/politics/archive/2012/02/studies-conservatives-are-from-mars-liberals-are-from-venus/252416/>; Thomas B. Edsall, *The Culture War and the Jobs Crisis*, CAMPAIGN STOPS (Nov. 11, 2012, 10:45 PM), <http://campaignstops.blogs.nytimes.com/2012/11/11/edsall-the-culture-war-and-the-jobs-crisis/> (“In a study based on 2008 polling, Abramowitz found majorities or solid pluralities of voters formed consistently liberal or conservative views – not centrist positions – on a continuum of issues including gay rights and abortion; off-shore oil drilling; the Iraq war; health care; financial regulation; climate change and mortgage assistance to low-income homeowners.”); ANDREW GELMAN ET AL., RED STATE, BLUE STATE, RICH STATE POOR STATE (2008).

<sup>5</sup> The mainstream in American law is fairly broad and can be seen as running from Bork himself on the right (notwithstanding Bork’s nomination defeat) to the late NYU Law and Oxford Professor Ronald Dworkin, a strong advocate of government-supported equality on the left. See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 428 (1990) (discussing an observation first made in Posner, *The Decline of Law as an Autonomous Discipline*, *supra* note 3, at 766). Compare ROBERT H. BORK, THE ANTITRUST PARADOX (1978) (suggesting constrained view of antitrust enforcement and perhaps even that antitrust legislation was a mistake); with RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) (taking expansive view of what law demands in terms of individual civil rights and permits in terms of government intervention to benefit the disempowered in programs such as affirmative action).

<sup>6</sup> See ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 1-46 (2012).

<sup>7</sup> See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992) (supporting use of legislative history as tool for statutory construction) [hereinafter *On the Uses of Legislative History*]; accord Stephen Breyer, *Judicial Review: A Practicing Judge’s Perspective*, 78 TEX. L. REV. 761, 766 (2000) (same) [hereinafter *Judicial Review*].

<sup>8</sup> See *infra* notes 159-260 and accompanying text.

clause.<sup>9</sup> But when the issue concerns arbitration administration such as the power of the arbitrators to give class-wide treatment to a dispute, or limitations on the sweep of the Federal Arbitration Act,<sup>10</sup> the Court has taken the opposite approach, restricting class treatment,<sup>11</sup> narrowing the seemingly clear text of a provision excepting workers from the Act,<sup>12</sup> or resisting expanded review of awards even if agreed to by the parties.<sup>13</sup>

This inconsistency – loving arbitration one minute when essentially cramming down a mass arbitration clause upon consumers in the next minute while overturning the decision of three experienced commercial arbitrators to process a price-fixing dispute on a class-wide basis<sup>14</sup> – is hard to square with traditional notions of sound jurisprudence. Cynics can be forgiven for concluding that the only apparent unifying principle of the

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<sup>9</sup> See *infra* notes 116-118, 131-177 and accompanying text. This relaxed attitude toward consent and willingness to impose contract terms even in cases of highly questionable consent extends beyond the Court's arbitration precedents. See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991) (enforcing pre-printed forum selection clause in small type on the back of a cruise ship ticket). See Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 167-70 (2012) (noting that the Supreme Court has championed a relaxed notion of consent in enforcing boilerplate text in receipt-like documents such as mailing inserts and confirmations as though the language had been consciously negotiated by the parties); see also Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute*, 12 NEV. L.J. 553 (2012); Linda S. Mullenix, *Carnival Cruise Lines, Inc. v. Shute: The Titanic of Worst Decisions*, 12 NEV. L.J. 549 (2012) (labeling *Shute* one of the worst Supreme Court decisions in history); see also Symposium, *The Worst Supreme Court Case Ever?*, 12 NEV. L.J. 516 (2012).

<sup>10</sup> United States Arbitration Act, 9 U.S.C. §§1-16 (2006) (originally enacted in 1925 and effective January 1, 1926; with only largely minor amendments in 1954, 1970, 1988, 1990, and 2002). The Court in its decisions often uses the short form of "FAA" for the Act, which is grating and even confusing. At least prior to the modern era of substantial Supreme Court arbitration jurisprudence, the anagram FAA was synonymous with "Federal Aviation Administration," and so it will remain in this article, where the Act will be referred to as the "Act" or the "Federal Arbitration Act".

<sup>11</sup> See e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (discussed *infra* notes 225-260 and accompanying text); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (discussed *infra* notes 206-218 and accompanying text). See generally Jeffrey W. Stempel, *Tainted Love: Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795 (2012) (noting that although the Court has almost romantically attached to arbitration as a dispute resolution device and to the enforcement of mass arbitration clauses, it exhibits opposition to arbitral power should that result in greater procedural protections for the more disempowered disputant) [hereinafter *Tainted Love*]. On the distinction between traditional commercial arbitration and the new "mass" arbitration reflected in boilerplate arbitration clauses contained on the back of contracts or enclosed with billing statements, see Jeffrey W. Stempel, *Mandating Minimum Fairness in Mass Arbitration*, 76 U. CIN. L. REV. 383 (2008) [hereinafter *Mandating Minimum Fairness*].

<sup>12</sup> See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (discussed *infra* notes 190-98 and accompanying text); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (discussed *infra* notes 169-78 and accompanying text); see also Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section I of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 253 (1991).

<sup>13</sup> See, e.g., *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (discussed *infra* notes 202-211 and accompanying text). See Nicholas R. Weiskopf & Matthew S. Mulqueen, *Hall Street*, *Judicial Review of Arbitral Awards, and Federal Preemption*, 29 REV. LITIG. 361 (2010); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103 (2009); Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469 (2006).

<sup>14</sup> Which is what the Court (or at least a 5-4 majority) did in *Stolt-Nielsen*, 559 U.S. 662. See discussion *infra* notes 206-18 and accompanying text.

Court's modern arbitration jurisprudence is that the more politically, socially, or economically powerful disputant is more likely to prevail than disputants with comparatively lower political, social, or economic capital.<sup>15</sup>

The pro-business, pro-establishment, pro-powerful tendencies of the Rehnquist and particularly the more conservative Roberts Courts are well chronicled.<sup>16</sup> Although I would prefer a Court (e.g., the Warren Court) that had more pro-underdog tendencies<sup>17</sup> or at least something centrist akin to the Burger Court,<sup>18</sup> I realize that victors in political wars claim legal spoils like judicial appointments just as they are permitted to choose ambassadors and cabinet members. Republican victories in five of the past nine elections and the episodic timing of judicial retirements has, along with the increasing conservatism of Justice Kennedy,<sup>19</sup> created the current Roberts Court, generally considered the most conservative since the early years of the New Deal,<sup>20</sup> and one which

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<sup>15</sup> See *Tainted Love*, *supra* note 11, at 800-03 (discussing how the Supreme Court's inconsistent approaches and outcomes can be harmonized only by noting that the Court consistently favors the disputant with greater social, economic, and political power).

<sup>16</sup> See *id.* at 797, n. 9 (citing commentary on pro-business orientation of the modern Court); see generally ERWIN CHERMINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010) (including pages 227-28, criticism of *Circuit City Stores, Inc. v. Adams*).

<sup>17</sup> The Warren Court was often criticized as resulted-oriented and insufficiently faithful to traditional legal principles and precedent, largely because of its enlargement of criminal defendant rights and restrictions on state power, particularly regarding civil rights. See, e.g., Ronald J. Krotoszynski, Jr., *A Remembrance of Things Past?: Reflections on the Warren Court and the Struggle for Civil Rights*, 59 WASH. & LEE L. REV. 1055, 1057-58 (2002) (discussing the "ends-justify-the means approach" of the Warren Court); JOHN DENTON CARTER, *THE WARREN COURT AND THE CONSTITUTION: A CRITICAL VIEW OF JUDICIAL ACTIVISM* (1973); ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968); LOUIS LUSKY, *BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION* (1975). But as the ensuing four decades have shown, conservative justices are at least as capable of eschewing precedent and being result-oriented as are liberal justices.

<sup>18</sup> Although more conservative than the Warren Court, the Burger Court was not as dramatically conservative as some had expected when President Richard Nixon appointed Burger to replace retiring Earl Warren against the backdrop of Nixon's strong criticism of the Warren Court during the 1968 presidential campaign. See VINCENT BLASI, *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (1983).

<sup>19</sup> See Lee Epstein & Andrew D. Martin, *Is the Roberts Court Especially Activist? A Study of Invalidating (and Upholding) Federal, State, and Local Laws*, 61 EMORY L.J. 737, 757 (2012) ("If, however, we consider only laws reviewed by the Court since the start of the Roberts Court years, even Kennedy's ideology shows in his votes—he too is now substantially more likely to strike liberal laws than conservative laws."). But see Adam Liptak, *Supreme Court Moving Beyond Its Old Divides*, N.Y. TIMES, June 30, 2012, at A1 ("[In the 2011-12 term,] [t]he court decided 15 cases by 5-to-4 votes, roughly in line with earlier terms. . . . What was striking this year was that Justice Kennedy, a moderate conservative, swung right and left an equal number of times. Since 2000, there have been only two terms in which Justice Kennedy did not vote with the conservatives at least 60 percent of the time in such ideologically divided cases.").

<sup>20</sup> See CHERMINSKY, *supra* note 16. The Court of 1932-37, which struck down several New Deal measures prior to the "switch in time" that "saved nine" in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) rivaled and perhaps exceeded the Roberts Court in conservatism. See NOAH FELDMAN, *SCORPIONS* 115-21 (2011) (describing events of the time). For example, the current Court narrowly upheld the constitutionality of the Affordable Care Act (in *National Fed'n of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)) while the Court of the 1930s did invalidate several pieces of similar legislation passed by a Democratic administration. And although the contract jurisprudence of the Roberts Court is quite conservative, it has not returned to the attitudes of *Lochner v. New York*, 198 U.S. 45 (1905), which struck

seems to have a solid working five-vote majority in favor of compelling arbitration (but not expansive arbitration unless desired by the more advantaged disputant) on most hotly contested matters.<sup>21</sup>

But being a traditionalist, I continue to think of law as capable of producing less partisan and more logically sound outcomes than legislatures or the executive branch, even as the membership of the bench and political attitudes may change. On a structural level, it is of course legitimate to have the Roberts Court in charge. To paraphrase one-time California Senator S.I. Hayakawa on the Panama Canal: “We stole it fair and square.”<sup>22</sup> The election of George W. Bush (the President appointing Justices Roberts and Alito) was not America’s finest hour due to the controversies and protracted legal battles surrounding his election, which was effectively decided by a five-member majority of the Court most closely allied with Bush’s political party.<sup>23</sup> But Bush was nonetheless President for eight years with the power to appoint whomever he pleased to the Court, just as the Senate had the prerogative of resisting or confirming.

Regardless of the inevitability of political differences from justice to justice and Court to Court, one would hope that conservative and liberal justices alike would at least play within the acknowledged rules of the profession and temper their personal preferences according to prevailing judicial norms. One norm I advance in this article is that the Court’s approach to statutory construction should be consistent – at least when examining a single statute – unless there is a powerful reason to apply different interpretative methodologies to different sections of the law in question. In other words, if a one takes a textualist approach to Section X of a statute, it should similarly take a textualist approach to Section Y. Conversely, if the Court focuses on legislative intent or other factors when viewing Section X, the same approach should be taken when addressing Section Y.

But, as outlined below, the Court has tended to shift statutory approaches when moving from section to section or issue to issue concerning the Federal Arbitration Act. It has been a “dynamic” interpreter, using approaches generally associated with left-leaning scholars when wishing to encourage arbitration<sup>24</sup> while invoking a more

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down state regulation on employment conditions as a violation of substantive due process because of interference with employer-employee “contracting.”

<sup>21</sup> See *infra* notes 129-260 and accompanying text (discussing Court’s arbitration cases).

<sup>22</sup> THE OXFORD DICTIONARY OF AMERICAN QUOTATIONS 270 (Hugh Rawson & Margaret Miner eds., 2d ed. 2006); James Reston, *Panama: What’s the Rush?*, N.Y. TIMES, Aug. 17, 1977, at A21.

<sup>23</sup> See *e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000). See also STEPHEN GILLERS, REGULATION OF LAWYERS: STATUTES AND STANDARDS 496-97 (7th ed. 2005) (describing Republican ties of the *Bush v. Gore* majority, including possibility that Justice O’Connor may have been interested in Bush’s installation so that she could retire and have her successor named by a Republican president, although she did not retire until after Bush was re-elected in 2004). In the accompanying Teacher’s Manual, however, Professor Gillers rejects all the contentions that Republican-appointed Justices Scalia, Thomas and O’Connor of the majority should have recused); Mark S. Brodin, *Bush v. Gore: The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563 (2012) (deeming the decision one of the Court’s all-time “worsts” in a symposium on the topic); Christopher Bryant, *Haste Makes Waste*, NEV. LAWYER, May 2001, at 18 (criticizing the decision).

<sup>24</sup> See *infra* notes 129-168, 180-189, 199-205, 219-260 and accompanying text (describing Court’s emphasis on expanding arbitrability in decisions).

tradition-bound approach to arbitral powers and procedures.<sup>25</sup> At this juncture of the Federal Arbitration Act's history, there is no realistic possibility of a retrenchment in the expansive scope of the Act encouraged by the Court since 1984.<sup>26</sup> But going forward, one would hope that the Court would become more consistent in its approach to all aspects of the Act.

One simple move the Court could make to achieve greater consistency would be to permit review of arbitration awards more informed by the substantive law governing the dispute – particularly when the arbitration under review is not the type of commercial arbitration conducted within an industry or trade as was the case when the law was enacted in 1925.<sup>27</sup> Currently, an arbitration award can be set aside only under fairly extreme circumstances, such as bias or corruption of an arbitrator.<sup>28</sup> But this limited scope of review came into existence when the typical arbitration involved merchants with commercial disputes, often merchants that would continue to do business in the future and operating according to informal norms particular to their lines of work.<sup>29</sup> Applied to that type of traditional arbitration, limited review made sense. But in the more modern world of mass arbitration that often involves a merchant against a consumer and where the merchants effectively direct the dispute resolution to an arbitration forum of their choice, overly deferential review of arbitration awards may impose injustices that the Congress enacting the Act would not have tolerated.<sup>30</sup>

My proposal is fairly simple: now that the Court has taken a dynamic and expansive approach to the Act regarding the imposition of arbitration, it should also apply a more dynamic and expansive approach to questions of the conduct, scope, and review

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<sup>25</sup> See *infra* notes 169-178, 190-198, 206-218 and accompanying text (describing the Court's more traditional and limited approach when faced with questions concerning the scope, procedure, or judicial review of arbitration).

<sup>26</sup> See *infra* notes 131-151 and accompanying text (identifying 1984 decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) as the inauguration of the Court's modern, largely pro-arbitration jurisprudence).

<sup>27</sup> The Act was passed at the urging of commercial interests, who had grown frustrated with the undue tendency of some courts to refuse to enforce clearly agreed upon arbitration clauses among merchants on the ground that such clauses violated public policy by "ousting" the court of jurisdiction. See Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 799 (2002); Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 601 (2009); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 277 (1990).

<sup>28</sup> See 9 U.S.C. § 10 (2006) (governing vacating of arbitration awards) and § 11 (governing confirmation of arbitration awards); *infra* notes 265-268 and accompanying text (describing judicial review of arbitration awards in more detail).

<sup>29</sup> See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1803 (1996); see also Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 149 (1992).

<sup>30</sup> See *infra* notes 88-94 and accompanying text (describing background, context and original intent of the Act as dealing with commercial arbitration among merchants familiar with it and desiring arbitration). In contrast, modern "mass" arbitration often involves types of claims and litigants not envisioned when the Act was passed. See Stempel, *Mandating Minimum Fairness*, *supra* note 11, at 396 (separating "old" or traditional commercial and mercantile arbitration envisioned by the enacting Congress from modern "new" or "mass" arbitration of consumer or employment disputes made possible since the 1980s because of Supreme Court's dynamic expansion of the scope of the Act).

of the arbitration and its results. Most important, if perhaps controversial, the Court should revive and expand the “manifest disregard of existing law” ground for vacating or modifying arbitration awards,<sup>31</sup> and treat review of mass arbitration no differently than review of a trial court decision. This would entail subjecting arbitral fact finding to a “clearly erroneous” standard of review while reviewing legal decisions not implicitly intended to be governed by guild or industry norms to at least modest de novo review to ensure the arbitral tribunal’s correct understanding and application of applicable law.

Part II of this article outlines the major schools of statutory construction. Part III reviews the Court’s modern arbitration jurisprudence, outlining the Court’s inconsistency of interpretative approaches in arbitration cases. Part IV suggests a modernized alternative approach to the traditional deference accorded to arbitrators in judicial review.

## II. METHODS OF STATUTORY CONSTRUCTION

Even if judges cannot always agree about the precise contours of “the law” by which we will be ruled, they usually can agree on the rules of the legal process, in particular approaches to construing statutes, assessing constitutional concerns, *stare decisis*, and application of precedent. The legal system embraces a reasonably concrete set of basic ground rules for statutory construction.<sup>32</sup> The Supreme Court Justices similarly embrace – or at least say that they embrace – these mainstream judicial approaches.<sup>33</sup> Justices in the majority in most of the arbitration cases of the past 30 years are particularly likely to style themselves as mainstream and resist allegations of judicial activism,<sup>34</sup> although their application of mainstream jurisprudence may often have a conservative slant in many cases.<sup>35</sup>

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<sup>31</sup> See *infra* notes 277-80 and accompanying text (describing the manifest disregard of existing law ground used by some courts to vacate arbitration awards under some circumstances).

<sup>32</sup> See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 587-846 (4th ed. 2007) (describing mainstream approaches to statutory construction based on law’s text, legislative background, purpose, and function; although different judges attach different weights to these indicia of statutory meaning, almost all agree that these factors must be examined and fairly applied as part of the process of statutory construction). See also *id.* at 847-1100 (discussing widely accepted “Rules, Presumptions and Canons of Statutory Construction” as well as accepted “Extrinsic Sources for Statutory Interpretation, including legislative background”).

<sup>33</sup> See, e.g., ESKRIDGE, ET AL., *supra* note 32, Appendix B (citing Court decisions in which basic mainstream rules of statutory construction, including use of canons of meaning and construction are regularly invoked); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184-85 (1989) (expressing support for strict textual reading of law, following established doctrine, and deferring to original understanding of laws) [hereinafter *Rule of Law*]; Breyer, *On the Uses of Legislative History*, *supra* note 7; Breyer, *Judicial Review*, *supra* note 7. See generally RICHARD A. POSNER, *HOW JUDGES THINK* Chs. 1-4 (2008) (expressing very legal realist view of the judicial process that includes a chapter devoted to “The Supreme Court as a Political Court” but nonetheless also observing widespread judicial embrace of mainstream legal principles and strong tendency of jurists to wish to be perceived as fair-minded, mainstream, and not excessively political, partisan, or result-oriented).

<sup>34</sup> TIMOTHY L. HALL, *SUPREME COURT JUSTICES, A BIOGRAPHICAL DICTIONARY* 358-61, 380-432 (2001) (discussing backgrounds and professional and public view of mainstream judicial approaches, of Justices, William Brennan, Potter Stewart, Byron R. White, Thurgood Marshall, Warren E. Burger, Harry Blackmun, Lewis Powell, William Rehnquist, John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, Anthony Kennedy, David Souter, Clarence Thomas, Ruth Bader Ginsburg, and Stephen Breyer, all Justices

This judicial center of gravity seems particularly well established in matters of statutory interpretation. Although the Court's major arbitration cases present a range of legal questions, all are in the main statutory construction cases focusing on the proper application of the Federal Arbitration Act, sometimes alone or sometimes in combination or arguable conflict with other statutes. Regarding statutory construction, the Supreme Court during the same period that it has longingly embraced arbitration, has also professed fidelity to a statutory construction regime emphasizing the following interpretative tools.

### A. *Statutory Text*

Mainstream legal thought places substantial emphasis on statutory text and the Court has repeatedly stated that the starting point for assessing a statute such as the Federal Arbitration Act is its text.<sup>36</sup> Justice Antonin Scalia is famous for his heavily textualist brand of statutory construction that looks almost exclusively at the text of the statute and eschews examination of the legislative history of the law or its overall purpose.<sup>37</sup> But even non-textualists such as Justice Stephen Breyer (a comparative fan of

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participating in the Court's modern arbitration decisions during the period from 1980 to the present). I am not naively suggesting that there are no significant jurisprudential differences between the Justices. On the contrary, some are distinctly more liberal or more conservative, more formalist or functionalist, more textual or more contextual than others. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II (5th ed. 2008) (providing a particularly candid and realistic history of the degree to which ideological, jurisprudential, political and even partisan factors played a role in the appointment and confirmation process). But notwithstanding the very real differences between the Justices, a review of their backgrounds demonstrates that all qualify as "mainstream" judicial actors in that they purport to agree on basic premises of the legal process and do not espouse "impermissible" views that would have threatened or precluded nomination and confirmation.

<sup>35</sup> I am thinking in particular of Justices such as Warren Burger, Sandra Day O'Connor, Anthony Kennedy, David Souter, and even Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. All of these Justices are generally characterized as judicial conservatives, particularly the latter four. See ABRAHAM, *supra* note 34, Chs. 11-13; HALL, *supra* note 34, at 384-423. But none are described as so conservative as to fall outside the judicial mainstream or accused of espousing views inconsistent with the basic legal canon. *But see* CHEMERINSKY, *supra* note 16 (suggesting that in practice and application, the current conservative Justices are rendering decisions inconsistent with the Constitution).

<sup>36</sup> See ESKRIDGE, ET AL., *supra* note 32, at 765-98, App. B, p. 19; WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS Ch. 5 (5th ed. 2009); REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975). See, e.g., *United States v. Locke*, 471 U.S. 84 (1985) (reading text of statute requiring filing "prior to December 31" literally to rule invalid a filing made on December 31); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (reading text of statute literally to calculate penalty for failure to pay wages to seaman). Regarding textualism and arbitration, see, e.g., *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (placing prominence on the text in construing §§ 9-11 of the Act, noting that the Act has textual features in conflict with enforcement of a contract to expand judicial review of arbitration results); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 672 (2012) ("Had Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest. When it has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA.").

<sup>37</sup> See ESKRIDGE, ET AL., *supra* note 32, at 765-66; POPKIN, *supra* note 36, at ch. 5 (providing general overview of problems with overly textualist view and noting leavening doctrines such as the Whole Act Rule and canon against overly literal construction that give an absurd result); William Eskridge, Jr., *The*

legislative history and deferring to agency constructions of a statute)<sup>38</sup> agree that the text of the law is the most important consideration and the place at which statutory construction must begin.<sup>39</sup> Chief Justice Roberts (and Chief Justices William Rehnquist and Warren Burger before him) and the other Justices of the current Court all appear to agree on the importance of text, with Justices Kennedy, Thomas, and Alito appearing closer to Justice Scalia's more textual orientation. Other Justices serving during the modern pro-arbitration era of the Court (Justices Blackmun, Stevens, O'Connor, and Souter) also reflected the legal profession's general preference for the primacy of text in statutory construction, even if the primacy is at times a "soft" one for some Justices. But overall, the Court as a whole historically has tended to operate in a pragmatic, largely centrist manner without undue emphasis on any particular method of statutory interpretation.<sup>40</sup>

### B. Legislative Intent

All members of the Court during the modern pro-arbitration era, except Justice Scalia, acknowledge that the drafting history and legislative intent of a statute are relevant to determining the meaning and application of a statute in particular contexts.<sup>41</sup>

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*New Textualism*, 37 UCLA L. REV. 621 (1990); Nicholas Zeppos, *Justice Scalia's Textualism and the "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1992). See also Jonathan Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Scalia, *The Rule of Law*, *supra* note 33.

<sup>38</sup> See Breyer, *On the Uses of Legislative History*, *supra* note 7 (defending legitimacy of legislative intent as interpretative tool); see also ESKRIDGE, ET AL., *supra* note 32, at 955-56, 971-73 (noting acceptance of legislative background and other extrinsic information as tools of statutory construction); ESKRIDGE, ET AL., *supra* note 32, at 990 n. j (collecting substantial academic commentary supporting Justice Breyer's attitude toward legislative history as mainstream view but also collecting scholarship reflecting substantial support for Scalia perspective); POPKIN, *supra* note 36, at chs. 2 - 5 (noting that for most of legal history legislative intent or purpose was seen as the touchstone of statutory construction and even more salient than statutory text but that text has attained more prominence in modern statutory construction theory). See, e.g., MINN. STAT. § 645.16 (codifying view that legislative intent "controls" judicial construction of statute meaning: "[t]he object of all interpretation and construction of laws is to ascertain and effectuate the intent of the legislature.").

<sup>39</sup> See, e.g., *U.S. v. Tinklenberg*, 131 S. Ct. 2007, 2012 (2011); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011).

<sup>40</sup> See, e.g., William N. Eskridge, Jr. & Philip Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 26 (1994); William N. Eskridge, Jr. & Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) [hereinafter *Practical Reasoning*].

<sup>41</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Co.*, 599 U.S. 120 (2000) (utilizing legislative history in Justice O'Connor majority opinion; opinion joined by Justices Scalia and Thomas); *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (Justice White in majority opinion invokes legislative history); compare *Kosak v. U.S.*, 465 U.S. 848 (1984) (utilizing legislative history in Justice Marshall's opinion for the Court), with *Kosak*, 465 U.S. at 862-69 (Stevens, J., dissenting) (utilizing the textualist approach); see also *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983) (considering legislative background of statute and IRS regulation, including congressional failure to respond negatively to agency regulation); *Leo Sheep Co. v. U.S.*, 440 U.S. 668 (1979) (relying heavily on legislative background and perceived intent and purpose of Congress that passed the Union Pacific Act of 1862). See James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 122 (2008) (finding that both liberal and conservative justices make frequent resort to legislative history); Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (noting widespread acceptance of legislative

The Justices vary to the degree with which they will end their inquiry if the text appears to direct a result. Some appear to see legislative history as inappropriate unless the statutory text is ambiguous while others appear willing to consult legislative history as a check on their reading of the text. The Justices also frequently differ, of course, as to whether particular language is ambiguous.<sup>42</sup>

### C. Legislative Purpose

Legislative intent connotes a relatively specific intent of the legislature to achieve a particular result or that statutory language be applied in a rather specific way in a situation envisioned by the drafters. Legislative purpose connotes more general goals of the statute.<sup>43</sup> For example, where the legislative history reflects congressional consensus that particular legal precedents be overturned, this is a matter of legislative intent. The Pregnancy Discrimination Act,<sup>44</sup> for example, was designed specifically to overrule the Court's 1976 *General Electric v. Gilbert* decision and deem pregnancy discrimination a violation of Title VII.<sup>45</sup>

Where, by contrast, the legislative history reflects more general congressional desire to achieve certain results to prevent or discourage undesirable results, this is a matter of legislative purpose. For example, the Private Securities Litigation Reform Act of 1995<sup>46</sup> was designed to make it more difficult to bring securities violation lawsuits on the basis of hunch and therefore required more particularized pleadings. But the statute did not specifically state whether the specified pleading standards found in case law applying Fed. R. Civ. P. 9(b) were adequate.<sup>47</sup> Based on the legislative purpose of the law and its enactment notwithstanding the existence of Rule 9(b), a judge might view the

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history as interpretative tool but contending that the Court has not been following “consistent and uniform rules of for statutory construction and use of legislative materials.”); *but see* ESKRIDGE, ET AL., *supra* note 32, at 987-90 (noting Justice Scalia’s opposition to use of legislative history).

<sup>42</sup> *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (Court divides over whether statutory text empowers agency to regulate greenhouse gas emissions); *U.S. v. Locke*, 471 U.S. 84 (1985) (Court divides over proper application of seemingly clear but odd filing deadline of “prior to December 31” contained in statute); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (Court divides over whether legislation setting statutory right of recovery has implicit end point or should be interpreted literally to allow damages to continue accruing). *See also* *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81 (2007) (Court relatively in agreement over meaning of text of statute but differing over whether literal application would produce absurd result and whether in such circumstances clear text may be disregarded).

<sup>43</sup> *See* POPKIN, *supra* note 36, at § 6.02 (noting distinction between legislative intent as something specifically sought by enacting legislature and legislative purpose as more generalized goals of legislation).

<sup>44</sup> 42 U.S.C. §2000e(k) (2006).

<sup>45</sup> In *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), the Court found that pregnancy discrimination by an employer did not violate Title VII because – I am not making this up – only women get pregnant (some Court decisions are even worse than the current Court’s arbitration jurisprudence). Congress reacted by passing the Pregnancy Discrimination Act, which made pregnancy discrimination an express violation of Title VII. *See* *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009) (noting current statutory provision).

<sup>46</sup> *See* 15 U.S.C. §78u-4(b)(2)(A) (2006) (codification of pleading standards of Private Securities Litigation Reform Act of 1995).

<sup>47</sup> *See* *Kalnit v. Eichler*, 264 F.3d 131 (2d Cir. 2001); *Novak v. Kasaks*, 216 F.3d 300 (2d Cir. 2000); Marc. I. Steinberg & Diego E. Gomez-Cornejo, *Blurring the Lines Between Pleading Doctrines: The Enhanced Rule 8(a)(2) Plausibility Pleading Standard Converges with the Heightened Fraud Pleading Standards Under Rule 9(b) and the PSLRA*, 30 REV. LITIG. 1, 16-25 (2010).

legislative purpose as requiring a more particularized pleading than found under the Rule in cases subject to the Act. Conversely, a judge might find congressional silence on the issue an indication that Congress, despite its general concern over weak securities claims filed on a hunch, was simply wanting something more than mere notice pleading and wider application of cases taking a strong view of Rule 9(b).<sup>48</sup>

Another example is provided by the Sherman and Clayton Antitrust Acts,<sup>49</sup> which were both designed to fight monopolization and to forbid contracts, combinations and conspiracies in restraint of trade – but Congress was relatively vague about how that should be done. Although there is some legislative history suggesting that the laws were designed to prevent specific behemoths such as the Sugar Trust or the domination of the oil industry reflected by John D. Rockefeller’s Standard Oil Company (prior to its becoming Amoco, Esso, Enco, etc.), the statutes are in the main laws expressing general purposive guidelines. As a result, the courts have tended to apply “rules of reason” rather than per se rules in many cases challenging alleged anti-competitive conduct.<sup>50</sup> Judge Posner has characterized the Sherman Act as something of a common law statute, one that seems to invite judicial application because of the absence of specific directives in the law’s text or legislative history.<sup>51</sup>

In its use of legislative purpose in construing the antitrust laws, the Court has used legislative purpose to trump the actual text of the law. For example, if the Sherman Act were read literally and applied to “any” contract restraining trade,<sup>52</sup> franchises and licenses would be forbidden because this is both the literal language of the statute and because all contracts by definition constrain the contracting parties to at least some degree in that as a result of the contract, they are obligated to perform or pay damages.<sup>53</sup> This view can also be considered akin to the “absurd result” canon of statutory

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<sup>48</sup> Justice Stevens was perhaps the best known exponent of what is sometimes called the “dog didn’t bark” approach to statutory construction. Under this view, congressional silence can be regarded as meaningful and frequently is invoked to suggest that a newly enacted statute was not designed to overturn an established practice touching on the area of statutory concern. If Congress had wanted to make a change, it logically would have said so on the face of the statute or in the legislative history. That Congress did not speak implies it intended no such change. See ESKRIDGE, ET AL., *supra* note 32, at 1035. The metaphor is taken from the Sherlock Holmes story involving the theft of a prize racehorse at night from the stable in which the family dog did not bark despite this burglary. Holmes correctly discerns that the thief must have been someone well-enough known to the dog such that the animal was not alarmed enough to bark. See Arthur Conan Doyle, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES (various editions and dates).

<sup>49</sup> See 15 U.S.C. §§ 1, 2, 4 (2006).

<sup>50</sup> See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 6.4 (4th ed. 2011); RICHARD A. POSNER, ANTITRUST LAW 39-40 (2d ed. 2011); JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 8.01(2)(b) (2d ed. 1999).

<sup>51</sup> See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 212 (1986) [hereinafter *Legal Formalism*]; Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818 (1983) [hereinafter *Statutory Interpretation*].

<sup>52</sup> The Sherman Act states that “*any* contract, combination, or conspiracy in restraint of trade” is illegal. See 15 U.S.C. § 1 (2006) (emphasis added).

<sup>53</sup> See DAVID G. EPSTEIN, BRUCE A. MARKELL & LAURENCE PONOROFF, MAKING AND DOING DEALS: CONTRACTS IN CONTEXT 711-13 (3d ed. 2011).

construction, a principle positing that statutory text will not be applied so literally as to render an absurd result.<sup>54</sup>

#### *D. The Hierarchy of Legislative History*

Not all legislative history is created equal but jurists tend to agree on the relative authority and persuasiveness of different forms of legislative history. In general, there is a preference, in roughly the following order for: committee reports;<sup>55</sup> statements by the chief authors of the legislation; constructions consistent with hearing testimony and congressional reaction; floor statements; and contemporary accounts of enactment of the legislation.<sup>56</sup>

#### *E. Canons of Construction*

Canons of statutory construction are general rules for interpreting the laws and are derived from common understandings of drafting conventions, the legislative process, public policy, or jurisprudence. Although varying in their affection for particular canons, all of the Justices appear to find them potentially useful in particular situations.<sup>57</sup> Both textualists and others invoke canons of textual construction that provide presumptions as to the interpretation of words in a statute.<sup>58</sup> Examples are the plain meaning rule<sup>59</sup> and Latin maxims such as *nocitur a sociis*<sup>60</sup> and *eiusdem generis*<sup>61</sup> as well as preference for

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<sup>54</sup> See *U.S. v. Wilson*, 503 U.S. 329, 334 (1992) (applying absurd result exception to general rule of applying “plain” textual meaning of statute); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-11 (1989).

<sup>55</sup> See Jorge Carro & Andrew Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 (1982) (over forty year period, more than 60 percent of Court’s citations to legislative history were to committee reports). See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69, 75, n. 7 (1984) (relying on Senate report regarding civil rights bill that was not even enacted but was similar to that enacted in law).

<sup>56</sup> See ESKRIDGE, ET AL., *supra* note 32, at 971-1065; POPKIN, *supra* note 36, at chs. 6, 9-11. See also OTTO HETZEL, MICHAEL LIBONATI & ROBERT WILLIAMS, *LEGISLATIVE LAW AND PROCESS* 589 (3d ed. 2001) (providing extensive list of 20 different forms of legislative background information that courts may use).

<sup>57</sup> This discussion of canons of construction is drawn largely from Appendix B to ESKRIDGE, ET AL., *supra* note 32, which presents an exhaustive review of the canons; see also SCALIA & GARNER, *supra* note 6.

<sup>58</sup> See ESKRIDGE, ET AL., *supra* note 32, app. B at 19-23 (providing examples of canons regarding presumptions as to word meaning); SCALIA & GARNER, *supra* note 6, at 69-239.

<sup>59</sup> This requires adherence to the clear linguistic meaning of statutory text unless this would bring about an absurd result or there is evidence that the text is in error in departing from the specific intent of the legislature. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527-35 (2007); *Barnhart v. Thomas*, 540 U.S. 20, 26-29 (2003); ESKRIDGE, ET AL., *supra* note 32, app. B at 19.

<sup>60</sup> This maxim provides that a general term is construed in a manner consistent with similar specific terms in a statute. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); ESKRIDGE, ET AL., *supra* note 32, app. B at 20.

<sup>61</sup> A general term is construed to reflect the class of objects shown in exemplary or specific terms used in the statute. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (discussed *infra* note 190-198 and accompanying text; ESKRIDGE, ET AL., *supra* note 32, app. B at 20).

ordinary meaning rather than technical or specialist meaning<sup>62</sup> and use of dictionary definitions<sup>63</sup> or resort to the default definitions of terms set forth in the Rules of Construction Act, 1 U.S.C. §1 if available.<sup>64</sup> There are also a number of grammar and syntax canons regarding punctuation, grammar, the “rule of the last antecedent,” and the understanding largely shared with laypersons that “may” implies discretion while “shall” implies that something is mandatory or less discretionary while “or” means in the alternative and is disjunctive rather than conjunctive.<sup>65</sup>

In addition, there are widely accepted canons regarding what might be termed the structural assessments of a statute.<sup>66</sup> There is also widespread judicial agreement tending to embrace canons “expressing a preference for continuity in law.”<sup>67</sup> Among these are a presumption of *stare decisis* but acceptance that wrongly decided precedents can be overruled where the case for change is sufficiently compelling.<sup>68</sup> In addition, there is a presumption against repeals by implication<sup>69</sup> and a presumption that statutory terms are used consistently across statutes.<sup>70</sup> Related to this is the *in pari materia* rule providing that the use of similar statutory provisions in comparable statutes will be applied in the same way.<sup>71</sup> There is also a judicial consensus that the views of a later Congress are generally not seen as illuminating the views of an enacting Congress.<sup>72</sup>

There are also a number of canons reflecting substantive policy generally embraced by the courts. Despite the legal realist truth that judges can differ considerably in their personal preferences, the bench as a group appears to accept a basic core of substantive legal, political, and social values as well as adherence to governing procedural rules. For example, a leading casebook divides these canons into several groups: federalism canons, due process and common law based canons.<sup>73</sup>

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<sup>62</sup> *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989); ESKRIDGE, ET AL., *supra* note 32, app. B at 20.

<sup>63</sup> *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988); ESKRIDGE, ET AL., *supra* note 32, app. B at 20.

<sup>64</sup> *See Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005); ESKRIDGE, ET AL., *supra* note 32, app. B at 21.

<sup>65</sup> *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005) (“may” implies discretion); *Lopez v. Davis*, 531 U.S. 320 (2001); *Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 302 (1989) (“shall” implies a command); *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 330-31 (1993) (rule of the last antecedent); ESKRIDGE, ET AL., *supra* note 32, app. B at 21.

<sup>66</sup> *See* ESKRIDGE, ET AL., *supra* note 32, at app. B. at 21; Stempel, *Tainted Love*, *supra* note 11, at 814-15.

<sup>67</sup> *See* ESKRIDGE, ET AL., *supra* note 32, app. B. at 25-26.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.* at 26; *Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>70</sup> *See Pierce v. Underwood*, 487 U.S. 552 (1988); ESKRIDGE, ET AL., *supra* note 32, app. B at 26.

<sup>71</sup> *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640-43 (2007) (ironic in that, *Ledbetter* was legislatively overruled in 2009 because of a widespread perception that the Court’s holding was in error; the *in pari materia* canon, however, is widely followed by both liberals and conservatives, although they may of course differ in its application); ESKRIDGE, ET AL., *supra* note 32, app. B at 26.

<sup>72</sup> *See* ESKRIDGE, ET AL., *supra* note 32, app. B at 28.

<sup>73</sup> *See id.* at 29-31.

## F. More Controversial Approaches to Statutory Construction

The mainstream approach to statutory construction embraced by the Justices generally begins with and emphasizes text but also considers legislative intent and purpose to the degree appropriate so long as it does not strain the reading of the text. The Court as a whole has been less willing or perhaps even unwilling to endorse some of the less established modes of statutory interpretation, which enjoy significant support in the academy. Among these are considerations of public policy, appreciation of the interest group influence in legislation, and the view that construction of legislation should evolve with changing circumstances.<sup>74</sup> In practice, however, it appears that courts use a variety of approaches that permit courts more ability to exercise personal preferences than courts are willing to acknowledge.<sup>75</sup> In addition, there are questions of the role of the executive branch and administrative agencies in the construction of statutes.<sup>76</sup>

Quite controversial are dynamic or evolutionary approaches to statutory construction. Under this approach, most associated with Professor William Eskridge,<sup>77</sup> reviewing courts are empowered to update legislation to fit current applications so long as sufficiently consistent with the language of the statute and the goals of the enacting legislature. In other words, the court can modernize the statute to address unanticipated problems or results in the field at odds with the goals of the legislation.<sup>78</sup>

For example, a dynamic statutory interpreter would approve of a decision such as *Griggs v. Duke Power*,<sup>79</sup> in which the Burger Court concluded that job discrimination claims made pursuant the Civil Rights Act of 1964 could be proven, at least as a prima facie matter, even without evidence of intentional discrimination (“disparate treatment”) in cases where the defendant employer had a facially neutral policy that caused a racially

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<sup>74</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1997) (arguing that construction of statutes should evolve in manner consistent with purposes of enacting legislature to fit changes in society, economics, business); CALABRESI, *supra* note 2 (suggesting that older statutes should be treated like common law precedents that can, in compelling cases, be “overruled” by courts). See also William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) (public policy considerations frequently if tacitly used by courts in deciding cases; finding such use appropriate and legitimate but questioning particular values emphasized in certain decisions); Richard Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1669 (1975) (noting rising interest group influence on modern legislation and administrative agency action but diffuse as to recommended reaction). See generally ESKRIDGE, ET AL., *supra* note 32, at chs. 6-8 (reviewing approaches to statutory construction).

<sup>75</sup> See Eskridge & Frickey, *Practical Reasoning*, *supra* note 40.

<sup>76</sup> See Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

<sup>77</sup> See William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); see also William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990); William N. Eskridge, *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001); William N. Eskridge, Jr. & Philip P. Frickey, *Forward: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994) (arguing for inclusion of dynamic perspective as component of more pragmatic, mainstream approaches to statutory construction).

<sup>78</sup> See ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 74; ESKRIDGE, ET AL., *supra* note 32, at 749; T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988) (arguing for dynamic statutory construction but labeling it as a “nautical” model in which the legislature sets the statute on a voyage that must be completed by courts construing the law).

<sup>79</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1972).

“disparate impact.”<sup>80</sup> The Court was in effect updating the statute (a mere eight years after its passage) to account for the difficulty of proving discrimination once employers were on notice that announced intentional discrimination violated the law.

Similarly, in *United Steelworkers of America v. Weber*,<sup>81</sup> the Court took a dynamic approach in concluding that affirmative action policies favoring minority workers did not violate the nondiscrimination principle of Title VII through reverse-discrimination.<sup>82</sup> The statute, which had been passed 15 years earlier, was largely silent on the issue. The Court in essence reasoned that effective implication of the law would under some circumstances require remedial relief that included affirmative action efforts.<sup>83</sup>

More controversial than dynamic statutory interpretation is the view that older statutes should be treated akin to common law in that a modern court can feel empowered to apply a construction of the statute that fits the current legal landscape even if this is far afield from the literal text of the law or the enacting legislature’s specific intent or general purpose. This approach is most associated with Guido Calabresi’s *A Common Law for the Age of Statutes*, in which then-Professor Calabresi defended the view<sup>84</sup> well enough that the book received the American Association of Law Schools triennial Coif Award.<sup>85</sup> Nonetheless, the book and the school of thought became a lightning rod for critics contending that the common law approach to statutory construction was insufficiently appreciative of the limits of judicial power and the American approach to separation of powers.<sup>86</sup>

Evolutionary approaches to statutory construction such as dynamic statutory interpretation or a common law approach are seldom directly addressed in judicial opinions and are, at least in official parlance, not mainstream schools of statutory construction. In practice, however, courts may use them *sub silentio* to aid in reaching a decision where the resolution of the issue is not dictated by statutory text, specific legislative intent, or clearly discernable legislative purpose whose application to the instant case is fairly clear.

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<sup>80</sup> See *id.* at 427-35; ESKRIDGE, ET AL., *supra* note 32, at 82-87. See generally MARK A. ROTHSTEIN, CHARLES B. CRAVER, ELINOR P. SHROEDER & ELAINE W. SHOBNEN, *EMPLOYMENT LAW* Ch. 2 (4th ed. 2009) (reviewing employment discrimination law and Title VII).

<sup>81</sup> See *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

<sup>82</sup> See *id.* at 198-209.

<sup>83</sup> See ESKRIDGE, ET AL., *supra* note 32, at 100-04; ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 74, at 24-25.

<sup>84</sup> See CALABRESI, *supra* note 2.

<sup>85</sup> See Otto J. Hetzel, *Instilling Legislative Interpretation Skills in the Classroom and the Courtroom*, 48 U. PITT. L. REV. 663, 667 n.14 (1987).

<sup>86</sup> See, e.g., Allan C. Hutchinson & Derek Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752 (1982); Grover Rees III, *Cathedrals Without Walls: A View from the Outside*, 61 TEX. L. REV. 347 (1982); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213 (1983); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 357 n.22 (1989) (citing additional articles critical of the book). However, other authorities have found the common law approach one worth exploring. See, e.g., Jack Davies, *A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act*, 4 VT. L. REV. 203 (1979) (law professor and state legislator argues in favor of statute essentially adopting a common law approach similar to Calabresi’s for statutes more than 25 years old). See also JACK DAVIES, *LEGISLATIVE LAW AND PROCESS IN A NUTSHELL* (3d ed. 2007).

Because of the outsider status of dynamic/common law statutory construction, it is more than a bit surprising to see it applied to questions of arbitrability by three successive courts (the Burger, Rehnquist, and Roberts Courts) generally regarded as conservative. Their predecessor, the Warren Court, generally regarded as one of the most liberal in American history, tended toward an originalist view that was sometimes wary of arbitration and hesitant to construe the Federal Arbitration Act in a manner that would open up wide areas of dispute to mass arbitration.<sup>87</sup> But, as discussed below, the Court since the 1980s has been engaged in a dynamic interpretative enterprise that has expanded the scope of the Act substantially beyond what was originally intended.

### III. THE SUPREME COURT AND ARBITRATION: PROMOTION BUT INCONSISTENCY

#### A. *Pre-Act History*

The Court (and courts generally) were not always proponents of arbitration. Indeed, the Act was prompted in large part by the business community's dismay over such decisions and its persuasion of Congress that legislative overruling of anti-arbitration decisions was in order.<sup>88</sup> A personal favorite illustration of pre-Act judicial hostility to arbitration is *Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet*, (often also known as *The Atlanten* or *Korn-Og*, the latter my preference).<sup>89</sup> In this case decided shortly before enactment of the Federal Arbitration Act, the Court, (affirming a Learned Hand trial court decision and a Second Circuit decision) held that even what appears to be a broadly worded arbitration clause in a shipping contract between merchants (with no discernable issues of consumer protection, consent, etc.) does not require arbitration.<sup>90</sup> The reason: because one party sought to arbitrate an issue of breach of contract, the arbitration clause was inapplicable because the claim did not arise out of the performance of the contract because the contract was not being performed due to the breach.<sup>91</sup>

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<sup>87</sup> See generally Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TULANE L. REV. 1377 (1991) (reviewing decisions on arbitration frequently showing Warren Court resistant to expansive statutory construction and favoring a more traditionalist, less dynamic, approach).

<sup>88</sup> See Stempel, *supra* note 87 (describing historical judicial resistance to arbitration and response by business and legislators culminating in Arbitration Act); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990) (noting degree to which some modern courts as late as the 1980s continued to resist enforcement of arbitration agreements based on problematic "public policy" concerns about arbitration) [hereinafter *Pitfalls of Public Policy*].

<sup>89</sup> *Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet*, 252 U.S. 313 (1920), *aff'g* 250 F. 935 (2d Cir. 1918), *aff'g* 232 F. 403 (S.D.N.Y. 1916).

<sup>90</sup> See *Atlanten*, 252 U.S. at 315 (the arbitration clause in question was very broad, stating that "[i]f any dispute arises, the same" shall be "settled" by arbitration, with a decision that "shall be final.").

<sup>91</sup> See *Atlanten*, 232 F. at 405 (somehow finding that the broadly worded arbitration clause was not intended to apply to the whole contract or its activity).

## B. *The Federal Arbitration Act*

Cases like *Korn-Og* were not that unusual. English courts resisted specific enforcement of arbitration clauses on the ground that these improperly ousted courts of their rightful jurisdiction, a view that was largely adopted in the United States. In reaction, the commercial community sought corrective legislation and obtained it with passage of the Act, now codified at 9 U.S.C. §§1-16.<sup>92</sup>

The Act itself, passed in 1925 with an effective date of January 1, 1926 (9 U.S.C. §14), is rather short and straight-forward. After defining key terms such as “commerce” and “maritime,” the Act states:

A written provision in any maritime transaction or 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, 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.<sup>93</sup>

Section 3 of the statute (9 U.S.C. §3) provides that courts may issue a stay of judicial proceedings in order to permit arbitration to proceed pursuant to an enforceable agreement. Section 4 (9 U.S.C. §4) gives federal courts authority to enter an order compelling arbitration if the petitioning party to a valid arbitration agreement is “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate.” Several sections of the Act deal with procedural matters. *See, e.g.*, 9 U.S.C. §5 (governing the appointment of arbitrators); 9 U.S.C. §6 (providing that applications for relief are treated as motions; 9 U.S.C. §7 (governing witnesses, fees, and subpoenas); 9 U.S.C. §8 (governing admiralty matters such as seizure of vessels); 9 U.S.C. §11 (regulating modification and correction of errors in an arbitration award); 9 U.S.C. §13 (governing papers and docketing); and 9 U.S.C. §15 (inapplicability of the “Act of State” doctrine).

The Act provides strong support for enforcing arbitration awards, specifying that federal courts may confirm awards and enter judgment based on the award (9 U.S.C. §9), which in turn gives the prevailing arbitration party the normal range of judgment collection tools under applicable procedural law. Section 10 of the Act (9 U.S.C. §10) permits arbitration awards to be challenged, but on grounds considerably narrower than those available in litigation, specifically:

- where the award was “procured by corruption, fraud, or undue means”;

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<sup>92</sup> See Stempel, *Pitfalls of Public Policy*, *supra* note 88, at 271-77 (1990) (summarizing pre-Act common law resistant to arbitration and gestation and passage of Act).

<sup>93</sup> 9 U.S.C. §2 (2006).

- where there was evident partiality or corruption in the arbitrators, or either of them;
- where the arbitrators erred by refusing to delay a hearing for good cause or to hear “pertinent and material evidence” or where there was “any other misbehavior” prejudicing the rights of the parties; or
- where the arbitrators exceeded the scope of their power in light of the matter submitted to them or “so imperfectly” executed their power “that a mutual, final, and definite award upon the subject matter submitted was not made;”<sup>94</sup>

The final section of the Act (9 U.S.C. §16) governs appeals and reflects congressional preference (largely through 1990 amendments rather than the original 1925 enactment) to reduce appellate challenge to pro-arbitration orders<sup>95</sup> but permit appellate review of orders refusing to compel arbitration or refusing to stay judicial proceedings pending arbitration.

### C. *The First Five Decades of Construing the Arbitration Act*

Despite passage of the Act, there remained some judicial resistance to arbitration, as occasionally reflected in case law over the next 50 years. Most prominent was *Wilko v. Swan*,<sup>96</sup> which held – seemingly out of the blue – that claims arising under the Securities Act of 1933 were not subject to arbitration, regardless of the clarity of the arbitration clause, the knowing and voluntary consent of the parties, the standard practice of the industry, or the expectations of the parties.

In a similar vein was *Bernhardt v. Polygraphic Co. of America*,<sup>97</sup> which the Court implicitly revisited and reversed in the watershed *Southland Corp. v. Keating*<sup>98</sup> decision. The Court held that the Federal Arbitration Act was procedural rather than substantive and consequently was subject to the *Erie* doctrine, which made Vermont law applicable in the instant case. Under Vermont law, arbitration agreements of this type were unenforceable. Hence, arbitration was not required regardless of the surrounding contracting circumstances.<sup>99</sup>

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<sup>94</sup> See 9 U.S.C. §10 (2006) (also specifically providing that reviewing court may direct a rehearing by the arbitrators if ground for vacating award is shown).

<sup>95</sup> See 9 U.S.C. §16 (2006) (stating that “an appeal may not be taken from an interlocutory order” granting a stay of litigation, directing/compelling arbitration, or refusing to enjoin an arbitration except pursuant to 28 U.S.C. § 1292(b), which permits trial courts to certify for immediate review decisions involving close legal questions where the judge believes earlier appellate review will expedite ultimate disposition of the matter).

<sup>96</sup> *Wilko v. Swan*, 347 U.S. 427 (1953).

<sup>97</sup> *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956).

<sup>98</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>99</sup> See *Bernhardt*, 350 U.S. at 204-06 (*Bernhardt* was a diversity case. Viewing the Arbitration Act as procedural, the Court declined to apply it to the dispute, reasoning that pursuant to *Erie Railroad v. Tompkins* and its progeny that the dispute was controlled by applicable state law (Vermont’s)).

The Court took a more receptive approach to arbitration in the context of labor arbitration in the “*Steelworkers Trilogy*,” three cases involving disputes between the then powerful United Steelworkers of America union and companies with which it had collective bargaining agreements providing for arbitration of workplace disputes.<sup>100</sup> Some argue that these cases – rather than the Court’s 1980s cases promoting arbitration – comprise the inauguration of the modern era of Supreme Court precedent favoring arbitration.<sup>101</sup> In *American Mfg. and Warrior & Gulf*, the Court enforced arbitration agreements.<sup>102</sup> In *Enterprise Wheel & Car*, the Court announced a very deferential standard for the review of labor arbitration decisions, holding that the decision would be confirmed by courts so long as the arbitrator’s decision “drew its essence” from the agreement.<sup>103</sup> A cynic might note that even a horribly erroneous decision can still be one dealing with the essence or core of the agreement giving rise to the dispute.

Because these three cases were so focused on labor arbitration rather than commercial or consumer arbitration, I consider them to be precursors to the modern era. To be sure, the Court is showing signs of greater affection for arbitration but this results largely from the Court’s view that arbitration is a particularly critical component of the collective bargaining process and an established means by which labor peace is preserved. As the Court’s other 1960s and 1970s cases show, the Court was warming to arbitration but continued to have doubts about it outside the labor arena.

In *Moseley v. Electronic Missile Facilities, Inc.*,<sup>104</sup> a plumbing/heating subcontractor filed suit in Georgia to collect funds allegedly owed to it by the general contractor for a United States government missile site and successfully resisted arbitration even though the contractor had previously filed an action in New York seeking to enforce the arbitration clause. The Court found that the subcontractor had adequately alleged an issue regarding possible fraud regarding the procurement of the arbitration agreement.<sup>105</sup> This seems a relatively classic case of what I have termed “old” or traditional commercial arbitration rather than the “new” or “mass” arbitration of retail

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<sup>100</sup> See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>101</sup> See Linda R. Hirschman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985) (viewing the *Steelworkers Trilogy* as important—the “first” trilogy discussed in the article; but seeing *Dean Witter Reynolds Inc. v. Byrd*, *Moses H. Cone Memorial Hosp. v. Mercury Const.*, and *Southland Corp. v. Keating* (all discussed *infra*) as a “second” important arbitration trilogy).

<sup>102</sup> See *Am. Mfg.*, 363 U.S. at 567-69; *Warrior & Gulf*, 363 U.S. at 581-85.

<sup>103</sup> See *Enterprise Wheel & Car Corp.*, 363 U.S. at 597-99. The *Enterprise Wheel* standard of review of labor arbitration awards actually differs from the standard of review set forth in the Federal Arbitration Act, 9 U.S.C. 11, which to me underscores the longstanding view that the Act was aimed directly at commercial arbitration. In the *Steelworkers Trilogy*, the Court fashioned labor arbitration law on the strength of Section 301 of the Labor Management Relations Act, which the Court has construed to provide authority for common law development of federal labor law. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957) (under the Act, an arbitration award is presumptively valid unless the arbitrators have exceeded their powers or acted with bias or favoritism. Although this in practice may not be much different than the *Enterprise Wheel* draws-its-essence-from-the-agreement test, one can make a strong case that the same standard should apply to review of both labor and commercial arbitration awards); see also Mark W. Lee, Note, *Judicial Review of Labor Arbitration Awards: Refining the Standard of Review* 11 WM. MITCHELL L. REV. 993 (1985).

<sup>104</sup> *Moseley v. Elec. Missile Facilities, Inc.*, 374 U.S. 167 (1963).

<sup>105</sup> *Id.* at 168-72.

consumer matters that has troubled many.<sup>106</sup> However, one might argue that the terms of the arbitration agreement unfairly subjected the subcontractor to a seriously inconvenient forum.<sup>107</sup> Notwithstanding the *Steelworkers Trilogy*, *Moseley* suggested continuing wariness toward arbitration by the court.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,<sup>108</sup> the Court held (arguably overruling *Moseley*) that a question of fraudulent inducement into the contract containing an arbitration clause was in first instance a question for the arbitrator. By giving arbitrators “first dibs” on these questions, the Court appeared to move toward a more favorable attitude toward arbitration.<sup>109</sup> Continuing this substantial deference to private dispute resolution agreements, the Court in *The Bremen v. Zapata Off-Shore Co.*,<sup>110</sup> enforced a forum selection clause in a maritime towing agreement, even though the party adhering to the towing contract had relatively little bargaining power in light of the disabled condition of its vessel.<sup>111</sup> The case was regarded as a sign that the Court was beginning to look more favorably on such agreements.<sup>112</sup> Logically, this suggested similarly more favorable attitudes toward arbitration agreements. But *The Bremen* was a case of traditional commercial arbitration rather than of new mass arbitration affecting consumers.

*Merrill Lynch, Pierce Fenner & Smith, Inc. v. Ware*,<sup>113</sup> involved a dispute over wage claims. The Court refused to enforce the standard arbitration clause signed by workers in the financial services industry as a condition of their employment because of a state law prohibiting arbitration of wage claims. Although this decision is now effectively overruled by *Southland* and its progeny<sup>114</sup> the latter cases are arguably distinguishable in that the state law in *Ware* appears more directly aimed against arbitration while the state law in *Southland* was made inapplicable to any contract provisions waiving substantive rights as a condition of obtaining a franchise. However, in view of the Court’s most recent arbitration decision in *AT&T v. Concepcion*, which refused to apply state contract law to arbitration agreements despite the language of the Federal Arbitration Act inviting its application,<sup>115</sup> *Ware* is effectively dead (absent a change in Court composition and a willingness to re-examine the issue) and represents the Court’s old skeptical concern about arbitration rather than its newfound affection for arbitration.<sup>116</sup>

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<sup>106</sup> See *infra* text accompanying notes 281-285 (discussing distinctions between traditional, individualized, “old” style commercial arbitration and “new” standardized mass arbitration of consumer, employment and debtor-creditor disputes); See also Stempel, *Mandating Minimum Fairness*, *supra* note 11.

<sup>107</sup> See Stempel, *supra* note 87, at 1397 (discussing *Moseley* in detail).

<sup>108</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

<sup>109</sup> *Id.* at 403-04; Stempel, *supra* note 87, at 1390-92 (discussing *Prima Paint*).

<sup>110</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

<sup>111</sup> *Id.* at 9-10.

<sup>112</sup> See Stempel, *Tainted Love*, *supra* note 11, at 826-27, n.145 (collecting commentary on decision).

<sup>113</sup> *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973).

<sup>114</sup> See *infra* text accompanying notes 131-151 (discussing *Southland* and its overruling of *Bernhardt v. Polygraphic*).

<sup>115</sup> See *infra* text accompanying notes 225-260 (discussing *Concepcion*).

<sup>116</sup> The issue of permissible state “interference” with arbitration is even a bit more complicated in that in *Doctor’s Associates v. Casarotto*, 517 U.S. 681 (1996), the Court struck down a Montana law requiring that arbitration clauses in franchise agreements must comply with certain disclosure requirements in order to be enforceable. *Casarotto* clearly would seem to constructively overrule *Ware*. But in *AT&T v.*

A year after *Ware*, in *Scherk v. Alberto-Culver Co.*,<sup>117</sup> the Court enforced an arbitration clause – one calling for arbitration in France – contained in a sale-of-business agreement between a businessperson and a large multinational company. Although traveling to Paris is hardly the greatest dispute resolution burden one might face, the Court’s enforcement reflects its general comfort with arbitration, at least in the commercial context. But, as in *The Bremen*, the Court was dealing with old style commercial arbitration and not the new mass arbitration of consumer complaints that would arise as a consequence of the Court’s later pro-arbitration jurisprudence. Even so, scholarly discussion of the decision expressed concern that the franchisee dealing with the manufacturer might lack sufficient independence, savvy, and bargaining power as well as expressing concern that the language and reasoning of *Scherk* could lead to more aggressive enforcement of arbitration clauses contained on consumer contracts.<sup>118</sup>

As of the mid-1970s, then, the Court’s approach could be characterized as one of greater acceptance of arbitration but with some continuing concern or even outright hostility when arbitration clauses swept within their textual ambit statutory claims. For example, in *Alexander v. Gardner-Denver Co.*,<sup>119</sup> the Title VII claim of a union employee was held to be beyond the scope of the arbitration clause contained in the collective bargaining agreement to which he was subject. Although the decision can be fairly regarded as one merely interpreting the scope of the arbitration clause and the nature of union-management dispute resolution as opposed to a civil rights claim, the decision can also be read as one applying a statutory or public policy exception to the Federal Arbitration Act.<sup>120</sup> In any event, *Gardner-Denver* suggested that the Court remained at least mildly skeptical about arbitration in some contexts.

For example, in *Barrentine v. Arkansas-Best Freight System, Inc.*,<sup>121</sup> the Court held that a broadly worked arbitration clause in a collective bargaining agreement did not apply to the worker’s Fair Labor Standards Act Claims. The case stands pretty clearly as a case applying a “statutory” claims exception to arbitration in the manner of *Wilko v. Swan*. The Court, although not overtly hostile to arbitration, continued to limit its reach and deny arbitrability for certain types of cases.<sup>122</sup> In *McDonald v. City of West Branch*,<sup>123</sup> in a fashion quite similar to *Barrentine*, the Court refused to compel arbitration of civil rights claims made pursuant to 42 U.S.C. §1983, suggesting that the Court is not yet in full embrace of arbitration as a concept.<sup>124</sup>

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*Concepcion*, the Court astonishingly suggested that even though it was preventing application of California’s judicially crafted doctrine of unconscionability as a contract defense, the states might be free to enact the type of specific legislation that Court had struck down in *Casarotto*. See *infra* text accompanying notes 244-245 (discussing this aspect of *Concepcion*).

<sup>117</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 501 (1974).

<sup>118</sup> See, e.g., Stempel, *Tainted Love*, *supra* note 11, at 828, n.154 (collecting commentary critical of *Scherk*).

<sup>119</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

<sup>120</sup> See Stempel, *Pitfalls of Public Policy*, *supra* note 88, at 321-23.

<sup>121</sup> *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

<sup>122</sup> See also Stempel, *Pitfalls of Public Policy*, *supra* note 88, at 308-19 (discussing *Barrentine* at greater length).

<sup>123</sup> *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

<sup>124</sup> See also Stempel, *Pitfalls of Public Policy*, *supra* note 88, at 323-27 (discussing *McDonald v. West Branch* at greater length).

But within a short time after *McDonald v. West Branch*, the Court's affection for arbitration solidified. Despite 1980s cases such as *Barrentine* and *West Branch* that reflected continued wariness about arbitration, the Court by the mid-1980s had embarked on a new path. Decided during the same term as *West Branch*, *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*,<sup>125</sup> enforced an arbitration agreement in a dispute over a construction project between the buyer hospital and the general contractor. The hospital sought a state court order staying arbitration proceedings notwithstanding that the construction contract, like most such contracts, contained a broadly worded arbitration clause committing such contract-related disputes to arbitration.

The Court's decision compelling arbitration and rejecting the view that "*Colorado River*" abstention<sup>126</sup> by the federal court was required by notions of deference to ongoing state proceedings<sup>127</sup> made eminent sense. In dissent, however, Chief Justice Burger and Justices Rehnquist and O'Connor argued that in its zeal to render the pro-arbitration ruling, the majority had been too quick to find a sufficiently final order that permitted appeal.<sup>128</sup> Legal realists might also note with some irony that in *Moses H. Cone*, it was three of the Court's Republican-appointed conservatives who had misgivings about the pro-arbitration result – exactly the opposite of the situation tending to obtain in the current Court.

What prompts some to see *Moses H. Cone* as the dawn of the modern pro-arbitration era is its rhetoric favoring arbitration.<sup>129</sup> More substantively, the *Moses H. Cone* majority states that the Act "create[s] a substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act."<sup>130</sup> In other words, the Act would appear to apply in state courts as well as in federal court. But this issue was not prominently addressed until the Court's next important arbitration case. Although the *Moses H. Cone* decision favored arbitration, it was not the full-fledged embrace that came in *Southland Corp. v. Keating*,<sup>131</sup> which most regard as the dawn of the Court's modern pro-arbitration jurisprudence.

*Southland* involved a dispute between the convenience store chain 7-Eleven and a California franchisee. The franchise agreement contained a broadly worded arbitration clause the franchisor sought to enforce to compel arbitration of the dispute. The franchisee resisted, citing as support a portion of the state's franchise law that forbade

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<sup>125</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

<sup>126</sup> See *Colorado River* abstention, so named after *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (when a federal court action is dismissed or stayed due to the existence of concurrent state court proceedings involving the same parties and controversy); see also ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPER, *FUNDAMENTALS OF PRETRIAL LITIGATION* § 4.5 (9th ed. 2013) (forthcoming 2013).

<sup>127</sup> See *Moses H. Cone*, 460 U.S. at 13-23.

<sup>128</sup> See *id.* at 30 (Rehnquist, J., dissenting).

<sup>129</sup> See, e.g., *id.* at 24 (viewing 9 U.S.C. § 2 of the Act as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."); *Id.* at 24-25 ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . [T]he Arbitration Act established that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

<sup>130</sup> See *id.* at 24.

<sup>131</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

enforcement of waivers of franchisee rights. The California Supreme Court reasoned that an arbitration clause was in effect a waiver of the franchisee's right to seek judicial relief in the event of a controversy over the franchise agreement. The U.S. Supreme Court reversed.<sup>132</sup>

*Southland* thus presented in starker relief than *Moses H. Cone* the issue of whether the Federal Arbitration Act was substantive federal law that took precedence over contrary state law. The Supreme Court could not alter the construction of a state statute declared by the state's highest court, even if it found the reasoning (that agreement to arbitration was a sufficient waiver of substantive rights to be forbidden under state franchise law) flawed. If the decision was to be reversed, it had to be because the state law was powerless against a federal law commanding arbitration – and the *Southland* Court so found, over the dissents of Justice Stevens<sup>133</sup> and Justice O'Connor (joined by Justice Rehnquist).<sup>134</sup>

*Southland*, authored by Chief Justice Burger, who had been promoting alternative dispute resolution from the bully pulpit of the Chief's office, also appears to mark the beginning of an ideological shift in that Republican and conservative Justices that might otherwise have opposed broad arbitration clause enforcement on federalism and states' rights grounds began to become arbitration advocates notwithstanding the powerful pull these concepts normally exert over Republicans and conservatives. Justice Rehnquist would soon be largely supporting outcomes favorable to arbitration. Although Justice O'Connor continued to express opposition to the nationalization of the Federal Arbitration Act by making it substantive law and was later joined by Justice Thomas, there are today no Republican-appointed Justices opposing arbitrability in close cases.<sup>135</sup>

The *Southland* majority embraced the now-modern view of the Act as federal substantive law, bootstrapping in part on the passing statement to that effect in Justice Brennan's *Moses H. Cone* opinion.<sup>136</sup> Although acknowledging that "the legislative history [of the Act] is not without ambiguities," the Court found that "there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts."<sup>137</sup> The Court further found that "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."<sup>138</sup> Thus, the Court held "that § 31512 of the California Franchise Investment Law violated the Supremacy Clause" as well as being inconsistent with the Federal Arbitration Act.<sup>139</sup>

Rightly or wrongly, *Southland* is an example of dynamic or evolutionary statutory construction in that the majority is expanding the reach of the statute beyond the specific intent of the enacting Congress and perhaps beyond the basic purpose of the statute as

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<sup>132</sup> *Id.* at 6.

<sup>133</sup> *Id.* at 17.

<sup>134</sup> *Id.* at 21.

<sup>135</sup> See *infra* notes 206-260 and accompanying text (discussing modern cases in which Republican appointees and conservatives support arbitration while Democratic appointees and moderates/liberals oppose arbitrability or class-wide treatment of arbitrable disputes).

<sup>136</sup> See *Southland Corp.*, 465 U.S. at 14.

<sup>137</sup> *Id.* at 16.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

well, although the *Southland* result can be defended in part on broad legislative grounds (i.e., general congressional support for arbitration). But in its *sub silentio* dynamism, the *Southland* majority arguably overreads the text of the Act and clearly minimizes or even ignores traditional mainstream concerns of federalism, historical practice, restraint in expanding congressional power absent a clear statement, and deference to traditional state prerogatives.

Although the majority has a plausible textual construction of the Act, it can also be argued that the Act's language stating that arbitration agreements may be avoided on "grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. §2) includes illegality under applicable state law such as the California Franchise Investment Act. Although it would not be well articulated for another decade or so, a natural reading of this language also clearly encompasses state contract law concepts such as fraud, misrepresentation, and unconscionability (both procedural and substantive) that can support setting aside contract terms such as arbitration clauses if they are deemed sufficiently oppressive.

The majority also has a plausible view of the legislative history. But Justice O'Connor's dissent is much more thorough in its exploration of legislative history and quite convincing in its argument that the Act was always intended by Congress only to apply to federal court proceedings, which were at the time the proceedings about which the commercial proponents of the Act were concerned.<sup>140</sup> In an important illumination of the result-orientation of the *Southland* majority, the O'Connor dissent notes that *Southland* is effectively overruling *Bernhardt v. Polygraphic Co.*,<sup>141</sup> which had viewed the Federal Arbitration Act as procedural and thus applied *Erie v. Tompkins*,<sup>142</sup> to require that the validity and enforceability of an arbitration clause litigated in Vermont state court be decided by Vermont law. But the *Southland* majority does not even cite *Bernhardt*, let alone address it and explain why its reasoning some 30 years ago (and much closer to the time the Act was passed) is in error.

This failing suggests the *Southland* majority may have been excessively intent on expanding the Act and embracing arbitration on personal preference grounds rather than giving the issue the careful reading of precedent it deserved. Even if one agrees with the *Southland* majority that the time had come to consider the Federal Arbitration Act as substantive federal law applicable in state court, the *Bernhardt/Erie* question at least needed to be addressed. Instead, the *Southland* majority dodged the issue – another indication of the Court's rush to embrace arbitration notwithstanding the normal rules of adjudication in the face of contrary precedent.

Both the O'Connor dissent and the Stevens concurrence/dissent in *Southland* also make a strong case that the majority's application of the Act is inconsistent with the federalism and states' rights concerns that not only constantly animate American law but also appear to have been on the mind of the enacting Congress. Justice Stevens, in addition to noting Justice O'Connor's compelling review of the legislative history of the

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<sup>140</sup> See *id.* at 24.

<sup>141</sup> *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (discussed *supra* notes 97-99 and accompanying text),

<sup>142</sup> *Erie v. Tompkins*, 304 U.S. 64 (1938).

Act, focuses on the importance of states' rights and federalism as a strong background norm of statutory interpretation.<sup>143</sup>

The Stevens dissent, like much of his judicial work, makes its insights concisely but powerfully and stakes out a moderate position consistent with his overall approach to law.<sup>144</sup> He respects the text of the statute but does not read it woodenly or hyper-literally. Instead, he reads the text with a healthy reverence for the legislative history of the law that may shed light on specific legislative intent. He is mindful of the purpose of the statute and practical realities of modern commerce and regulation. He respects state prerogatives in an area of traditional state autonomy and the federalist model of American government and law. He is willing to read the Act as laying down substantive law applicable in state as well as federal court but gives breathing space to state contract law and regulation. He appreciates that the California franchise law is not an anti-arbitration law but a franchisee protection law, which arguably takes it out of the broad reach of 9 U.S.C. 2's authority to compel arbitration and puts it into the savings clause of this portion of the Act.

Justices Stevens also correctly recognizes, in light of Justice O'Connor's strong arguments based on legislative history, that the *Southland* majority is engaging in what might be termed "dynamic" or "evolutive" statutory construction by adapting the 1925 legislation to 1984 commercial reality. "Although Justice O'Connor's review of the legislative history . . . demonstrates that the 1925 Congress that enacted the statute viewed the statute as essentially procedural in nature, I am persuaded that the intervening developments in the law compel the conclusion that the Court has reached" as to the Act being substantive law, even if not as to the applicability of the California Franchise Investment Act.<sup>145</sup>

Joining the *Southland* majority opinion were Justices William Brennan, Byron White, Harry Blackmun, and Lewis Powell.<sup>146</sup> With the exception of Justice Brennan, who espoused support for a "living Constitution" that was interpreted consistent with changes in American society and who tended to favor federal authority over state authority in many cases,<sup>147</sup> these Justices were traditionalists who eschewed dynamism for original legislative intent and federalism over unitary control by a central

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<sup>143</sup> See Stempel, *Tainted Love*, *supra* note 11, at 835-37 (reproducing significant portion of Stevens dissent and discussing at length).

<sup>144</sup> See BILL BARNHARDT & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 200-03 (2010); Symposium, *The Finest Legal Mind: A Symposium in Celebration of Justice John Paul Stevens*, 99 GEO. L.J. 1263 (2011). My personal favorite work of Justice Stevens is his lone dissent in *National League of Cities v. Usery*, 426 U.S. 880-81 (1978) (Stevens, J., dissenting) (in fewer than two pages he demolishes the majority's concern that wage and hour regulation of local government employees was too much of a national intrusion on state sovereignty to withstand Tenth Amendment scrutiny. Within a decade, the full Court came to appreciate his wisdom and overruled *Usery* in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 557 (1985)).

<sup>145</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984).

<sup>146</sup> See generally *id.*

<sup>147</sup> *Id.* (Justice Brennan was arguably being inconsistent with his general sympathy for less powerful litigants such as workers, women, racial/ethnic minorities, and small businesspersons); see generally SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010).

government.<sup>148</sup> But here they are embracing in *Southland* a result seemingly at odds with their professed jurisprudential philosophies.

In *Dean Witter Reynolds v. Byrd*,<sup>149</sup> decided the year after *Southland*, the Court continued in a pro-arbitration vein. The issue was whether a customer's mixture of federal securities claims (not arbitrable because of *Wilko v. Swan*)<sup>150</sup> and state law claims (clearly arbitrable under the Act if sued on alone) prevented arbitration of the state claims because they were intertwined with the non-arbitrable federal claim. Resolving a split in the circuits, the Court rejected the intertwinement doctrine that had required all claims to go to litigation in some circuits, holding that arbitration of the state law claims could be compelled and need not await resolution of the securities claims. The *Dean Witter Reynolds v. Byrd* decision was unanimous, a reflection of its reasonableness under the circumstances (by a Court for the moment saddled with the *Wilko* precedent that was steadily falling out of fashion).

Concurring separately, Justice White (a member of the *Moses H. Cone* and *Southland* majorities and a consistent supporter of arbitration during his time on the Court) criticized *Wilko* and noted that its holding involved only claims under the Securities Act of 1933 and that too many courts and commentators had assumed the same reasoning applied to claims brought pursuant to the Securities Exchange Act of 1934. Justice White argued that there were sufficient differences between the laws such that *Wilko*'s restriction on arbitration should be confined strictly to 1933 Act claims.<sup>151</sup> Although Justice White's attempt to differentiate the statutes is not particularly persuasive, it is an important small step on the way to overruling *Wilko* (and its shaking 1933 Act reasoning based on the then-Court majority's personal public policy preferences) and removing this and other statutory restrictions on arbitration.

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>152</sup> the Court again supported arbitration, dealing an implicit blow to cases like *Wilko*, *Alexander v. Gardner-Denver*, *Barrentine v. Arkansas-Best*, and *McDonald v. West Branch* that had restricted arbitration for statutory claims.<sup>153</sup> The Court found no legal barrier to requiring arbitration of antitrust claims raised by an automobile retailer in its dispute with the

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<sup>148</sup> See ABRAHAM, *supra* note 34, at ch. 11 (reviewing Burger Court and noting that White, Blackmun and Powell were generally viewed as moderates, although when Blackmun first joined the Court, his voting was more conservative and closer to that of Burger); see also HALL, *supra* note 34, at 368-71, 388-95 (same). See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 102-21 (2005) (noting Blackmun's general drift toward more liberal stances during the latter half of his time on the Court). Both Blackmun and Powell were arguably selected for the Court because of their moderation. Prior to their emergence as candidates for the Court, President Richard Nixon had nominated G. Harrold Carswell and Clement Haynsworth to opening seats, only to have both run into confirmation problems. Nixon needed to submit new names of candidates who would not have the arguable problems of competence (Carswell) or conflict of interest (Haynesworth, although the allegations against Haynesworth, a respected Fourth Circuit judge are not in the wisdom of hindsight considered unfair by most observers) as well as having sufficient centrist tendencies that Democrats would not fight the new nominees as too conservative. Powell, a former ABA president, and Blackmun, a long-time Eight Circuit judge and former counsel to the Mayo Clinic, both fit the bill as impeccable mainstream candidates for the Court. See Stempel, *Tainted Love*, *supra* note 11, at 839-40, n. 214 (providing background on situation).

<sup>149</sup> *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985).

<sup>150</sup> *Wilko v. Swan*, 346 U.S. 427 (1953); see *supra* note 96 and accompanying text.

<sup>151</sup> *Dean*, 470 U.S. at 224-25 (White, J., concurring).

<sup>152</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>153</sup> See *supra* notes 119-125 (discussing these cases).

manufacturer. The contract between the retailer and the manufacturer, as might be expected in this commercial setting, contained a broadly worded arbitration clause.

Writing for the majority, Justice Harry Blackmun found no basis in statutory text, legislative intent or purpose, or public policy concerns for cutting back the scope of the arbitration agreement merely because one of the bases of dispute involved a federal statute. In reaching this result, the Court sounded more loudly the death knell of *Wilko* and similar cases that opposed arbitration of certain claims based on public policy grounds. “We find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims,” wrote Justice Blackmun.<sup>154</sup> The majority opinion reiterated much of the pro-arbitration rhetoric of *Moses H. Cone, Southland*, and *Prima Paint* about the strong federal policy favoring arbitration.<sup>155</sup>

Two terms later, the Court advanced the cause of arbitrability and sounded the death knell of *Wilko v. Swan* in *Shearson/American Express v. McMahon*.<sup>156</sup> Picking up on Justice White’s concurrence in *Dean Witter Reynolds v. Byrd*,<sup>157</sup> the Court refused to extend the securities law statutory exception of *Wilko v. Swan* to claims made pursuant to the Securities Exchange Act of 1934. Although the 1933 Act exception of *Wilko* was not dead yet, it was living on borrowed time in that the rationale for refusing a statutory claim exception in *McMahon* is equally applicable and powerful as regards 1933 Act claims that were at issue in *Wilko*.<sup>158</sup> The *McMahon* Court also rejected the argument that claims made pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO) were exempt from arbitration, a view shared by the entire Court, that also runs counter the notion of the existence of a statutory claims or public policy exception to arbitrability.<sup>159</sup>

*McMahon* is thus an important pro-arbitration opinion in the sense that it limits and sets the stage for further curtailment of the statutory claims exception to arbitrability. Justice Blackmun (joined by Justices Brennan and Marshall) dissented, arguing that the 1934 Act was sufficiently similar to the 1933 Act that the *McMahon* claim should enjoy the protection against arbitrability provided by *Wilko v. Swan*.<sup>160</sup> Although on the losing side of this significant battle, the dissenters fought hard against the constriction and foreshadowed demise of *Wilko*.

The same year, in *Perry v. Thomas*,<sup>161</sup> the Court struck another blow for arbitration. In a Justice Thurgood Marshall opinion, it compelled arbitration of a wage claim in the face of a state law exempting wage claims from arbitration. In effect, *Merrill Lynch v. Ware*,<sup>162</sup> was overruled while *Southland v. Keating*,<sup>163</sup> was affirmed, shoring up

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<sup>154</sup> See *Mitsubishi*, 473 U.S. at 626.

<sup>155</sup> See *id.* at 625-26.

<sup>156</sup> *Shearson/Am. Express v. McMahon*, 482 U.S. 220 (1987).

<sup>157</sup> *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985), see discussion *supra* notes 149, 151 and accompanying text.

<sup>158</sup> See Stempel, *Pitfalls of Public Policy*, *supra* note 88, at 294 (likening *Wilko*’s status to that of “wounded animal limping across the Savannah” and sure to be attacked again in view of *McMahon*’s undercutting of the rationale of *Wilko*).

<sup>159</sup> See *McMahon*, 482 U.S. at 238-42.

<sup>160</sup> See *id.* at 243.

<sup>161</sup> *Perry v. Thomas*, 482 U.S. 483 (1987).

<sup>162</sup> *Merrill Lynch v. Ware*, 414 U.S. 117 (1973); see discussion *supra* notes 113-16 and accompanying text.

the strength of the modern, pro-arbitration working majority of the Court four years after the watershed *Southland* decision. *Perry v. Thomas* continued the Court's embrace of arbitration on the rhetorical level as well and makes substantial citation of the Court's more recent cases with pro-arbitration outcomes.<sup>164</sup> The message to even the casual reader is pretty clear. Arbitration is generally strongly supported by the Court, even in the face of contrary state law.

*Perry v. Thomas* is generally susceptible to the same bases of praise or scorn one might heap on *Southland*. The majority (Justices Marshall, Burger, Blackmun, Brennan, and White) is a group purporting to embrace mainstream jurisprudence but arguably neglecting to consider core mainstream judicial concerns of federalism, state prerogatives of contract regulation, legislative intent and purpose, and reading the Federal Arbitration Act's text too broadly. But *Perry* may perhaps be better defended than *Southland* in that the California Labor Code § 229 appears more directly aimed at arbitration (and thus in conflict with the now-deemed-substantive federal law) while the California Franchise Investment Act was a broader prohibition against waivers of all types, not solely arbitration clauses.<sup>165</sup> Only Justices Stevens and O'Connor dissented, each in separate opinions. Justice O'Connor reiterated her view that the enacting Congress did not intend for the Federal Arbitration Act to create substantive federal law applicable to state proceedings and echoed the Stevens view from *Southland* that the Act's own language permits refusal to order arbitration if there were other bases under state law preventing enforcement of the contract.<sup>166</sup>

Justice Stevens made a similar argument of legislative intent and purpose and defended an originalist notion of statutory interpretation even though his *Southland* dissent had been relatively dynamic or evolutive in its approach to the statute.<sup>167</sup> Whatever the merits of the pro- and anti-arbitration perspectives clashing in *Perry v. Thomas*, it seemed odd that the Court majority did so little to defend its position against the contention that the majority had been unfaithful to the legislative intent and purpose of the law, as well as, the rights of the sovereign states to regulate contractual undertakings. In essence, the *Perry* majority is resting on the analysis of *Southland*, which makes *Perry* a similarly dynamic approach to construing the Act.

In *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>168</sup> the Court completed the process begun in *Byrd* and *McMahon* and formally overruled *Wilko v. Swan*. The Court had now eliminated the rationale for a statutory claims exception to arbitration as well as making 1933 Act claims subject to arbitration. Although the arbitral

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<sup>163</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984), see discussion *supra* notes 131-51 and accompanying text.

<sup>164</sup> See *Perry*, 482 U.S. at 489-91.

<sup>165</sup> See CAL. LAB. CODE ANN. § 229 (West 2013) (specifically stating that actions for payment of wages may be maintained "without regard to the existence of any private agreement to arbitrate").

<sup>166</sup> See *Perry*, 482 U.S. at 493 (O'Connor, J., dissenting).

<sup>167</sup> *Id.* (Stevens, J., dissenting) (citing *Southland*, 465 U.S. at 17 (Stevens, J., dissenting)) (contending that "the States' power to except certain categories of disputes from arbitration should be preserved unless Congress decides otherwise... [E]ven though the Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the Court nor the litigant even considered the possibility that the Act had pre-empted state-created rights. It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend.").

<sup>168</sup> *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477 (1989).

exceptions for Title VII, FLSA, and Section 1983 claims in prior case law were not overturned, they appeared in jeopardy.

But in *Gilmer v. Interstate/Johnson Lane*,<sup>169</sup> the Court reaffirmed its apparently continuing commitment to these public policy exceptions to arbitrability by distinguishing the earlier statutory cases from Age Discrimination in Employment Act (ADEA) claims, for which the Court found no such exception.<sup>170</sup> Notwithstanding its arguable support for exceptions from arbitration for Title VII, FLSA and Section 1983 claims, the Court's support for arbitration is dramatically on display in *Gilmer*. The case involved a securities industry employee making an ADEA claim against the brokerage house that fired him at age 62. The *Gilmer* majority, in an opinion by Justice White, treats the case as simply one of whether a statutory exception exists for ADEA claims and determines the answer is "no," as per *Rodriguez, McMahon, and Soler Chrysler-Plymouth*.

The Court gave only the figurative back of its hand (in part because the issue was raised late in the proceedings by Gilmer's amici but not by Gilmer himself below)<sup>171</sup> to a much stronger argument contending that the Act itself in its clear text states that arbitration clauses in employment contracts are not enforceable, at least for workers engaged in interstate commerce. Section 1 of the Act states that "nothing herein contained [in the Act] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>172</sup>

Rather than simply refusing to consider the § 1 argument because of waiver, the *Gilmer* majority used a bit of linguistic sleight of hand to avoid the issue by viewing the securities industry form signed by Gilmer as something other than a "contract of employment."<sup>173</sup> The *Gilmer* majority begs the question of how an arbitration clause can

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<sup>169</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>170</sup> *Id.* at 33-35.

<sup>171</sup> *See id.* at 24, n.2 ("Several *amici curiae* in support of Gilmer argue that [Section 1 of the Act] excluded from the coverage of the FAA all 'contracts of employment.' Gilmer, however, did not raise the issue in the courts below, it was not addressed there, and it was not among the questions presented in the petition for certiorari.")

<sup>172</sup> 9 U.S.C. §1 (2006). Section 1 speaks of a "class of workers engaged in foreign or interstate commerce," giving seamen and railroad employees as illustrative examples. Although an individual worker may be engaged in interstate commerce, he or she might not be part of a class of workers regularly engaged in such commerce. Gilmer, however, as a stock broker, surely falls within a common sense meaning of the words of Section 1 in that securities brokers, dealers, agents, sales and servicing employees most certainly are as a group engaged in interstate commerce because of the nature of financial markets and the common use of wire, mail, and telephone communications as part of their activities.

<sup>173</sup> *See* 500 U.S. at 24, n. 2:

In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. . . . The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts that the exclusionary clause in §1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. . . . Unlike the dissent, we chose to follow the plain language of the FAA and the weight of authority, and we therefore hold that §1's exclusionary clause

be sufficiently subject to the Act to be enforceable by the employer if it is not contained in a contract between them. The success of the securities industry in requiring that all its licensed brokers sign arbitration agreements would logically make out a stronger case for extending § 1 protections to those workers, who clearly must agree as a condition of employment and where it appears that there is no reasonable alternative for the prospective employee other than submitting to the arbitration clause. Instead, the *Gilmer* Court defined the problem away through a legal fiction of sorts.

In his dissent, Justice Stevens, who raised troubling objections to the Court's embrace of arbitration rather than federalism or legislative history in *Southland*, offers a rather devastating rebuttal. He points out that the Court on many occasions has not strictly enforced the concept of waiver in order to render a full assessment of a case before it.<sup>174</sup> He then notes that narrowness of the Court's concept of what constitutes a "contract of employment."<sup>175</sup> On the issue of the meaning of § 1, Justice Stevens marshals equally compelling evidence of legislative intent and purpose to protect workers from unwanted arbitration agreements that could not realistically be avoided because of the vulnerability of workers seeking work.<sup>176</sup> Although the discussion during the legislative history focused on workers who were constantly and visibly involved in physical movement across state lines, this was a mere consequence of the involvement during the legislative process of the leadership of the Seaman's Union, which

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does not apply to *Gilmer's* arbitration agreement. Consequently, we leave for another day the issue raised by *amici curiae* (citations omitted).

"Another day" came a decade later when the Court decided *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (discussed *infra* notes 190-198), holding that even where the arbitration agreement was in a direct contract between employer and employee asserting a Title VII claim, §1 was inapplicable because the employee, a retail electronics salesperson and manager, was not part of a class of workers engaged in interstate commerce, *id.* at 115.

<sup>174</sup> See *Gilmer*, 500 U.S. at 37.

<sup>175</sup> *Id.* at 40:

Given that the FAA specifically was intended to exclude arbitration agreements between employees and employers, I see no reason to limit this exclusion from coverage to arbitration clauses contained in agreements entitled "Contract of Employment." In this case, the parties conceded at oral argument that *Gilmer* had no "contract of employment as such with respondent. *Gilmer* was, however, required as a condition of his employment to become a registered representative of several stock exchanges, including the New York Stock Exchange (NYSE) Just because his agreement to arbitrate any dispute, claim or controversy" with his employer that arose out of the employment relationship was contained in his application for registration before the NYSE rather than a specific contract of employment with his employer, I do not think that *Gilmer* can be compelled pursuant to the FAA to arbitrate his employment-related dispute. Rather, in my opinion the exclusion in §1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment.

The Stevens dissent then marshals history and precedent supporting a broad reading of the term contract of employment.

<sup>176</sup> *Id.*

understandably used seaman as their paradigmatic example of workers who should not be unfairly saddled with nonconsensual arbitration agreements.<sup>177</sup>

Although the discussion of the employment exception in *Gilmer* is necessarily truncated, it foreshadows the Court's ultimate unfortunately crabbed reading of §1 in *Circuit City Stores, Inc. v. Adams*.<sup>178</sup> In taking a narrow view of § 1, the Court downplayed the text of the Federal Arbitration Act, congressional intent, statutory purpose, and the federalism concerns of the states in protecting workers from potentially unfair tribunals that might be imposed upon the workers without their consent due to the great leverage held by employers.

There is of course a jurisprudential inconsistency of the Court's broad and aggressive (and dynamic and evolutive as well) reading of §§ 2, 3, and 4 of the Act regarding the enforceability of arbitration coupled with the Court's very narrow reading of § 1 of the Act protecting employees from compelled arbitration. Logically, § 1 should receive the same interpretative treatment as does § 2. Given the legislative intent and statutory purpose of enforcing commercial arbitration agreements between merchants and halting judicial reluctance to specifically enforce clearly consensual arbitration clauses, there is nothing inconsistent with a pro-arbitration view of the Act that also recognizes that the Act does not extend its support of arbitration into the employment context.

Despite the tangential treatment of § 1 in *Gilmer*, the decision (with only Justices Stevens and Marshall in dissent) suggests a Court becoming more committed to arbitration as a process and willing to depart from standard statutory construction to support this favored process. Ironically, however, the same Court that was moving toward a narrow view of § 1 and the degree of interstate activity required to protect workers from unwanted pre-dispute arbitration clauses took a broad view of interstate commerce regarding the reach of the Act generally.

In a divided opinion in *Allied-Bruce Terminex Companies, Inc. v. Dobson*,<sup>179</sup> the Court held that the Federal Arbitration Act reaches as broadly as the limits of congressional power under the Commerce Clause. This was hardly a shock in that the Act had been considered substantive law for ten years since *Southland*. Further, the Court has given a broad construction to the concept of interstate commerce at least since the New Deal – but was unwilling to take a similar approach to interstate commerce when the issue was whether employees could be bound by an arbitration clause notwithstanding the exception to arbitration for employment matters set forth in § 1 of the Act. *Dobson* continues the Court's support for arbitration in a cases that are defensible on their facts but looks bad when juxtaposed with the Court's unwillingness to give pro-worker § 1 the same treatment accorded the Act generally. The consistency of all these decisions, however, is primarily their willingness to use dynamic statutory construction when it supports expansion of arbitration.

In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,<sup>180</sup> the Court was again dynamically pro-arbitration in refusing to apply the Carriage of Goods by Sea Act

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<sup>177</sup> See Stempel, *supra* note 12 (reviewing origin of the statutory provision and caselaw, arguing for construction of §1 applicable to all workers involved in interstate commerce, rather than narrow railroad-trucker-seaman only construction provided by some courts).

<sup>178</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); see discussion *infra* notes 190-98 and accompanying text.

<sup>179</sup> *Allied-Bruce Terminex Cos., Inc. v. Dobson*, 513 U.S. 265 (1995).

<sup>180</sup> *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

(COGSA) to prevent arbitration of a dispute in Japan pursuant to a clause in a bill of lading for a shipment of oranges from Morocco to Boston, which also included a Japanese choice of law provision. COGSA provides that:

[a]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.<sup>181</sup>

Given a plain reading, COGSA would appear to foreclose imposition of an arbitration agreement if arbitration resulted in any shrinkage of claimant remedies. But the Court majority avoided this seeming command of the statute by holding that the arbitration and choice of law clauses were not provisions “lessening liability.” As Justice Stevens explained in dissent:

The foreign-arbitration clause imposes potentially prohibitive costs on the shipper, who must travel – and bring his lawyers, witnesses, and exhibits – to a distant country in order to seek redress.

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The Court assumes that the words “lessening such liability” must be narrowly construed to refer only to the substantive rules that define the carrier’s legal obligations. Under this view, contractual provisions that lessen the amount of the consignee’s net recovery, or that lessen the likelihood that it will make any recovery at all, are [erroneously placed] beyond the scope of the statutes. . . . In my opinion, this view is flatly inconsistent with the purpose of COGSA . . . .<sup>182</sup>

In effect, the Court majority through its minimization of the practical impact of the arbitration clause dictating a distant and inconvenient forum and distant applicable law, held that COGSA, enacted in 1936, a decade after the Federal Arbitration Act, was trumped by the Act notwithstanding that COGSA would appear to be substantive law every bit as much as is the Act. Further, the facts of the case presented a rather sympathetic case of a shipper forced to adhere to a seemingly one-sided contract that might well fail unconscionability analysis under state law. As the Stevens dissent noted, COGSA was enacted to correct just such problems.<sup>183</sup>

Reviewing once again § 2 of the Federal Arbitration Act, which makes arbitration clauses specifically enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract, Justice Stevens observed that:

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<sup>181</sup> *Id.* at 543 (citation omitted).

<sup>182</sup> *Id.* at 549-50.

<sup>183</sup> *See id.* at 542-43 (Stevens, J., dissenting); *see also id.* at 545 (noting academic support for enforcing COGSA and similar precedent authored by respected Second Circuit Judge Henry Friendly).

This language plainly intends to place arbitration clauses upon the same footing as all other contractual clauses. Thus, like any clause, an arbitration clause is enforceable “save upon such grounds” as would suffice to invalidate any other, nonarbitration clause. The FAA thereby fulfills its policy of jettisoning the prior regime of hostility to arbitration. Like any other contractual clause, then, an arbitration clause may be invalid without violating the FAA if, for example, it is procured through fraud or forgery; there is mutual mistake or impossibility; the provision is unconscionable; or, as in this case, the terms of the clause are illegal under a separate federal statute which does not evidence a hostility to arbitration. Neither the terms nor the policies of the FAA would be thwarted if the Court were to hold today that a foreign arbitration clause in a bill of lading “lessens liability” under COGSA. COGSA does not single out arbitration clauses for disfavored treatment; it invalidates any clause that lessens the carrier’s liability. Illegality under COGSA is therefore an independent ground “for the revocation of any contract,” under FAA § 2. There is no conflict between the two federal statutes.

The correctness of this construction becomes even more apparent when one considers the policies of the two statutes. COGSA seeks to ameliorate the inequality in bargaining power that comes from a particular form of adhesion contract. The FAA seeks to ensure enforcement of freely negotiated agreements to arbitrate. . . . [F]oreign arbitration clauses in bills of lading are not freely negotiated. COGSA’s policy is thus directly served by making these clauses illegal; and the FAA’s policy is not disserved thereby. In contrast, allowing such adhesionary clauses to stand serves the goals of neither statute.<sup>184</sup>

Justice Stevens attributed the majority’s error to “overzealous formalism”<sup>185</sup> but the decision appears just as much to be preference for arbitration regardless of the text, intent, or purpose of the Federal Arbitration Act, a preference embraced in spite of the Act’s direction that arbitration agreements be subject to the very same contract-based defenses to enforcement listed by Justice Stevens. Just as disturbingly, Justice Stevens dissented alone. A super-majority of the Court was sufficiently supportive of arbitration that it pursued it even in the face of contrary substantive law.

Similar substantive preferences for arbitration over states’ rights, federalism and the right to regulate was reflected a year later in *Doctor’s Associates, Inc. v. Casarotto*.<sup>186</sup> A Subway sandwich shop franchisee sought to avoid arbitration of his dispute with the franchiser based on the failure of the arbitration clause in the agreement to comply with the requirements of a Montana statute, which provided that “[n]otice that a contract is subject to arbitration. . . shall be typed in underlined capital letters on the first page of the

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<sup>184</sup> *Id.* at 555-56.

<sup>185</sup> *Id.* at 556.

<sup>186</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.”<sup>187</sup>

Reversing the Montana Supreme Court, the U.S. Supreme Court held that the provision was, because of its focus on arbitration, in violation of the Federal Arbitration Act because the state law did not apply to the revocation of “any” contract but only to arbitration agreements. Justice Ruth Bader Ginsburg’s majority opinion enjoyed a supermajority, with only Justice Thomas in dissent, reiterating his view that *Southland* was wrongly decided.<sup>188</sup>

Notwithstanding the strength of the Court’s vote and its consistency with federal appeals court decisions taking a similarly dim view of similar state laws, *Casarotto* reads like an opinion written by a Court wishing to promote arbitration despite countervailing state goals that are completely consistent with the views of the Congress that enacted the FAA. The Montana statute was not a ban on specific enforcement of arbitration clauses but simply a means of forcing disclosure to attempt to ensure that arbitration agreements are consensual.

The Montana law was, of course, vulnerable to pre-emption because it singles out arbitration. But this presumably reflected state concern that arbitration agreements presented particularly pressing problems of disclosure, consent and fairness. A court less enthused about arbitration could have respected this state policymaking in the traditional state domain of contract law and been consistent with the Act. Although the state statute places some additional burden on the drafters of arbitration agreements, the burden is light and but a disclosure provision rather than a substantive bar to arbitration. Further, a court less driven to require arbitration could have considered other contract based defenses to arbitrability and whether Montana’s information-forcing statute was simply a form of that sort of state-centered policing of contracts.<sup>189</sup>

In *Circuit City Stores, Inc. v. Adams*,<sup>190</sup> the Court expressly addressed the issue it had dodged in *Gilmer v. Interstate/Johnson Lane*.<sup>191</sup> The *Circuit City* Court ruled that § 1 of the Act, which prohibited enforcement of arbitration clauses in employment contracts, did not apply to all workers engaged in activity affecting commerce but only applied to those directly involved in interstate movement of goods.<sup>192</sup> In reaching this result, the Court took a narrow construction of § 1 and limited the protections of this part of the Act to only transportation workers.

As he had in *Gilmer*, Justice Stevens dissented, this time enjoying support from Justices Ginsburg, Breyer and Souter.<sup>193</sup> As in *Gilmer*, Justice Stevens reviewed the legislative history of the Act and convincingly showed congressional desire to protect workers subject to adhesionary contracts containing arbitration clauses.<sup>194</sup> Although the language of § 1 could have been broader, it only singles out seamen and railroad workers. The catchall of “any other class of workers engaged in foreign or interstate commerce”

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<sup>187</sup> MONT. CODE ANN. § 27-5-114(4), *invalidated by Casarotto*, 517 U.S. 681 (1996).

<sup>188</sup> 517 U.S. at 690.

<sup>189</sup> See Stephen Ware, *Arbitration and Unconscionability After Doctor’s Associates v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996).

<sup>190</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>191</sup> See *supra* notes 169-178 and accompanying text (discussing *Gilmer*).

<sup>192</sup> See 532 U.S. at 119.

<sup>193</sup> *Id.* at 124 (Stevens, J., dissenting).

<sup>194</sup> See *id.* at 124-29 (reviewing legislative history of §1 of the Act).

was broad enough to encompass workers involved in non-transportation activities implicating interstate commerce. Early cases construing § 1 took this view and it was not until *Tenney Eng., Inc. v. Electrical Workers*,<sup>195</sup> that a contrary view arose in the circuits, which were still split at the time of the *Circuit City* decision.<sup>196</sup>

In addition to criticizing the majority's pre-arbitration reading of § 1, Justice Stevens made a persuasive case that the majority ignored both congressional intent and legislative purpose underlying the statute.

It is not necessarily wrong for the Court to put its own imprint on a statute. But when its refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority. As the history of the legislation indicates, the potential disparity in bargaining power between individual employees and large employers was the source of organized labor's opposition to the Act, which it feared would require courts to enforce unfair employment contracts. . . . When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences.

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A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.<sup>197</sup>

Justice Souter's dissent, also joined by the other three dissenters, noted the difficult-to-defend inconsistency of the Court's broad construction of § 2, which makes arbitration agreements specifically enforceable save for contract-based revocation defenses, and the Court's narrow construction of § 1 so as to limit employee protection to only transportation workers.<sup>198</sup> Although not speaking in the language of traditional-versus-dynamic statutory construction, the dissent in essence spotlighted the inconsistency prompting this article's call for symmetry in construction of the Act through the expansion of judicial review of arbitration awards.

The Court continued its obvious policy preference for arbitration in *Buckeye Check Cashing, Inc. v. Cardegna*.<sup>199</sup> In *Buckeye*, the Court addressed a variant of the *Prima Paint* issue of allocation of initial interpretative authority between the court and arbitrator.<sup>200</sup> The Court held that an issue of whether an allegedly usurious contract

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<sup>195</sup> *Tenney Eng'g, Inc. v. United Elec. Radio & Machine Workers of Am., (U.E) Local 437*, 207 F.2d 450 (3d Cir. 1954).

<sup>196</sup> Stempel, *supra* note 12 (providing a more detailed description of the case law of §1 prior to *Gilmer* and *Circuit City*).

<sup>197</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132-33 (2001).

<sup>198</sup> *See id.* at 133-35.

<sup>199</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

<sup>200</sup> *See supra* notes 108-112 and accompanying text (discussing *Prima Paint*).

containing an arbitration clause was illegal and thus void and unenforceable was for the arbitrator,<sup>201</sup> a result that can be justified under *Prima Paint* even if incorrect or unwise. *Buckeye* is thus an example of continued dynamic statutory construction in the service of keeping more dispute resolution activity before the arbitrator rather than the courts.

*Hall Street Associates, LLC v. Mattel, Inc.*,<sup>202</sup> took the pro-arbitration sentiment of the Court further in that it prevented parties to an arbitration agreement from consensually expanding judicial review of arbitration. *Hall Street* held that parties to an arbitration agreement could not stipulate to more searching judicial review of any resulting award, in particular de novo review of the arbitrator's legal determinations rather than the more limited menu of grounds for vacating an award set forth in 9 U.S.C. § 10. The Court viewed this as an improper attempt to change the applicable law or to attempt to control the courts.<sup>203</sup>

Justices Stevens, Kennedy and Breyer dissented.<sup>204</sup> All essentially argued that the Federal Arbitration Act did not preclude such agreements to enlarge the scope of review. The Stevens dissent noted that there was precedent permitting such agreements prior to the Act and that neither the text nor the legislative history of the Act suggested that Congress intended to overturn these precedents.<sup>205</sup> *Hall Street* strengthens arbitration by preventing judicial review in excess of that provided by § 10 of the Act. But in “protecting” the courts from litigant efforts to control their discharge of statutory duty, *Hall Street* is something of a throwback to pre-Act judicial rulings that refused to enforce arbitration agreements on the theory that they improperly “ousted” courts from their established jurisdiction. Inconsistently, *Hall Street* devalues the “freedom of contract” concept that animated passage of the Act as well as the sentiment of the commercial community that fueled passage of the Act. Businesses wanted to have courts enforce arbitration agreements but *Hall Street* thwarts that goal. By *Hall Street*'s reasoning, the Federal Arbitration Act itself could be characterized as an imposition on the courts that the judiciary can reject in order to avoid being unduly burdened.

The arbitration jurisprudence of the Roberts Court became increasingly problematic in 2010 and 2011. In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>206</sup> a customer sought class action proceedings in its arbitration with the shipper when accusing the shipper of illegal price fixing. The arbitration clause of the shipping contract (a/k/a charter party) used broad language and no one contested that the matter was subject to arbitration.<sup>207</sup> But the shipper was strongly opposed to class action treatment of the claim. The appointed arbitrators considered the issue and after the hearing determined to proceed with class treatment of the case but stayed proceedings pending judicial review.<sup>208</sup>

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<sup>201</sup> See 546 U.S. at 445-46.

<sup>202</sup> *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>203</sup> See 552 U.S. at 583-84; see also Allen Blair, *Is Less Really More?* *Hall Street Associates, Private Procedural Ordering and Expanded Review of Arbitral Awards in State Courts*, 5 PENN. ST. Y.B. ARB. & MEDIATION 74 (2013) (criticizing *Hall Street* on various levels).

<sup>204</sup> See 552 U.S. at 592 (Stevens, J., dissenting, joined by Kennedy, J.); *Id.* at 596 (Breyer, J., dissenting).

<sup>205</sup> See *id.* at 592-93.

<sup>206</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

<sup>207</sup> See *id.* at 1765.

<sup>208</sup> See *id.* at 1766.

The federal district court vacated this “award” (which, as Justice Ginsburg pointed out in dissent, was not really what one thinks of as an arbitration award because it was not a final ruling on the merits and did not order any relief on the merits of the underlying claim) on the ground that the arbitrators had shown “manifest disregard” of law because they had failed to conduct a choice of law analysis.<sup>209</sup> The Second Circuit reversed and reinstated the arbitration panel decision.<sup>210</sup> Subsequently, the Supreme Court vacated the decision to proceed on a class basis, holding that class treatment was improper absent sufficient proof that the shipper (Stolt-Nielsen) had affirmatively consented to class action arbitration even though it was uncontested that it had consented to arbitration in general.<sup>211</sup>

*Stolt-Nielsen*, a reasonably close 6-3 decision, could be viewed as a curtailment of the Court’s general affinity for arbitration. The decision, after all, has the immediate practical effect of limiting an arbitration panel’s power over a dispute. But *Stolt-Nielsen* reflects not so much a cooling of arbitral ardor so much as it reveals dramatic inconsistency in the Court’s support for arbitration. In most of the cases of the modern (post-*Southland*) era, the Court has given no serious consideration to issues of consent in the formation of an arbitration agreement. But in *Stolt-Nielsen*, where the party resisting broader arbitration was the party with greater commercial power and where the relief requested would empower claimants, the Court is suddenly gripped with concern over whether there exists sufficient consent to arbitrate.<sup>212</sup> The law of arbitrability as set forth in the Court’s pre-*Stolt-Nielsen* cases of the modern, pro-arbitration era, has been broad construction of broadly worded arbitration agreements and the presumption that unless stated to the contrary, arbitration generally should be able to accord the same remedies that are available in litigation.

Justice Ginsburg’s dissent (joined by Justices Stevens and Breyer)<sup>213</sup> makes the unassailable argument that the matter was not a final award subject to review under the Act (9 U.S.C. § 10)<sup>214</sup> and takes the sensible view that an agreement to arbitration ordinarily carries with it an agreement to arbitrate according to whatever rules govern the proceeding as applied by the arbitrators.

The panel did just what it was commissioned to do. It construed the broad arbitration clause (covering “[a]ny dispute arising from the making, performance or termination of this Charter Party,” . . . and ruled, expressly and only, that the clause permitted class arbitration. The Court acts

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *See id.* at 1767-68.

<sup>212</sup> *See id.* at 1773-75; *see, e.g., id.* at 1774 (emphasizing “consensual nature of private dispute resolution”); *id.* at 1775 (“a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”).

<sup>213</sup> *See id.* at 1777 (Ginsburg, J., dissenting).

<sup>214</sup> *See id.* at 1773-75. *See, e.g., id.* at 1774 (emphasizing “consensual nature of private dispute resolution”), *id.* at 1775 (“a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”), *id.* at 1778 (“The Court . . . does not persuasively justify judicial intervention so early in the game, or convincingly reconcile its adjudication with the firm final-judgment rule prevailing in the federal court system.”); *id.* at 1779 (“No decision of this Court, until today, has ever approved immediate judicial review of an arbitrator’s decision, as preliminary as the ‘partial award’ made in this case.”) (footnote omitted).

without warrant in allowing Stolt-Nielsen essentially to repudiate its submission of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators' judgment, this Court's de novo determination.

The controlling FAA prescription, § 10(a) authorizes a court to vacate an arbitration panel's decision only in very unusual circumstances.”<sup>215</sup>

In *Stolt-Nielsen*, “[t]he question properly before the Court is not whether the arbitrators’ ruling was erroneous but whether the arbitrators ‘exceeded their powers.’ [under 9 U.S.C. §10(a)(4)]. The arbitrators decided a threshold issue, explicitly committed to them, about the procedural mode available for presentation of AnimalFeeds’ antitrust claims.”<sup>216</sup>

As the dissent also noted, the right question to ask in cases like *Stolt-Nielsen* is “the proper default rule when there is no stipulation.”<sup>217</sup> Where industry-wide arbitration is the norm, one would logically expect the dispute resolution norm to be one of according full remedies commensurate with the dispute. And, as the dissent also noted “[w]hen adjudication is costly and individual claims are no more than modest in size, class proceedings may be ‘the thing,’ i.e., without them, potential claimants will have little, if any, incentive to seek vindication of their rights.”<sup>218</sup>

*Rent-A-Center, West, Inc. v. Jackson*,<sup>219</sup> found the Court back in an unbridled pro-arbitration mode, holding that an arbitration clause challenged as unconscionable by a former employee bringing a 42 U.S.C. § 1981 discrimination suit must first be assessed by the arbitrator rather than the court. The clause was broadly drafted, stating that the arbitrator “and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation” of the agreement that was “not limited to any claim that all or any part of” the agreement was void or voidable.<sup>220</sup> But by reading the clause broadly and literally to preclude judicial assessment of the fairness of the provision, the Court ignored the very language of § 2 of the Act, which permits contract-based claims for revocation of an arbitration agreement.

Coming less than two months after the Court’s protection in *Stolt-Nielsen* of a large shipping company that had not (in the majority’s view) adequately “consented” to class treatment of allegations that it had engaged in price fixing, it was inconsistent for the Court to exhibit little or no concern over the employee’s “consent” to a clause that truly does seek to oust courts from even the jurisdiction left to them by the drafters of the

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<sup>215</sup> *Id.* at 1779-80 (Ginsburg, J., dissenting) (noting that the majority unfairly and inaccurately characterized the arbitration panel decision as being one of policy preference for class action treatment despite that the words “policy” or “public policy” are “not so much mentioned” by the panel, which instead “tied its conclusion that the arbitration clause permitted class arbitration” based on contract language, historical practices, applicable rule, and the record as informed by expert testimony); *see also id.* at 1780-81.

<sup>216</sup> *Id.* at 1781 (Ginsburg, J., dissenting).

<sup>217</sup> *See id.* at 1783.

<sup>218</sup> *See id.* at 1783 (citations omitted).

<sup>219</sup> *Rent-A-Center, West, Inc., v. Jackson*, 130 S. Ct. 2772 (2010).

<sup>220</sup> *Id.* at 2775.

Federal Arbitration Act. Similarly odd is the *Rent-A-Center* Court's willingness to permit this when it only two years earlier was unwilling to permit the expanded judicial review of arbitration awards sought by the contracting parties in *Hall Street*.<sup>221</sup> The decisions seem irreconcilable except by reference to a raw preference for arbitration with limited judicial involvement – but (per *Stolt-Nielsen*) piecemeal arbitration of claims rather than class treatment.

The majority's reasoning is circular in that it prevents (until after an award and a § 10 challenge to the award) judicial scrutiny of the arbitration clause even though the worker's very argument is that the clause was obtained through improper means (procedural unconscionability) or was unreasonably favorable to the employer (substantive unconscionability). In particular, the arbitration clause contained a fee-sharing provision that the trial court had determined was not substantively unconscionable and which had been affirmed by the Ninth Circuit, with other unconscionability arguments pending review had the Supreme Court not intervened.<sup>222</sup>

The *Rent-A-Center* majority justified its holding as a natural extension of *Prima Paint v. Flood & Conklin Mfg. Co.*,<sup>223</sup> and *Buckeye Check Cashing, Inc. v. Cardegna*,<sup>224</sup> which held that attacks on the contract containing an arbitration clause are for the arbitrator because such attacks do not question the validity of the arbitration clause itself. But allowing arbitrators to assess contract revocation defenses that do not focus on arbitration is one thing. Allowing boilerplate arbitration agreements imposed on employees (who would be free of such clauses had the Court decided *Gilmer* or *Circuit City* correctly) is quite another.

*Rent-A-Center*, was consistent with the Court's dynamic, pro-arbitration approach to the Act. Under *Rent-A-Center*, it is not enough to require judicial enforcement of arbitration clauses after judicial investigation determines they apply to the dispute and are not subject to a revocation defense under § 2. Now, parties favoring arbitration, even the highly problematic mass arbitration that was foreign to the drafters of the Act, can remove courts from inquiry altogether, restricting the judicial role to its limited authority to police arbitration awards after the fact pursuant to the limited scope of § 10 of the Act (that is, unless, the Court takes an unjustifiably expansive view of § 10, as it did in *Stolt-Nielsen*).

Then came *AT&T Mobility LLC v. Concepcion*,<sup>225</sup> which involved the purchase by Vincent and Lisa Concepcion of mobile phones subject to an AT&T Mobility ("AT&T") service contract. And like most cellphone service contracts, the AT&T contract provided for arbitration, including the right of AT&T to "make unilateral

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<sup>221</sup> Three days after issuing *Rent-A-Center*, the Court in *Granite Rock Co. v. Int'l Bhd of Teamsters*, 130 S. Ct. 2847 (2010) held that a dispute over the ratification date of the collective bargaining agreement at issue was a matter for the court rather than an arbitrator and that the employer did not implicitly consent to arbitration and that a claim of tortious interference fell outside the scope of the Labor Management Relations Act. In dissent, Justices Sotomayor and Stevens argued that the CBA clearly routed such issues to the arbitrator. See 130 S. Ct. at 2866 (Sotomayor, J., dissenting).

<sup>222</sup> The trial court had made the ruling of no substantive unconscionability as an alternative holding should its determination that the issue was for the arbitrator be disturbed on review. See 130 S. Ct. at 2776.

<sup>223</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

<sup>224</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

<sup>225</sup> *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

amendments, which it did to the arbitration provisions on several occasions.”<sup>226</sup> The Concepcions brought litigation alleging the improper charging of \$30.22 in sales tax on the supposedly “free” phones they received from AT&T as part of the service agreement, a complaint that was consolidated with a putative class action alleging fraud and false advertising in that the company had advertised the phones as “free” as part of the service arrangement.<sup>227</sup>

AT&T in turn moved to compel arbitration of the *Concepcion* claim. The Concepcions resisted, asserting that the arbitration agreement was unconscionable and “unlawfully exculpatory under California law because it disallowed classwide procedures.”<sup>228</sup> Because the arbitration clause forbade class action treatment of claims, the trial court and the Ninth Circuit found it unconscionable under California law on the strength of *Discover Bank v. Superior Court*,<sup>229</sup> which held that limitations on remedies such as a ban on class actions were unconscionable contract provisions.

Notwithstanding that *Discover Bank* and earlier class action precedent such as *Armendariz v. Foundation Health Psychcare Services*<sup>230</sup> can reasonably be characterized as unconscionability decisions in which the unreasonably fair terms simply happened to be contained in an arbitration clause,<sup>231</sup> the *Concepcion* majority characterized California law as specifically anti-arbitration law that was precluded by the Act. “The question in this case is whether § 2 pre-empts California’s rule classifying most collective arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule. . . . California courts have frequently applied this rule [that waivers in consumer contracts that limit consumer remedies are unconscionable] to find arbitration agreements unconscionable.”<sup>232</sup>

The *Concepcion* majority construed *Discover Bank* to be a restriction on arbitration rather than an unconscionability rule of which a particular contract provision

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<sup>226</sup> *Id.* at 1744.

<sup>227</sup> *See id.*

<sup>228</sup> *Id.* at 1745.

<sup>229</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

<sup>230</sup> *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).

<sup>231</sup> Other state supreme court cases are consistent with *Armendariz* and *Discover Bank* in finding some arbitration agreements unconscionable, not merely because they are arbitration agreements, but because of some other unfairness in the contracting process or the terms of the clause itself, such as lack of mutuality in the parties’ access to remedies. *See, e.g.*, *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998); *Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999). Some scholars have criticized this approach. *See, e.g.*, Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186-87 (2004); Christopher Drahozal, *Nonmutual Agreements to Arbitrate*, 27 IOWA J. CORP. L. 537, 547 (2002). And it appears that most states do not find unconscionability from nonmutuality alone so long as there was sufficient consideration given to the party that lacks mutuality of remedies or procedural options. *See* Allyson K. Kennett, Note, *Showmethemoney Check Cashers, Inc. v. Williams: Show Me the Mutuality – A New Demand Based on an Old Doctrine Changes the Rules for Enforceability of Arbitration Agreements in Arkansas*, 54 ARK. L. REV. 621 (2001). But regardless of which perspective is correct in a cosmic sense, it appears unquestionable that the text of the Federal Arbitration Act itself places authority for making this determination in the hands of the state with the contract law governing the disputed arbitration clause. *See* 9 U.S.C. §2 (2006).

<sup>232</sup> *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

(the AT&T arbitration agreement) ran afoul. In doing so, it embraced the view of critics who had opposed this application of California unconscionability law.<sup>233</sup>

The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.<sup>234</sup>

Beyond this formalist but erroneous analysis (in error because it so misread the statutory language and congressional intent and purpose as well as ignoring federalism concerns),<sup>235</sup> the *Concepcion* majority was also engaged in dynamic construction that expanded the arbitration imposition and arbitration enforcement portions of the Act,<sup>236</sup> at least so long as the arbitration is bilateral, limited in scope, and not vested with too many of the leveling characteristics of litigation such as class treatment, liberal joinder of parties, and broad access to discovery.<sup>237</sup>

In particular, the majority saw California unconscionability law as a barrier that must be dismantled out of a view that arbitration works best when bilateral and that “[a]rbitration is poorly suited to the higher stakes of class litigation” and “increases risks

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<sup>233</sup> See *id.* at 1746-47 (citing Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine*, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006); Randall, *supra* note 231, at 186-87).

<sup>234</sup> 131 S. Ct. at 1748.

<sup>235</sup> See *supra* notes 92-94 and accompanying text (discussing the language, structure, and legislative background of the Arbitration Act)..

<sup>236</sup> See, e.g., 131 S. Ct. at 1749 (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”).

<sup>237</sup> See 131 U.S. at 1750-52 (emphasis in original):

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. . . .

[A] switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. . . .

Second, class arbitration *requires* procedural formality. . . . We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator [but this observation comes from the same Court that in *Rent-A-Center* was willing to allow the arbitrator to have total control of determining whether the arbitration clause at issue encompassed the instant dispute]. . . .

Third, class arbitration greatly increases risks to defendants. . . .

Arbitration is poorly suited to the higher stakes of class litigation.

to defendants.”<sup>238</sup> Once again, the Court is embracing arbitration when it serves the interest of the business establishment and requiring adherence to arbitration clauses generally so that arbitration replaces much litigation. But at the same time, the Court is also embracing a view that leverage to plaintiffs provided by class treatment is so threatening to business defendants as to unfairly coerce settlement.<sup>239</sup> Although this has long been a rallying cry of forces opposing class actions, the most sophisticated scholarship on the topic has largely debunked this view as a canard.<sup>240</sup>

In *Concepcion*, the dissenters reflect a stronger commitment to the standard rules of adjudication and a more realistic picture of the practical implications of the decision to which they object. In the main, however, the dissenters are simply truer than the majority to both federalism concerns and legislative intent and purpose.<sup>241</sup>

But the dissenters, like the majority, also could not resist a public policy argument. But at least the public policy of the dissenters recognizes the realities of small claims practice and the potential for class treatment to level the playing field upon which larger, wealthier, repeat player institutional litigants contend with largely unorganized individuals of modest means. More important in terms of the mainstream rules of jurisprudence, the dissent reflects the type of respect for traditional state contract law prerogatives reflected in the text of the Act and its legislative history.<sup>242</sup> Emphasizing

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<sup>238</sup> See *id.* at 1751-52.

<sup>239</sup> See *id.* at 1752.

<sup>240</sup> See Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003); see also Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 WASH. U.L.Q. 1127, 1128-29, 1227-1230 (2006) (collecting literature debating degree of coercive force in class actions).

<sup>241</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1757 (Breyer, J., dissenting) (“The *Discover Bank* rule does not create a ‘blanket policy in California against class action waivers in the consumer context.’ Instead, it represents the ‘application of a more general [unconscionability] principle.’ Court’s applying California law have enforced class-action waivers where they satisfy general unconscionability standards...[A]nd even when they fail, the parties remain free to devise other dispute mechanisms, including informal mechanisms that, in context, will not prove unconscionable.”); see also *id.* (observing that *Discover Bank* is “consistent with the federal Act’s language” as well as its purpose and that Congress in passing the Act was not endorsing arbitration so much as it was endorsing enforcement of otherwise valid contracts to arbitrate). See also *id.* at 1757-81 (Breyer, J., dissenting) (Justice Ginsburg asked: “[w]here does the majority get its contrary idea – that individual, rather than class, arbitration is a “fundamental attribute[e]” of arbitration? The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.” ). See also *id.* at 1757-81 (Breyer, J., dissenting):

Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision. If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?

<sup>242</sup> *Id.* at 1761 (citations omitted):

What rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim?” In California’s perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the \$30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great

their legislative intent and purpose advantages over the majority, the dissenters also noted that it was quite clear that in passing the Act, Congress was focused on merchants acting “under the customs of their industries, where the parties possessed roughly equivalent bargaining power.”<sup>243</sup>

Although the dissent hews considerably closer to mainstream approaches to statutory construction and to the text and legislative intent of the Act than does the *Concepcion* majority, the majority was able to put together an argument based on precedent because the Court’s arbitration decisions of the prior 30 years had steadily moved away from fidelity to statutory text, legislative intent, the purpose of the Act, and concern for values of consent and fairness in contracting. Instead of more traditional statutory construction, the Court’s arbitration decisions have been marked by an evolution in its view of the Act or even a re-writing of the Act that dynamically expanded the use of arbitration.

The *Concepcion* majority was so intent on striking down California’s use of the authority provided in § 2 of the Federal Arbitration Act that it exhibited a truly embarrassing moment of judicial Alzheimer’s. After criticizing California’s *Discover Bank* doctrine of unconscionability as unduly targeted against arbitration, the *Concepcion* majority observed that “[o]f course States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted.”<sup>244</sup> The problem, of course, is that the Court prohibited just this type of state disclosure statute in *Doctor’s Associates, Inc. v. Casarotto* a mere 15 years earlier<sup>245</sup>

In its modern era, the Court has reflected an unrealistically positive view of the wonders of arbitration – so upbeat that it is willing in most cases to impose arbitration in situations far exceeding those envisioned by the drafters of the Federal Arbitration Act<sup>246</sup> despite significant issues of states’ rights, the quality of contract consent, the fairness of the arbitration tribunal, and the overall operation of the dispute resolution system. But at crucial junctures, the Court strains to rein in arbitration when concerned that arbitration may reach results the Court dislikes or come to resemble litigation. On one metaphorical hand, the Court expands the reach of the Act through dynamic statutory construction (albeit often *sub silentio*) while on the other hand, it thwarts arbitration developments it dislikes through application of more traditional statutory approaches (albeit inconsistently applied) and the majority’s personal preference as to what constitutes acceptably conducted arbitration.

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length while a call is placed on hold). *Discover Bank* sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to insulate an agreement’s author from liability for its own frauds by “deliberately cheating large numbers of consumer out of individually small sums of money.” Why is this kind of decision – weighing the pros and cons of all class proceedings alike – not California’s to make?

<sup>243</sup> *Id.* at 1759 (citing legislative history materials).

<sup>244</sup> *Id.* at 1750, n. 6.

<sup>245</sup> See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); Stempel, *Tainted Love*, *supra* note 11, at 875-76 (providing a detailed discussion of this embarrassing bout of judicial Alzheimer’s that afflicted the *Concepcion* majority).

<sup>246</sup> See 9 U.S.C. §§1-16 (2006).

During the past three decades, the U.S. Supreme Court's approach to arbitration disputes<sup>247</sup> has usually reflected zeal for arbitration and a corresponding if subconscious derogation of litigation, at least if resorted to by consumers or employees. This has produced an inconsistent, oft-criticized body of Federal Arbitration Act jurisprudence.<sup>248</sup> In particular, the support for arbitration and willingness to stretch the reach of the Act seems to apply only when arbitration functions as the Court thinks it should.<sup>249</sup> For example, where arbitration seeks to embrace classwide solutions to disputes, the majority becomes hostile.<sup>250</sup> It also becomes less supportive of arbitration when arbitration becomes too close to litigation or too seemingly advantageous to less powerful disputants,<sup>251</sup> in particular with regard to class treatment of disputes, something largely opposed by the business community that seems to enjoy particular favor with the Court.<sup>252</sup> Inconsistently, the Court resists when commercial actors seek to stipulate to broader judicial review of an arbitration award.<sup>253</sup>

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>254</sup> *Rent-A-Center West, Inc. v. Jackson*,<sup>255</sup> and, most recently in *AT&T Mobility, LLC v. Concepcion*,<sup>256</sup> the Roberts Court far exceeded its predecessors in problematic attitudes toward arbitration. In *Stolt-Nielsen*, the Court overturned an arbitration panel's considered decision to permit class action treatment of a matter based on the record of the dispute and the custom and practice of dispute resolution in this industry.<sup>257</sup> In *Rent-A-Center*, the Court permitted the drafter of the arbitration agreement to eject the judiciary from process of determining whether an arbitration agreement had in fact been made – a decision at odds with the statutory language and the Court's recent prior precedent in *Hall Street* forbidding the parties to agree to an expanded judicial role in policing arbitration agreements and

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<sup>247</sup> I talk of the "Court" primarily as a matter of shorthand, recognizing of course that many of the Court's arbitration decisions have involved a division among the Justices, including some 5-4 votes on important issues. To be sure, some of the Justices are not under the spell of arbitration – but the Court as a whole has been from approximately the mid-1980s to the present.

<sup>248</sup> Although there is of course substantial scholarship generally approving the Court's modern arbitration jurisprudence, the bulk of commentary on the Court's arbitration decisions of the past 40 years has been quite critical. See, e.g., Jeffrey W. Stempel, *Arbitration, Unconscionability and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 813-20 (2004)(collecting citations); David S. Schwartz, *Enforcing Small Print to Protect Big Business; Employee and Consumer Rights Claims in a Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean Sternlight, *Arbitration: Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637 (1996).

<sup>249</sup> See Stempel, *Tainted Love*, *supra* note 11.

<sup>250</sup> See *supra* text accompanying notes 206-218 & 225-260 (discussing the Court's decisions in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.* and *AT&T Mobility LLC v. Concepcion*).

<sup>251</sup> In *AT&T Mobility LLC v. Concepcion*, the Court did both. It (or, rather, five out of nine of its members) lavishly praised arbitration while simultaneously suggesting that all of these wonderful attributes of arbitration were eradicated if the arbitration involved classwide treatment of a dispute. See *infra* text accompanying notes 225-260.

<sup>252</sup> See generally *supra* notes 15-20 (noting degree to which the Court in recent years has favored business litigants and results generally regarded as ideologically and politically conservative).

<sup>253</sup> See, e.g., *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); see *supra* text and accompanying notes 202-211.

<sup>254</sup> *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

<sup>255</sup> *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

<sup>256</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>257</sup> See *supra* text accompanying notes 206.

outcomes.<sup>258</sup> In *Concepcion*, the Court struck down a decision refusing to uphold an arbitration clause restricting class actions based on California state contract law that deemed unconscionable such contractual limitations on consumer remedies.

*Concepcion* is a particularly glaring display (by a bare 5-4 majority vote) of the Court's infatuation with arbitration overcoming what should have been its fidelity to the language, legislative intent, and purpose of the Federal Arbitration Act as well as inadequate appreciation of states' rights and the legal system's commitment to making the class action remedy available in apt cases.<sup>259</sup> *Concepcion*, like *Stolt-Nielsen*, is also a reflection of the Court's uneven view toward arbitration – supporting imposition of arbitration through a dynamic and expansive approach to the statute but invoking more conservative and formal statutory construction jurisprudence when addressing limits on arbitration or means by which arbitration may operate more like litigation or serve the less powerful disputants.<sup>260</sup>

#### IV. RETHINKING JUDICIAL REVIEW OF ARBITRATION AWARDS

As reflected in a review of the Supreme Court's expansive arbitration decisions of the past 30 years, the Act has been transformed from a procedural device applicable in federal court to enforce commercial arbitration clauses into a national law mandating mass arbitration of consumer and employment disputes. In effect, arbitration has transplanted litigation for many types of disputes as it has moved from subsets of merchants (e.g., international shippers) into the new mass arbitration (e.g., complaints about mobile phones, disputes over credit card debt).

But in spite of having converted arbitration from a consensual arrangement between merchants into a de facto default method of dispute resolution for vendors willing to impose arbitration upon consumers or workers, the Court has inconsistently acted to prevent the incorporation of procedural devices such as class resolution.<sup>261</sup> Perhaps even more troublingly, it has been unwilling to give adequate deference to statutory restrictions on arbitration<sup>262</sup> and unwilling to permit parties to expand the scope of judicial review of the arbitrations they choose.<sup>263</sup>

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<sup>258</sup> See *supra* text accompanying notes 219-224.

<sup>259</sup> See *supra* text accompanying notes 225-258.

<sup>260</sup> See Stempel, *supra* note 240 (noting degree to which class treatment of issues tends to increase the leverage of less powerful litigants and that institutional or "repeat player" litigants such as governments, businesses, or insurers tend have this power in ordinary, non-class litigation)., accord, Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1378-82 (2000) (noting leveling effect of class treatment). For discussion of the degree to which "repeat player" litigants have advantages over "one-shot" litigants (e.g., consumers, employees, debtors), see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (the "seminal article" on this point); see also Stempel, *supra* note 240, at 1166; Joel B. Grossman, Herbert M. Kritzer & Stewart Macaulay, *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 803, 809 (1999) (finding continued vitality in Professor Galanter's typology and observation).

<sup>261</sup> See *supra* text accompanying notes 206-260 (discussing *Stolt-Nielsen v. AnimalFeeds* and *Concepcion*).

<sup>262</sup> See *supra* text accompanying notes 180-185 (discussing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 530 (1995)).

<sup>263</sup> See *supra* text accompanying notes 202-211 (discussing *Hall Street v. Mattel*).

Under these circumstances, some restoration of symmetry is in order. If arbitration is to supplant litigation en masse, at least the arbitration that takes place should be adequately subject to the rule of law. When arbitration results no longer turn on guild folkways or the special norms of a given industry but instead involve millions of ordinary consumer transactions, this new expanded net of arbitration logically requires judicial review commensurate with arbitration's new role. This in turn requires adequate judicial policing of arbitration awards to ensure that they comply with applicable law. Achieving this, in the absence of congressional legislation, requires the Court to construe this portion of the Act as dynamically as it has the arbitration enforcement sections of the law.<sup>264</sup>

As previously noted, the Act, particularly as currently construed by a working majority of the Court, is tilted toward enforcing arbitration awards.<sup>265</sup> Section 10 of the Act permits arbitration awards to be challenged, but on grounds considerably narrower than those available in litigation.<sup>266</sup> Specifically, an arbitration award may be vacated:

- where the award was “procured by corruption, fraud, or undue means;”
- where there was “evident partiality or corruption in the arbitrators, or either of them;”
- where the arbitrators erred by refusing to delay a hearing for good cause or to hear “pertinent and material evidence” or where there was “any other misbehavior” prejudicing the rights of the parties; or
- where the arbitrators exceeded the scope of their power in light of the matter submitted to them or “so imperfectly” executed their power “that a mutual, final, and definite award upon the subject matter submitted was not made.”<sup>267</sup>

The clearest portions of §10 are fine as far as they go. Of course awards that are the product of fraud, corruption, duress, or clear favoritism should not stand. But the case law of §10 and motions to disqualify arguably tainted arbitrators prior to the rendering of an award suggests that courts take the impartiality of arbitrators somewhat less seriously than they treat judicial disqualification.<sup>268</sup> A full examination of this

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<sup>264</sup> See *supra* text accompanying notes 92-95 (describing the structure and content of the Act).

<sup>265</sup> See 9 U.S.C. §9 (2006) (specifying that federal courts may confirm awards and enter judgment based on the award which in turn gives the prevailing arbitration party the normal range of judgment collection tool under applicable procedural law); see also 9 U.S.C. § 11 (2006) (providing limited grounds for making technical or numerical corrections to ministerial errors of arbitration awards); see also 9 U.S.C. §16 (2006) (governing appeals and reflecting congressional preference (largely through 1990 amendments rather than the original 1925 enactment) to reduce appellate challenge to pro-arbitration orders but permits appellate review of orders refusing to compel arbitration or refusing to stay judicial proceedings pending arbitration).

<sup>266</sup> See 9 U.S.C. §10 (2006) (providing that reviewing court may direct a rehearing by the arbitrators if ground for vacating award is shown).

<sup>267</sup> See *id.*

<sup>268</sup> See Nancy A. Welsh, *Mandatory Pre-dispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. U. L. REV. 187, 206-10 (2012) (concluding conflicts of

shortcoming is beyond the scope of this article but substantial scholarly commentary supports treating issues of arbitrator impartiality akin to the manner in which reviewing courts insist on judicial impartiality.<sup>269</sup> Admittedly, the language of § 10 is narrower than that of the ABA Model Code of Judicial Conduct<sup>270</sup> and its state analogs as well as the federal disqualification statute.<sup>271</sup> Further, the Congress of the Federal Arbitration Act appears to have intended no greater policing of arbitrator impartiality.<sup>272</sup> But the

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interest, bias, lack of neutrality of arbitrators taken less seriously than disqualification of judges on similar grounds) [hereinafter *Incentivizing Procedural Safeguards*]; Nancy A. Welsh, *What is “(Im)Partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395 (2010) [hereinafter *Embedded Neutrals*].

<sup>269</sup> See, e.g., Welsh, *Incentivizing Procedural Safeguards*, *supra* note 268; Welsh, *Embedded Neutrals*, *supra* note 268; Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929 (2010); Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007); Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contact*, 81 ST. JOHN’S L. REV. 99 (2007). This is not to say that courts consistently do a good job regarding judicial impartiality. For example, in one notorious case, a state supreme court judge participated (casting the then-deciding vote) in a case in which a defendant company’s CEO had provided more than \$3 million of electoral support to the judge in a recent election. The U.S. Supreme Court reversed on due process grounds, but only by a 5-4 vote. See Jeffrey W. Stempel, *Impeach Brent Benjamin Now!? Giving Adequate Attention to Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1 (2010) (describing case and state judge’s clearly erroneous failure to recuse as well as Court’s ruling). In another judicial cliff-hanger of sorts, the Court in another 5-4 vote disqualified a federal trial judge who sat in the case of a multi-million dollar deal involving a university of which he was a board member. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988). The trial judge whose indefensible conduct was so strongly defended by the dissenters was subsequently convicted of taking bribes and removed from the bench. See STEPHEN GILLERS, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 510 (7th ed. 2005).

<sup>270</sup> In contrast to § 10’s ban on bias, corruption, or evident partiality, § 2.11 of the ABA Model Code of Judicial Conduct, which has been largely adopted in each state, requires disqualification when the judge’s “impartiality might be reasonably questioned” as well as when the judge has bias, prejudice, or mere personal knowledge of the parties or the dispute. In addition, § 2.11 requires disqualification in the event of family or financial connections linking the judge to the litigants or the case; so does the federal disqualification statute, 28 U.S.C. § 455. Further, the Model Judicial Code (in Canons 3 & 4) also places limits on judicial behavior broader than those imposed on most arbitrators. This is not to say that there are no rules governing arbitrators. Organizations such as the American Arbitration Association (AAA) and Judicial and Mediation Services (JAMS) have codes of ethics and rules of their own regarding disqualification of neutral arbitrators (recall that in some arbitrations, each side appoints an arbitrator who is permitted to be a partisan advocate). But even if these strictures were as strong as those applied to state and federal judges, the fact remains that many mass arbitrations are conducted not by respected organizations of this type but by other organizations that may be unduly supportive of repeat player disputants who can continue to provide work to the organization. Or the arbitrators may be part of an employer or vendor’s own “in-house” system of arbitration or be subject to no organizational strictures.

<sup>271</sup> The federal statute, 28 U.S.C. § 455 requires disqualification if there are any of a number of family or financial interests of the judge implicated in the controversy (§ 455(b)) while § 455(a) requires disqualification whenever the arbitrator’s impartiality is subject to reasonable question.

<sup>272</sup> The Act’s legislative history, both in general and regarding arbitrators disqualification, is sparse. See STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 1-14 (3d ed. 2011); IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW* ch. 1 (1994) (probably the most extensive treatment of legislative history of Act found in treatises); Stempel, *Pitfalls of Public Policy*, *supra* note 88, at 260-265. Indeed, the legislative history is so sparse or considered so distant in time and practical use that many casebooks or treatises devote no attention to the passage of the Act. See, e.g., JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE AND LAW*

dynamic expansion of §§ 2-4 of the Act requires a corresponding expansion of § 10's strictures regarding arbitrator neutrality. Sauce for the goose of mass arbitration imposed through "agreements" reflected in package inserts should also be sauce for the gander of ensuring that this new form of modern mass arbitration be adequately policed for adjudicator neutrality in a manner reflecting its status as a substitute for litigation rather than a means of honoring industry norms.

Other § 10 grounds for vacating an award also make sense. An award that is the product of unduly hurried or truncated arbitration in which one or both parties lacked fair opportunity to present the case should also be set aside (§ 10(3)). Likewise, when arbitrators render awards clearly beyond the scope of what was submitted for decision (the "exceeded their powers" language of § 10(4)), the award should not stand. But what about arbitration awards that are legally incorrect? Surely such awards are at least as troublesome as those emerging from a biased arbitrator (who nonetheless may reach the correct result) or where the arbitrators refused to provide a disputant with an additional deposition or production of documents that may or may not have impacted the result.

Consider a charitable pledge with an arbitration clause on which the donor fails to make the promised contribution. Currently, nearly 80 percent of the states provide that promises to make charitable gifts are enforceable even if they lack consideration by the recipient.<sup>273</sup> If the arbitration clause provided for application of the law of one of these states,<sup>274</sup> an arbitration award refusing to order payment because of lack of consideration would be clearly incorrect – and would clearly create a different result in arbitration than what would have been obtained in either state or federal court subject to that state's law.<sup>275</sup>

Disparate results between arbitration and litigation would seem unjustified. A deal should be enforceable or unenforceable without regard to the forum in which it is the

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(2d ed. 2010); LEONARD RISKIN, ET AL., DISPUTE RESOLUTION AND LAWYERS (4th ed. 2009) (abridged). The most logical conclusion is that the enacting Congress meant what it said in the text of § 10 and wanted to upend arbitration awards only in cases of clear bias or similarly troubling issues rather than based on a broader notion that arbitrators should be at sufficient arms length from the disputants or the controversy. Recall that when the Act was passed, its drafters envisioned arbitrations involving merchants in a particular industry, making it likely that many arbitrators would of course have familiarity with the industry and its participants.

<sup>273</sup> See JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS 225-27 (6th ed. 2009); E. ALLAN FARNWORTH, CONTRACTS 91-92 (4th ed. 2004); EPSTEIN, ET AL., *supra* note 53, at 283; AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) CONTRACTS § 90(2) (1981); Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1080-81 (1992). See, e.g., *Jewish Fed'n v. Baroness*, 560 A.2d 1353 (N.J. Super. Ct. Law Div. 1989) (enforcing on grounds of public policy); *Allegheny Coll. v. Nat'l Chautauqua Cnty. Bank*, 159 N.E. 173 (1927) (leading case in the area authored by then Judge Benjamin Cardozo, but one finding promissory estoppel rather than express absence of need for consideration to make gift pledge binding).

<sup>274</sup> For example, *Iowa*. See, e.g., *Salisbury v. Northwestern Bell*, 221 N.W.2d 609 (Iowa 1974); see also PERILLO, *supra* note 273, at 225-227 (citing cases); FARNSWORTH, *supra* note 273, at § 2.19 (citing cases).

<sup>275</sup> As all judges presumably know, the rules of law announced in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) were designed to achieve uniformity between state and federal adjudication of similar disputes, at least in terms of applicable law, by requiring use of relevant state law – including application of the choice of law rules of the forum state -- in federal court matters where jurisdiction was not founded on a federal question. See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE §§ 2.13-2.17 (6th ed. 2011).

subject of dispute. Even if the arbitration clause was silent as to applicable law, a decision requiring consideration to enforce the promise simply seems wrong in that it runs counter to the great bulk of American law on the issue.<sup>276</sup>

But under the prevailing approach of § 10 review, these types of pretty clearly incorrect arbitration decisions are unlikely to be overturned. Some courts have interpreted § 10 broadly to create a “manifest disregard of law” ground for vacating an arbitration award.<sup>277</sup> Under this approach, an award may be set aside if “the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it.”<sup>278</sup> Although there is considerable variance in judicial use of the manifest disregard approach and little definitive Supreme Court discussion,<sup>279</sup> particularly in the modern era of mass arbitration, there is no doubt that manifest disregard review of arbitration awards is substantially narrower than ordinary appellate review regarding errors of law and that § 10 in operation is far more deferential to arbitration outcomes than the yardstick courts apply to trial outcomes.<sup>280</sup>

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<sup>276</sup> In addition, real world cases will often involve nontrivial evidence of detrimental reliance by the charitable organization promised a gift (at least if the gift is large) and the doctrine of promissory estoppels may apply to make the pledge enforceable.

<sup>277</sup> The doctrine has roots in *Wilko v. Swan*, 346 U.S. 427 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 47 (1989) but has never really been assessed at length by the modern Court. The doctrine has developed in the lower courts and different circuits have different approaches to the doctrine. In *Wilko*, the Court stated that while “the interpretations of the law” by arbitrators are not subject to judicial review under the Arbitration Act but suggested that decisions reflecting “manifest disregard” may be subject to review; see 346 U.S. at 436-37. See also Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justices of Arbitration*, 59 U. KAN. L. REV. 47, 75-82 (2010) (describing manifest disregard and calling for its expansion); Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 234 (2007) (describing and recommending clarification and codification, but not necessarily expansion).

<sup>278</sup> *Cytec Corp. v. Deka Prods. Ltd. P’ship*, 439 F.3d 27, 35 (1st Cir. 2006) (cited as a “common formulation of the test for manifest disregard.”). See Drahozal, *supra* note 277, at 235 (noting that some circuits make it more difficult to invoke the doctrine by adding “that [the] law [at issue] must be “well defined, explicit, and clearly applicable to the case.”) See Drahozal, *supra* note 277, at 235 (citing *Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 90 (2d Cir. 2005)).

<sup>279</sup> See Drahozal, *supra* note 277, at 235, noting that every federal appellate court has used some form of manifest disregard of law review and also observing:

As a “non-statutory” or “judicially created” ground for vacating arbitration awards, based on dicta in an overruled Supreme Court case, [manifest disregard] lacks a firm doctrinal footing. The circuits disagree on what manifest disregard is (with the Seventh Circuit in particular adopting its own, idiosyncratic approach) and how the standard should be applied. *Id.* at 234-35 (footnotes omitted).

States are also divided both as to the permissibility of the approach and the application of it. See *id.* at 235. See also *Sooner Builders & Inv., Inc. v. Nolan Hatcher Constr. Servs., L.L.C.*, 164 P.3d 1063, 1072 nn. 14-15 (Okla. 2007) (collecting state cases adopting or rejecting manifest disregard).

<sup>280</sup> See Drahozal, *supra* note 277, at 235-38; see generally Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*, 19 OHIO ST. J. ON DISP. RESOL. 861 (2004) (finding challenges to arbitration on manifest disregard grounds fairly frequent but unsuccessful more than 90 percent of the time); Stephen L. Hayford, *Reining in the “Manifest Disregard” of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 125-26 (summarizing and categorizing approaches and, although critical of some courts for overly aggressive review, concluding that review is largely deferential).

This situation of greater deference to arbitration than is accorded to trial courts made sense in 1925 – even though federal trial judges are selected only after a substantial vetting process that includes confirmation by the U.S. Senate while anyone selected by the parties can be an arbitrator, regardless of training, intelligence, criminal record or the like.<sup>281</sup> But in 1925, arbitration meant commercial arbitration or specialized industry or guild arbitration in which relatively sophisticated repeat players chose arbitrators based on the candidate’s knowledge of the business rather than the candidate’s legal pedigree.<sup>282</sup> Because a primary object of the Act was to require courts to give breathing space for industry expertise,<sup>283</sup> it made perfect sense to adopt a deferential standard of review.

But that was then and this is now. Arbitration today, although still including the commercial and specialized arbitrations of the early 20<sup>th</sup> Century, is largely composed of mass arbitration frequently involving consumers or lower level employees who can hardly be viewed as insiders, repeat players, or participants in an industry where dispute resolution turns on specialized industry norms.<sup>284</sup> In mass arbitration, the correct results are presumptively results that accord with the substantive law because this type of arbitration involves wholesale displacement of a large amount of adjudication with a system of privatized dispute resolution without the specialized decisional norms that might prevail for certain industries or trades. Consequently, awards produced through the

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<sup>281</sup> I do not mean to imply that arbitrators tend to be disproportionately drawn from the dregs of humanity. Quite the contrary, to become an arbitrator for an established dispute resolution organization like AAA or JAMS normally requires experience and a good reputation in the relevant legal, commercial, construction, or employment community. But not all arbitrations are conducted by reputable organizations – or any organization at all. Or an arbitration may be “in-house” as established by the vendor or employer imposing arbitration on a consumer, employee, or contractors. Consequently, there will be varying standards for qualifying as an arbitrator and varying means of quality control. Although not all judges are Learned Hand or Louis Brandeis, federal judges in particular are subjected to substantial scrutiny and state court judges, even those in relatively wide-open electoral systems, regularly receive scrutiny by the organized bar, the press, and political opponents.

<sup>282</sup> See MACNEIL, ET AL., *supra* note 272, at ch. 1 (noting that commercial arbitration within a given industry or field was what was envisioned by Congress at the time of the Act); see also Stempel, *Pitfalls of Public Policy*, *supra* note 88, at 277-83; Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926) (describing arbitration as composed largely of agreements by commercial actors in the same industry). See also Lisa Bernstein, *Extralegal Contractual Relations in the Diamond Industry*, *supra* note 29 (describing traditional role of arbitration in a specialized guild or industry).

<sup>283</sup> See MACNEIL, ET AL., *supra* note 272, at ch. 1; George Gluck, *Great Expectations: Meeting the Challenge of a New Arbitration Paradigm*, 23 AM. REV. OF INT’L ARB. 231, 234 (2012) (“The disputes envisioned as suitable for arbitration [at the time of passage of the Act] were business-to-business disputes that required quick and efficient resolution – precisely the type that had been privately resolved long before arbitration agreements were officially blessed by legislators. These were often trade disputes, which the parties agreed to have resolved by a senior and respected member of the trade, effectively opting out of the dispute resolution forum offered by the State.”) (footnotes omitted); Stempel, *Pitfalls of Public Policy*, *supra* note 88, at 277-83; Cohen & Dayton, *supra* note 282 (noting that the history and intent behind the Act; largely supported by commercial actors to ensure enforcement of arbitration agreements contained in contracts between merchants), *accord*, Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 97-102 (2012); Kenneth R. Davis, *The End of an Error: Replacing “Manifest Disregard” With a New Framework for Reviewing Arbitration Awards*, 60 CLEV. ST. L. REV. 87, 113-116 (2012).

<sup>284</sup> See Stempel, *Mandating Minimum Fairness*, *supra* note 11; Schwartz, *supra* note 248, at 107-08; Sternlight, *supra* note 248.

newer mass arbitration of today must logically comport with substantive law in order to merit judicial enforcement.

Continuing to use the 1925 concept of § 10 for reviewing mass arbitrations resulting from the Court's dynamic expansion of §§ 2-4 during the past 30 years effectively permits arbitrations that err (such as the mythical charitable giving contract enforcement discussed above)<sup>285</sup> to be accorded the force of a judgment when courts would themselves regard such a judgment as error. This is an untenable situation requiring change – both to bring statutory construction harmony to the different aspects of the Act and to prevent unduly disparate results between arbitration and adjudication.

The conventional wisdom, of course, is that this cannot be done without amendment of the Act.<sup>286</sup> But courts can in fact legitimately update the application of § 10 to arbitration without a congressional change in the law. The Supreme Court's now-longstanding dynamic construction of the Act has opened the door to an expanded reading of § 10 (and § 1 should the Court ever reverse or sufficiently modify *Circuit City* and *Gilmer*).<sup>287</sup> The Court long-ago departed from a strictly textualist or originalist approach to the Act and its intent and purpose, at least regarding §§ 2-4<sup>288</sup> and has arguably done so for § 1, albeit in a way many regard as incorrect.<sup>289</sup> The Court has

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<sup>285</sup> See *supra* notes 273-276 and accompanying text (describing hypothetical arbitration in which arbitrator clearly is incorrect regarding the result that would obtain under prevailing law).

<sup>286</sup> See Welsh, *Procedural Safeguards*, *supra* note 268; Cole, *supra* note 269. It is a conventional wisdom to which I have fallen prey in the past. See Stempel, *supra* note 269, at 264-68. Upon further reflection over the years, perhaps fueled by the increasingly asymmetric dynamism of the Roberts Court and additional instances of lawless or erroneous arbitration results, I have come to believe that courts can legitimately give Section 10 of the Act the broader construction recommended in this article without acting impermissibly outside the accepted judicial role. See also Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309 (2011) (advocating broader judicial policing of mass arbitration via external regulation rather than reinterpretation of § 10 of the Act); Davis, *supra* note 283, at 131 (article urging expanded judicial review of arbitration awards criticizes Court's failures in construction and concludes that "[m]aybe it's time for Congress to act."). As Professor Weston notes, the Court's overbroad expansion of the Act has effectively barred state regulatory action that touches significantly upon arbitration. See Maureen Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 5 PENN. ST. Y.B. ARB. & MEDIATION 59 (2013).

<sup>287</sup> See *supra* notes 169-178, 190-198 and accompanying text (discussing *Gilmer* and *Circuit City* and Court's narrow construction of § 1 of the Act); see also Stempel, *supra* note 12.

<sup>288</sup> See *supra* notes 129-260 (reviewing Court's modern Arbitration Act jurisprudence).

<sup>289</sup> See Matthew F. Finkin, "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); Stempel, *supra* note 12; Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135 (2000); Kenneth F. Dunham, *Great Gilmer's Ghost: The Haunting Tale of the Role of Employment Arbitration in the Disappearance of Statutory Rights in Discrimination Cases*, 29 AM. J. TRIAL ADVOC. 303 (2005); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996). Although *Circuit City* and *Gilmer* took a crabbed view of the § 1 employment contract exception, it was not because of applying a conservative approach to statutory construction. If the Court had done so, it could have concluded the exercise in favor of the employees in short order, see *supra* notes 169-178, 190-198 and accompanying text.

The text of § 1 of the Act is pretty clear: the imposition of arbitration based on a written agreement is not to "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2006). Under modern notions of interstate commerce, which the Court has been happy to invoke to support required arbitration, many workers other than sailors and railroad workers qualify, at least as a matter of text.

implicitly legitimized dynamic statutory construction as an acceptable approach to applying legislation, even if it is unlikely to explicitly say so.

Although the outcomes of many of the Court's arbitration cases have been widely criticized by scholars and consumer groups, they have been just as fervently supported by business interests and some elements of the judiciary attracted by arbitration's reduction in the judicial docket. And to state the obvious, none of the Justices responsible for this dynamic expansion of the Federal Arbitration Act have been the target of impeachment actions or similar political retaliation. The logical conclusion is that the legal body politic has now silently accepted statutory dynamism as acceptable mainstream jurisprudence even though at times unhappy with the results. Although the Court's 1984 *Southland* decision has been criticized for its dynamism,<sup>290</sup> that scholarly critique is largely in the rear view mirror and the Justices making this argument have dropped this protest.<sup>291</sup>

In light of this history, it is now open to courts to view § 10 through a dynamic lens – and courts should do so. Looking at § 10, particularly § 10(4), through this lens makes a strong case for providing broader judicial review of arbitration awards stemming from modern mass arbitrations and vacating them when they make errors of law or fact that would result in reversal of trial court decisions containing the same errors. However, where the arbitration award under review emanates from the type of traditional commercial or industry arbitration prevailing at the time of the Act, courts may continue to apply § 10 in a deferential manner. Reading § 10 in this dynamic manner in harmony with the Court's post-*Southland* era comports sufficiently with mainstream jurisprudence.

Supporters of keeping arbitration less like litigation and relatively free of judicial review will undoubtedly not warm to my proposal.<sup>292</sup> But traditional judicial deference would under my proposal continue to obtain for traditional arbitration. It bears emphasis

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Although the enacting Congress may have had a narrower intent in that they had a specific group in mind, this would not (pun slightly intended) derail most conservative judges from applying the text of the statute. To the extent non-textual factors are invoked, they auger in favor of a broader reading of §1 so that workers received protection against imposed arbitration akin to what they enjoyed at the time the Act was passed.

<sup>290</sup> See, e.g., Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55 (2004); Richard M. Alderman, Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform, 38 HOUS. L. REV. 1237 (2001); Schwartz, *supra* note 248; Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331; Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1993). There are, of course, other important scholarly voices more hospitable to *Southland* and the modern era both as a matter of statutory construction and practical impact. See, e.g., Christopher R. Dahoza, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002).

<sup>291</sup> As compared to the 1990s and early Twenty-First Century, there has been markedly less scholarship arguing that *Southland* was wrongly decided or advocating return to the pre-*Southland* view that the Act was a procedural statute intended to control in federal court but not to lay down substantive law applicable in state courts. After *Southland*, some members of the Court, particularly Justices O'Connor and Thomas, sometimes argued that the case was wrongly decided and should be reversed. But those protests appear to have ceased, even before Justice O'Connor retired. The last opinion arguing that *Southland* was in error or should be reversed appears to have been Justice Thomas's dissent in *Preston v. Ferrer*, 552 U.S. 346, 363 (2008). See Stempel, *Tainted Love*, *supra* note 11, at 861.

<sup>292</sup> See, e.g., Thomas E. Carbonneau, *The Assault on Judicial Deference*, 23 AM. REV. OF INT'L ARB. 417 (2012).

that the broader, litigation-like appellate review urged in this article would apply only to the new, mass arbitration that has supplanted litigation for many consumer and employment disputes. This of course may prompt the criticism that I am being inconsistent in a manner similar to the Supreme Court's differential modes of statutory construction in arbitration cases. My response: the notion of "imperfect" execution of arbitrator power differs depending upon whether the arbitration in question was an industry or commercial norms arbitration or was instead the type of modern mass arbitration imposed on consumers and employees, which unless otherwise agreed should be governed by applicable law rather than insider norms or arbitrary decisions.

Using that most mainstream of factors, text, a natural reading of the statute would permit the conclusion that an arbitrator's clear legal error would constitute "misbehavior" prejudicing the rights of the parties or execution of the arbitrator's power that was executed "so imperfectly" as to require setting aside the award. A textual approach to § 10(4) can support a more expansive review of awards than courts have traditionally accorded. This provision of the statute provides that arbitration awards should be vacated where the arbitration is "so imperfectly executed that a mutual, final, and definite award upon the subject matter submitted was not made."<sup>293</sup>

The dictionary defines "imperfect" as (of course) "not perfect" and "defective."<sup>294</sup> In matters of modern mass arbitration that do not involve industry norms or particularized customs for doing business, the implicit understanding is that although arbitration differs from adjudication in procedural formality, the arbitral claimant or defendant will be subject to the same law and resolution of factual disputes as is the litigation claimant or defendant. Consequently, an arbitration award that is clearly incorrect in its determination of facts or application of law is defective.

Thus, to find facts in a clearly incorrect way and to be mistaken regarding the law is imperfect. To "execute" can mean to "perform as required" and to "perform skillfully or properly" as in executing a sports play, military maneuver, or other task.<sup>295</sup> But these are secondary definitions to the primary definition of "to carry out fully" or "to put completely into effect." When reading "execute" in conjunction with the rest of the words of § 10(4), the more natural reading of "so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made" suggests that this portion of the Act was focused on defects such as lack of finality, lack of clarity, mis-naming of parties, oversight in failing to address a claim, and similar defects that are more technical and go less to the substantive merits of the dispute.

Although text alone does not make a powerful case for expanded § 10 judicial review of arbitration awards, the text of the Act does not completely foreclose a construction of § 10(4) that invalidates awards when there are palpable errors of fact-finding or clearly inaccurate application of the law. While text may be the first-among-equals of statutory interpretation tools, only the most fundamentalist textualists are unwilling to consider other factors.<sup>296</sup> Because the Court itself, including those

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<sup>293</sup> See 9 U.S.C. § 10(4) (2006).

<sup>294</sup> See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 582 (10th ed. 1996); see also FUNK & WAGNALL'S DESK STANDARD DICTIONARY 416 (1921) (defining "imperfect" as "[n]ot perfect; incomplete; defective.")

<sup>295</sup> MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 405 (10th ed. 1996).

<sup>296</sup> See Peter Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242 (1998) (disagreeing with textualists as to legitimacy and wisdom of considering other

professing textualism in other contexts, have treated some portions of the Act dynamically, consideration of non-textual factors cannot fairly be foreclosed in trying to harmonize § 10 review with other portions of the Court's modern Federal Arbitration Act jurisprudence.

Legislative intent unsurprisingly tends to favor a constricted reading of § 10(4), and § 10 generally. As previously noted, the proponents of the Act and Congress envisioned arbitration as the consensual commercial, industrial, and guild arbitration of insiders, not the modern mass imposition of arbitration on tenuous grounds where consent is suspect. But if the statutory interpreter's goal is vindication of a specific original legislative intent, § 10 does not support review of arbitration that parallels review of trial decisions.

The general congressional purpose underlying the Act admits more easily of expanded judicial review. Although the Congress of 1925 and the interest groups pushing for the Act (e.g., the Chamber of Commerce) did not contemplate today's mass arbitration, neither is there any indication that they wished to expand imposed arbitration so broadly or to have large swaths of consumer, employment, or other disputes between businesses and individuals transferred to a privatized system with only minimal judicial review. There is actually some indication that the 1925 Congress, had it known what would develop in *Southland's* wake, would have disapproved. The enacting Congress specifically included § 1 of the Act, barring enforcement of arbitration clauses contained in contracts of employment.

Despite the defanging of this provision in *Gilmer* and *Circuit City*, it remains standing as a powerful indication that the enacting Congress had considerable misgivings about this type of imposed mass arbitration. That same Congress would likely have held similar reservations about imposed mass arbitration of consumer disputes. Viewed in this light, § 10 of the Act may be an apt candidate for the "imaginative reconstruction" suggested by Judge Richard Posner, an approach that stops short of a fully evolutionary, updating, or Calabresian common law approach but has elements of the dynamic approach. Judge Posner's suggestion: when faced with a situation beyond the contemplation of the Congress that enacted the statute, courts should attempt to envision what the enacting Congress would have done had it contemplated the current situation.<sup>297</sup> Given what the 1925 Congress did in § 1, it is not farfetched to conclude that had it known that its new law would result in mass arbitration of consumer and other disputes pitting business against individuals, that Congress would have wanted § 10 to be construed in a manner that provided meaningful judicial policing of such arbitration outcomes.

Consideration of interest group impact also supports a broader application of § 10(4) when modern mass arbitration is involved. Scholars divide on the question of what to do about the unavoidable influence of interest groups on legislation. Most suggest that courts should attempt to fight against this in various ways and to limit the special interest aspects of legislation, even though the language of a statute and its

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indicia of statutory meaning); Peter Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225 (1999).

<sup>297</sup> See Posner, *Legal Formalism*, *supra* note 51, at 212; Posner, *Statutory Interpretation*, *supra* note 51, at 817-21 (1983) (noting that where statute is open-ended, it operates as a common law statute under which courts have greater freedom to flesh out the meaning of the law in application).

legislative history require that the victorious interest group obtain at least some of the spoils of political victory.<sup>298</sup> Others argue, to again paraphrase Senator Hayakawa, assuming that interest groups won fair and square<sup>299</sup> (e.g., without bribery or coercion by merely effective means of the legal means of influencing public policy), that courts should construe the law to give the prevailing interest group its full measure of legislative victory.<sup>300</sup>

Under either approach, an interest group analysis of § 10(4) does not limit a court's ability to read it broadly in favor of more expansive judicial review of arbitration awards. The driving forces behind the Act were merchant groups such as the Chamber of Commerce. Their goal was to obtain judicial enforcement of the traditional commercial and guild arbitration clauses commonly contained in their contracts. Although the successors to these groups generally like what the Burger, Rehnquist and Roberts Courts have done in expanding their ability to impose arbitration en masse upon consumers and employees, this was not part of the original interest group activity leading to passage of the Act. Consequently, even under the "conservative" approach more supportive of holding fast to the legislative victories of interest groups, there is no compelling reason to cleave to a narrow approach to § 10(4).<sup>301</sup> The more liberal attitude toward interest group activity logically supports greater judicial resistance to special interest group legislation and thus resistance to a continuing narrow view of § 10 review.

While an originalist view of the Act supports the status quo of highly deferential review of arbitration awards, a more dynamic approach strongly augers in favor of more searching review commensurate with the changes in arbitration wrought by *Southland* and its progeny. Put simply, it is a foolish consistency that adheres to a limited standard of review designed for the commercial insider arbitration of the early 20<sup>th</sup> Century when the early 21<sup>st</sup> Century is awash in imposed mass arbitration quite different than that existing at the time the Act was passed. Although it would perhaps seem controversial or unduly activist for judges to read § 10 more expansively on its own, it is hardly stretching the boundaries of apt judicial behavior to give § 10 the same treatment the Court has accorded §§ 2-4 for nearly 30 years.

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<sup>298</sup> See Eskridge & Frickey, *Practical Reasoning*, *supra* note 40, at 345-53 (1990) (arguing for judicial use of assortment of considerations to apply statutes so as to accomplish public purposive goals of enacting legislature); Daniel Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667 (1992) (suggesting that courts should reduce the private rents acquired by special interest groups successful in obtaining legislation); Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (distinguishing between public-regarding and special interest legislation and suggesting purposive statutory construction that gives narrower reading to the latter category of statutes); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (suggesting role for courts in construing laws in a corrective rational manner in light of errors legislators may make, including errors introduced by interest group influence).

<sup>299</sup> See *infra* text accompanying note 22.

<sup>300</sup> See, e.g., Frank Easterbrook, *The Supreme Court, 1983 Term – Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14-15 (1984) (defending school of statutory construction that treats legislation as contract between government and affected interest groups); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); *but see* Mark Movsesian, *Are Statutes Really "Legislative Bargains"?* *The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145 (1998).

<sup>301</sup> However, jurisprudential conservatives may legitimately argue for a narrow approach to judicial review for other reasons such as the seemingly most natural reading of the text of § 10.

Once the door is open to dynamism, its analytic tools logically lead to § 10 review of mass arbitration commensurate with judicial review of trial findings and rulings. A purposive or interest group approach also supports this reading of § 10, while the text of the section is only slightly adverse and at least subject to a construction in favor of expansion. Even an originalist focus on legislative intent, perhaps the strongest factor favoring continued narrow construction of § 10 and highly deferential judicial review, is not particularly persuasive in light of the enacting legislature's understandable ignorance of the brave new world of mass arbitration the Court would usher in some 60 years later. Weighed against other interpretative factors, this should not be sufficient to prevent more expansive § 10(4) review commensurate with the modern world of mass arbitration.

By contrast, the manifest disregard of law standard is a bit timid in requiring that the arbitrator must be apprised of the correct law and willfully disregard it in order to make the award vulnerable.<sup>302</sup> When trial courts err, appellate courts do not hinge their reversal on whether the judge was adequately presented with the correct law by the parties. Rather, the judge is expected to find and apply applicable law correctly even in the face of bad lawyering. Now that arbitration has become the new litigation, a similar burden should be placed on arbitrators.

Because of the problems posed by this requirement, which creates unnecessary potential for debate as to the state of the record below (i.e., was the arbitrator really adequately briefed on the law by counsel), future application of “error of law” review of arbitration awards should dispense with this requirement (although continued use of manifest disregard review in apt cases is completely consistent with this article’s suggested approach). Scrutiny or an expanded review of arbitration awards for basic legal accuracy should become a required part of future arbitration jurisprudence. If arbitration is to replace litigation as a default, it should also include the default rule that the award must comply with the substantive law applicable to the dispute.

In addition to improving the judicial quality control exerted over arbitration, a move toward greater law-based review of arbitration decisions would be jurisprudentially satisfying in that it would bring application of § 10 of the Act into harmony with the Supreme Court’s construction of the Act as a whole. Adoption of this approach would also reduce the problems posed by *Hall Street*,<sup>303</sup> in which the Court refused to permit the parties themselves to provide for expanded judicial review. So long as an arbitration agreement does not provide for review beyond the standard form of appellate quality control sought in this article (for modern mass arbitration awards), the parties’ agreement seeking to customize review should be respected unless it places an undue burden on a court or is otherwise substantially inconsistent with the court’s adjudicative role.

A loose end of sorts remains. If this article’s proposed dynamic reading of § 10(4) for modern mass arbitration is adopted, the *Hall Street* problem is largely obviated. But what about the converse: an arbitration agreement that provides for review even narrower or more deferential than that provided pursuant to § 10.<sup>304</sup> *Hall Street* suggests that this type of party agreement does not run afoul of the Act or improperly

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<sup>302</sup> See *supra* notes 277-280 and accompanying text (describing manifest disregard review).

<sup>303</sup> *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

<sup>304</sup> See *supra* notes 202-211 and accompanying text (discussing *Hall Street*).

permit the parties to impose on the judiciary because it reduces judicial workload (by requiring even less judicial scrutiny than that available pursuant to the § 10).<sup>305</sup>

But this view is of course subject to question and criticism. A major rationale for expanded arbitration in the *Southland* era has been the argument that arbitration is not substandard justice but simply a type of forum selection. Even for regular § 10 review, this argument is problematic. Sure, arbitration is a type of forum selection – but it is forum selection with substantive implications such as no jury trial, reduced discovery, absence of stringent evidentiary rules, as well as highly deferential judicial review in place of the norm of appellate review as quality control.

If the parties are permitted to restrict judicial review even further than the limited review provided by § 10, this may reduce the workload of courts but it does so at the cost of making arbitration even more substantively different than litigation. This does not pose a significant problem where the arbitration is of the traditional commercial or industry variety in existence at the time the Act was passed, arbitrations in which the disputants frequently wanted decision based on the specialized or informal norms of their fields. But the continued highly deferential approach to application of § 10 exacerbates the problems of modern mass arbitration as a substitute for litigation by making such privatized justice even less protective of litigants than ordinary arbitration.

Consequently, an apt approach to the “reverse-*Hall Street*” problem should continue the apparent norm of allowing parties to restrict review and avoid otherwise applicable law in cases involving traditional arbitration. However, where the dispute is subject to modern mass arbitration of the type that did not exist prior to *Southland*, the arbitration agreement should not be permitted to eject the application of law or to avoid the dynamic application of § 10(4) advocated in this article.

## V. CONCLUSION

Rightly or wrongly, the Supreme Court has during the past 30 years expanded the scope of the Federal Arbitration Act through dynamic statutory construction more judicially activist than the better known mainstream jurisprudence involving text, legislative history, and congressional intent. As a result of the Court’s efforts, the incidence and role of arbitration has expanded well beyond what was intended by the enacting Congress or what is mandated by the Act’s text, albeit with some disturbing inconsistency that suggests the Court favors arbitration as a tool of business more than as an improvement over litigation or as a means of facilitating party autonomy and freedom of contract.

Assuming no retrenchment in this 30-year trend, a glaring problem of asymmetry remains. While compulsion of arbitration has expanded due to the Court’s dynamic statutory construction of §§ 2, 3, and 4 of the Act, protection of workers from adhesion contracts of arbitration under § 1 of the Act and review of arbitration awards pursuant to § 10 has remained static. The result is a missed opportunity to exercise greater quality

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<sup>305</sup> See *supra* notes 202-211 and accompanying text (discussing *Hall Street*); see also 552 U.S. at 576, 590; Weston, *supra* note 269; James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J. L. & BUS. 745 (2009); James M. Gaitis, *Clearing the Air on “Manifest Disregard” and Choice of Law in Commercial Arbitration: A Reconciliation of Wilko, Hall Street and Stolt-Nielsen*, 22 AM. REV. INT’L ARB. 21 (2011).

control over arbitration as well as jurisprudential inconsistency. The Court (or lower courts as a precursor to High Court review) can fix this problem by recognizing that – at least in modern mass arbitrations imposed on consumers and employees – that § 10(4) of the Act permits courts to vacate arbitration awards reflecting clear errors of factual determination or application of law. Such errors are sufficiently “imperfect” arbitrations to justify judicial rejection.