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## Odd Man Out: A Comparative Critique of the Federal Arbitration Act's Article III Shortcomings

Matthew J. Stanford

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# Odd Man Out: A Comparative Critique of the Federal Arbitration Act’s Article III Shortcomings

Matthew J. Stanford\*

*Arbitration is an issue of considerable national concern. Yet as the Supreme Court continues to broaden the Federal Arbitration Act’s (FAA) “liberal federal policy favoring arbitration agreements,” few viable challenges to the FAA’s expansion remain. One would be hard-pressed to find a doctrinal framework so permissive of delegating judicial power to non-Article III tribunals. Meanwhile, the Justices responsible for the FAA’s modern metastasis continue to vociferously question other congressional delegations of judicial power to non-Article III bodies. Those same Justices have yet to address the potential Article III shortcomings of the Court’s FAA jurisprudence. This Note investigates that analytical incoherence.*

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## INTRODUCTION

Arbitration has drawn increased criticism in recent years.<sup>1</sup> Though seen by some as a source of swift, inexpensive, and impartial justice,<sup>2</sup> many others view arbitration as a clandestine, unaccountable act of institutional subversion,<sup>3</sup>

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1. See, e.g., Nan Aron, *CFPB Study Proves Forced Arbitration Harms Consumers; Agency Should Prohibit the Practice Wherever It Can*, HUFFINGTON POST (Mar. 20, 2015), [http://www.huffingtonpost.com/nan-aron/cfpb-study-proves-forced\\_b\\_6911050.html](http://www.huffingtonpost.com/nan-aron/cfpb-study-proves-forced_b_6911050.html) [<https://perma.cc/VT6B-QFMC>]; Ken Sweet, *Consumer Financial Protection Bureau Moves to Curb Forced Arbitration, a Contentious Practice*, U.S. NEWS & WORLD REP. (Oct. 7, 2015), <http://www.usnews.com/news/business/articles/2015/10/07/financial-regulators-move-to-restrict-forced-arbitration> [<https://perma.cc/4XQS-L2BT>].

2. See, e.g., *Allied Bruce-Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (describing arbitration as “cheaper and faster than litigation”); Christopher R. Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 AM. REV. INT’L ARB. 163, 163 (2011) (“[A]rbitration may be preferred to litigation because it is cheaper and faster; because it enables parties to pick a decision maker (the arbitrator) who is an expert in the field; or because it provides a neutral forum (a reason most commonly cited for international disputes); among other reasons.”) (internal citations omitted).

3. See Lisa Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238 (1998) (explaining the “repeat player effect”); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212 (2006) (discussing consumer and employee advocates’ concerns that arbitration “benefits repeat players by allowing them to hide unfavorable information about their discriminatory practices, product defect and safety concerns, and other legal violations.”)

which forces into private tribunals those disputes otherwise destined for the courtroom. Such hostility is perhaps most palpable toward the insertion of boilerplate, non-negotiable arbitration clauses into employment handbooks and purchase agreements.<sup>4</sup> But the judicial response to this phenomenon—dubbed “forced arbitration” by its critics<sup>5</sup>—has been largely accommodating.

The Supreme Court has read the Federal Arbitration Act<sup>6</sup> (FAA) expansively, concluding that it established “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”<sup>7</sup> The result: barring demonstrable fraud or abuse of economic power,<sup>8</sup> the Court will “rigorously enforce” the agreement.<sup>9</sup> Minimal judicial review required.<sup>10</sup>

One would be hard-pressed to find another doctrinal framework so permissive toward federal preemption and delegation of adjudicative power. And yet, the same Justices urging the FAA’s contemporary expansion remain markedly hostile to other congressional delegations of judicial power to non-Article III bodies, such as administrative agencies and bankruptcy courts.<sup>11</sup> Those same Justices have yet to address the potential Article III pitfalls of their FAA jurisprudence. That analytical incoherence is the focus of this Note.

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“hinders future claimants in proving cases of repeat offenses,” and “thwarts development of the law in areas affecting public interests, such as civil rights and product defect”).

4. See, e.g., JAMS, *JAMS CLAUSE WORKBOOK: A GUIDE TO DRAFTING DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS* (2015), <http://www.jamsadr.com/clauses> [<https://perma.cc/ELD4-DKRZ>]; NAT’L ARBITRATION & MEDIATION, *SAMPLE DISPUTE RESOLUTION CONTRACT PROVISION (EMPLOYMENT)*, <https://www.namadr.com/documents/ContractProvisions-Employment.pdf> [<https://perma.cc/WUF2-4PWD>].

5. See, e.g., *Eliminating Forced Arbitration*, ALL. FOR JUSTICE, <http://www.afj.org/our-work/issues/access-to-justice> [<https://perma.cc/GMZ6-XN5R>] (last visited Oct. 23, 2015); Christine Hines & Jim Lardner, *Leaving Consumers High and Dry*, U.S. NEWS & WORLD REP. (Apr. 21, 2015), <http://www.usnews.com/opinion/economic-intelligence/2015/04/21/cfpb-data-shows-forced-arbitration-leaves-consumers-high-and-dry> [<https://perma.cc/YZD2-J2M3>]; Martin R. Kardon, *The Injustice of Forced Arbitration at Nursing Homes*, LAW360 (Sept. 4, 2015), <http://www.law360.com/articles/699082/the-injustice-of-forced-arbitration-at-nursing-homes> [<https://perma.cc/RF7C-S7T6>].

6. 9 U.S.C. §§ 1–16, 201–208, 301–307 (2012).

7. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

8. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

9. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

10. See 9 U.S.C. § 10 (requiring affirmance of arbitration awards unless procured by “corruption, fraud, or undue means,” or where arbitrators are “guilty of misconduct” or have “exceeded their powers”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (describing the FAA as providing for “no effective means of review”); see also *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 220 (3d Cir. 2012) (“[E]ven serious errors of law or fact will not subject [an arbitrator’s] award to vacatur.”).

11. See, e.g., *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting) (arguing that a claimant “has no authority to compromise the structural separation of powers or agree to an exercise of judicial power outside Article III”); *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (holding that bankruptcy court lacked Article III authority to enter final judgment on estate’s counterclaim).

The Court's avoidance of this issue is shortsighted. Increased opposition to forced arbitration<sup>12</sup> will inevitably lead to further legal challenges. This Note raises one. Namely, the non-delegable nature of Article III judicial power should prevent the FAA's assignment of such power to private tribunals, especially when arbitral awards are subject to what, at best, can be described as modest judicial review.<sup>13</sup> In a word, neither legislation nor contract may overcome the constitutional separation of powers.

This Note proceeds as follows. Part I surveys the history of the judiciary's disposition toward arbitration both before and after the FAA's enactment. Part II details the FAA's statutory framework, including key Supreme Court decisions defining its scope. Part III discusses the failures of past challenges to the FAA—namely, Seventh Amendment and unconscionability arguments that litigants have used to avoid forced arbitration. Part IV offers a comparative analysis of the Supreme Court's scrutiny of statutes and international treaties conferring adjudicatory power to non-Article III bodies—magistrate and bankruptcy judges, administrative agencies, and international tribunals—relative to the FAA's still-untested scheme of delegation. These approaches prove incompatible. Part V then examines one scholar's attempt to rescue the FAA from constitutional ruin, and argues that such attempts are futile given Article III's inviolable institutional function

## I.

### ARBITRATION IN THE AMERICAN LEGAL TRADITION

The Court's arbitration mega-doctrine is a relatively modern phenomenon. Congress passed the FAA in 1925 with the goal of “revers[ing] centuries of judicial hostility to arbitration agreements by placing arbitration upon the same footing as other contracts.”<sup>14</sup> In so doing, the Supreme Court would later proclaim, the legislature “declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>15</sup>

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12. See Jack M. Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WM. & MARY BUS. L. REV. 227, 232–33 (2011).

13. See 9 U.S.C. § 10; *Oxford Health*, 675 F.3d at 220.

14. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225–26 (internal quotation marks, citations, and modifications omitted).

15. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

*A. Arbitration Before the FAA*

Before the FAA, federal courts were loath to compel parties to arbitrate disputes.<sup>16</sup> At most, a court might award nominal damages for breaching the underlying agreement to arbitrate.<sup>17</sup> This is not to say that arbitration itself was uncommon or that courts actively discouraged the practice. To be sure, courts of equity would regularly enforce arbitration awards.<sup>18</sup> As Justice Joseph Story once explained:

[W]hen [courts] are asked to proceed farther and to compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider, whether such tribunals possess adequate means of giving redress, and whether they have to compel a reluctant party to submit to such a tribunal, and to close against him the doors of the common courts of justice, provided by the government to protect rights and to redress wrongs.<sup>19</sup>

Some eighty years later, Justice Louis Brandeis elaborated on the highly conditional nature of judicially enforcing arbitration agreements. He explained that federal courts would not compel arbitration “except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action.”<sup>20</sup>

Such apprehension was once widely felt among the federal judiciary. Many courts, including the Supreme Court, endorsed the view that prior agreements to arbitrate could not “oust” courts of their jurisdiction.<sup>21</sup> This argument derives from English courts’ hostility to arbitration agreements dating to the eighteenth century.<sup>22</sup> The primary concern underpinning this

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16. Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201, 210 (2012).

17. *Id.*

18. *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 120–21 (1924); *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) (“[Courts of equity] have and can have no just objection to these domestic forums, and will enforce, and promptly interfere to enforce their awards when fairly and lawfully made, without hesitation or question.”).

19. *Tobey*, 23 F. Cas. at 1320–21.

20. *Red Cross*, 264 U.S. at 121.

21. *See Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874) (“[A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.”); *see also* PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 16 (2013) (describing how courts formerly viewed arbitration agreements as “unenforceable attempts to appropriate [the courts’] jurisdiction”).

22. *See, e.g., Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982–84 (2d Cir. 1942) (describing the “judicial hostility” of English courts to arbitration agreements); HENRY S. KRAMER, *ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE* § 1.02[4] (2015) (“The long period of hostility by the English courts toward arbitration shaped American law, leading U.S. courts to also hold that arbitration agreements were not to be enforceable and that they could be revoked by either party until an arbitration actually began.”).

resistance to ouster—or at least that most commonly proffered<sup>23</sup>—was the lack of judicial supervision and legislative authorization of arbitration proceedings.<sup>24</sup>

Judicial attitudes began to change in the early twentieth century. As Professor Roger Perlstadt notes, “[A] reform movement began gaining steam in an effort to reverse the non-enforcement of arbitration agreements.”<sup>25</sup> This revolution was spurred primarily by the still-common view—albeit an increasingly mistaken one<sup>26</sup>—that arbitration provides a more cost-effective and efficient means of resolving disputes than litigation.<sup>27</sup> The two prominent promoters of this movement were Julius Cohen, who was then-counsel to the American Bar Association’s Committee on Commerce, Trade and Commercial Law, and Charles Bernheimer, at that time Chairman of the Arbitration Committee of the New York Chamber of Commerce.<sup>28</sup> Together, Cohen and Bernheimer devised an agenda to secure the legislative enshrinement of arbitration.<sup>29</sup> Testifying before the Senate and House Subcommittees in 1924, Cohen laid out a three-part plan: “The first [goal] is to get a State statute, and then to get a Federal law to cover interstate and foreign commerce and admiralty, and, third, to get a treaty with foreign countries.”<sup>30</sup>

Step one came to pass four years earlier in New York, when the state legislature passed an act making all arbitration agreements specifically enforceable.<sup>31</sup> Most notably, the statute placed agreements to arbitrate future

23. One criticism suggests that judicial hostility toward arbitration agreements stemmed not from the lack of judicial supervision and legislative authorization, but from “the desire of the judges, at a time when their salaries came largely from fees, to avoid loss of income.” *Kulukundis Shipping Co.*, 126 F.2d at 983.

24. *See id.* (“An effort has been made to justify this judicial hostility to the executory arbitration agreement on the ground that arbitrations, if unsupervised by the courts, are undesirable, and that legislation was needed to make possible such supervision.”); *Park Constr. Co. v. Indep. Sch. Dist.* No. 32, 296 N.W. 475, 483 (1941) (Peterson, J., dissenting) (“Whenever arbitrations are made compulsive, it is by legislative authority, which at the same time provides safeguards to obtain full hearing and decision under the supervision of the courts.” (internal quotation marks omitted)).

25. Perlstadt, *supra* note 16, at 211.

26. *See* Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 8 (2010) (“Arbitration was popularly touted as a more efficient, less costly, and more final method for resolving disputes; there was little or no discovery, motion practice, judicial review, or other trappings of litigation. By the beginning of the twenty-first century, however, it was common to speak of U.S. business arbitration in terms similar to civil litigation—‘judicialized,’ formal, costly, time-consuming, and subject to hardball advocacy.”); *see also Knocking Heads Together*, ECONOMIST (Feb. 1, 2007), <http://www.economist.com/node/8633318> [<https://perma.cc/CUL7-A374>] (“[Arbitration] often proves no cheaper, fairer, or even quicker.”).

27. Perlstadt, *supra* note 16, at 210.

28. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History*, 63 BUS. LAW. 55, 58–59 (2007).

29. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101 (2006).

30. *Id.* (citing *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16 (1924)).

31. Perlstadt, *supra* note 16, at 211.

disputes within its ambit.<sup>32</sup> Energized by their success in New York and the Supreme Court's decision to uphold the law,<sup>33</sup> Cohen and Bernheimer set their sights on the rest of the country. At the state level, these efforts culminated in the Uniform Arbitration Act, the first version of which the National Conference of Commissioners on Uniform State Law disseminated in 1925.<sup>34</sup> On the federal level, Cohen used the New York statute as a template for what would ultimately become the first version of the FAA.<sup>35</sup> Cohen realized step two of his dream in 1925.<sup>36</sup> The international scope of step three would not come to fruition until the passage of the New York Convention in 1958.<sup>37</sup>

### B. *The Court's Initial Response to the FAA*

President Calvin Coolidge signed the FAA into law on February 12, 1925.<sup>38</sup> But judicial hostility to arbitration agreements hardly vanished overnight. To the contrary, courts continued to deny the arbitrability of statutory claims over the following six decades.<sup>39</sup> The Supreme Court reiterated its hostility to the arbitrability of federal statutory claims in *Wilko v. Swan*.<sup>40</sup> There, the Court deemed the judicial forum provision of the Securities Act of 1933 unwaivable, and thus beyond the reach of the wide-sweeping arbitration clause at issue.<sup>41</sup> The Court feared, among other things, the likelihood that the judicially unaccountable mode of arbitration might dilute the rights that the Securities Act enshrined.<sup>42</sup> The Court employed a similar rationale regarding Fair Labor Standards Act (FLSA) claims. In *Barrentine v. Arkansas-Best Freight System, Inc.*,<sup>43</sup> the Court explained that arbitrators were inherently incompetent to adjudicate statutes of public import. Arbitrators were not only less likely to be “conversant with the public law considerations underlying the FLSA,”<sup>44</sup> but also contractually limited in their role to ascertain the meaning of

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32. Moses, *supra* note 29, at 101.

33. See *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109 (1924).

34. John M. McCabe, *Uniformity in ADR*, 8 DISP. RESOL. MAG., Summer 2002, at 20. Notably, unlike the FAA, the Uniform Arbitration Act sought only to enforce arbitration agreements covering disputes that arose *before* the agreement was signed, not those arising afterward. *Id.*

35. Moses, *supra* note 29, at 102.

36. Pub. L. No. 68-401, 43 Stat. 883 (1925).

37. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (codified at 9 U.S.C. § 201).

38. *Coolidge Administration Accomplishments*, CALVIN COOLIDGE PRESIDENTIAL FOUND., <https://coolidgefoundation.org/presidency/coolidge-administration-accomplishments> [<https://perma.cc/N49Z-E3JM>] (last visited Mar. 16, 2017).

39. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 451 (2011).

40. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

41. *Id.* at 433–35.

42. See *id.* at 435–36.

43. 450 U.S. 728 (1981).

44. *Id.* at 743.

the agreement at issue and facilitate the intent of the parties.<sup>45</sup> Moreover, arbitrators lacked the remedial arsenal that courts readily wielded.<sup>46</sup>

This institutional competency logic likewise extended to civil rights matters. In *Alexander v. Gardner-Denver Co.*,<sup>47</sup> the Court considered the “purpose and procedures” of Title VII of the Civil Rights Act of 1964, ultimately finding that Congress recognizes courts, not arbitrators, as holding the “final responsibility” to enforce the statute.<sup>48</sup> Moreover, and perhaps more importantly, the Court eschewed the presumption, now commonplace,<sup>49</sup> that courts and arbitral tribunals are functionally symbiotic, and thus, that either forum serves as an adequate adjudicator.<sup>50</sup> Rather, the Court explained, arbitrators and courts had very distinct domains to rule: the former over “the law of the shop,” and the latter, “the law of the land.”<sup>51</sup>

In *McDonald v. City of West Branch*,<sup>52</sup> the Court added another statutory action—and another analytical criticism—to its list. Finding the incompatibility of federal civil rights actions and arbitration to be “apparent,” the Court refused to give arbitration awards preclusive effect.<sup>53</sup> Justice William Brennan warned that “[i]n addition to diminishing the protection of federal rights, a rule of preclusion might have a detrimental effect on the arbitral process.”<sup>54</sup> “Were such a rule adopted,” he continued, “employees who were aware of this rule and who believed that arbitration would not protect their § 1983 rights as effectively as an action in a court might bypass arbitration.”<sup>55</sup>

Justice Brennan seems to suggest that the proper allocation of power between each institution according to its competencies actually serves both the claimants’ interest in accountability and the defendants’ interest in efficiency.<sup>56</sup> That is, the absence of meaningful review actually threatens the long-term viability of arbitral tribunals. Conversely, withholding preclusive effect from arbitral awards incentivizes the continued use of arbitration as the preferred means of resolving disputes in a cheaper, more efficient manner. And yet,

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45. *Id.* at 744 (“[T]he arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute.”).

46. *Id.* at 745 (“It is most unlikely that he will be authorized to award liquidated damages, costs, or attorney’s fees.”).

47. 415 U.S. 36 (1974).

48. *Id.* at 56.

49. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) (“We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.”).

50. *See Gardner-Denver*, 415 U.S. at 56–58.

51. *See id.* at 57 (citing *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–83 (1960)).

52. 466 U.S. 284 (1984).

53. *Id.* at 292.

54. *Id.* at 292 n.11.

55. *Id.*

56. *See id.*

amidst the multitude of cases defining the scope of the FAA, not one reached the question of the law's Article III legitimacy.

## II.

### INSIDE THE FEDERAL ARBITRATION ACT

In essence, the FAA purports to make arbitration agreements as enforceable as other contractual agreements.<sup>57</sup> It applies to both domestic<sup>58</sup> and international<sup>59</sup> arbitration agreements. International commercial arbitration is further governed by the FAA's incorporation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)<sup>60</sup> and the Inter-American Convention on International Commercial Arbitration (Panama Convention).<sup>61</sup> At bottom, the FAA holds that if a plaintiff files a matter in court that is subject to an arbitration agreement, the court must stay the action<sup>62</sup> and compel the parties to arbitrate the case.<sup>63</sup>

But the FAA's execution has hardly been as straightforward as its statutory scheme might suggest. To the contrary, the remaining portions of this Part suggest that one's conception of the FAA's statutory structure and constitutional legitimacy is largely contingent upon the source consulted. This Part shows that while the FAA's text and legislative history bespeak one scheme, the Supreme Court's construction suggests another, which deviates significantly from explicit congressional directives.

#### A. Expanding Statutory Structure

A basic sense of the statutory scheme provides a useful starting point. Passed to combat the "three evils" of delay, expense, and injustice,<sup>64</sup> the FAA made its way through Congress without serious concern for the legislature's constitutional power to pass such a statute.<sup>65</sup> Interestingly, the legislative history suggests that Congress believed it was acting within its Article I power "to constitute Tribunals inferior to the [S]upreme Court"<sup>66</sup> and Article III's

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57. 9 U.S.C. § 2 (2012).

58. *Id.* §§ 1–16.

59. *Id.* §§ 201–307.

60. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (codified at 9 U.S.C. §§ 201–208).

61. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 (codified at 9 U.S.C. §§ 301–307).

62. 9 U.S.C. § 3 (2012).

63. *Id.* § 4.

64. Moses, *supra* note 29, at 101.

65. *See id.* at 108–09 (discussing the lack of concern about Congress's constitutional authority to adopt the FAA).

66. U.S. CONST. art. I, § 8.

grant of “the judicial Power” to “such inferior Courts as the Congress may from time to time ordain and establish.”<sup>67</sup>

As “the primary substantive provision of the Act,”<sup>68</sup> section 2 serves as the central focus of this Note. Section 2 provides that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, 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>69</sup>

Simply put, arbitration clauses are as valid and enforceable as any other provision to which contracting parties agree.

The Supreme Court accordingly claims to view arbitration as simply “a matter of contract.”<sup>70</sup> This understanding is concomitant with that of Congress, which passed the FAA with the express objective of placing arbitration agreements “upon the same footing as other contracts, where [they] belong.”<sup>71</sup> The FAA’s pro-arbitration bent is thus not meant to establish a separate set of procedural criteria for arbitration. Rather, “the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”<sup>72</sup> In theory, then, arbitration agreements remain voidable under “generally applicable contract defenses, such as fraud, duress, or unconscionability.”<sup>73</sup> But as subsequent Sections of this Note reveal, these defenses rarely stand a chance against the robust federal policy favoring arbitration that the Court has forged over the years.

To enforce an arbitration agreement, a party need only “petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement” pursuant to section 4 of the FAA.<sup>74</sup> Consistent with the contractual logic of section 2, section 4 “does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed *in the manner provided for in the parties’ agreement*.”<sup>75</sup>

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67. U.S. CONST. art. III, § 1; see Moses, *supra* note 29, at 108–09 (citing *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16 (1924)).

68. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

69. 9 U.S.C. § 2 (2012).

70. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010).

71. H.R. REP. NO. 68-96, at 1 (1924).

72. Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Univ., 489 U.S. 468, 476 (1989).

73. *Rent-A-Center*, 561 U.S. at 68 (internal quotation marks omitted).

74. 9 U.S.C. § 4 (2012).

75. *Volt Info.*, 489 U.S. at 474–75 (internal quotation marks omitted).

Section 4 provides the procedural framework by which a court determines whether the dispute at issue is subject to arbitration—known as “the question of arbitrability.”<sup>76</sup> When a party moves to compel arbitration, a court should only order arbitration if it is certain that “the making of the agreement for arbitration or the failure to comply therewith is not in issue.”<sup>77</sup> Absent such certainty—that is, “[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue”<sup>78</sup>—section 4 actually mandates, as a preliminary matter, that a trial be conducted as to the existence of such an agreement.<sup>79</sup> In fact, section 4 allows the “party alleged to be in default” to “demand a jury trial of such issue.”<sup>80</sup> Some lower courts continue to invoke this statutory provision as a necessary bulwark against the enforcement of arbitration agreements lacking mutual assent,<sup>81</sup> but these precautionary provisions have largely faded into obsolescence. Meanwhile, as the next Sections show, the Supreme Court has slowly removed arbitration from the purview of state contract law without placing a meaningful check on the disputes over which arbitrators claim jurisdiction.

### 1. State Law Preemption

The enforceability of arbitration agreements has assumed a scope far broader than any contractual analogue. Departing from the default, state-administered rules that ordinarily operate against the drafter when ambiguity strikes,<sup>82</sup> the Supreme Court has crafted an analytical framework that responds to this obscurity with an increased preference for arbitration.<sup>83</sup> The Court has thus construed section 2 as “embod[ying] a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>84</sup>

The FAA has also eclipsed state attempts to limit arbitration’s reach. The FAA “contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.”<sup>85</sup> And yet, the

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76. *AT&T Techs., Inc. v. Comm’n Workers of Am.*, 475 U.S. 643, 649 (1986).

77. 9 U.S.C. § 4.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See, e.g.*, *Burgoon v. Narconon of N. Cal.*, 125 F. Supp. 3d 974 (N.D. Cal. 2015); *Hutton & Hutton Law Firm, LLC v. Girardi & Keese*, 96 F. Supp. 3d 1208 (D. Kan. 2015); *Williams v. Gen. Elec.*, 13 F. Supp. 3d 1176, 1188 (N.D. Ala. 2014).

82. RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981).

83. *See, e.g.*, *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Univ.*, 489 U.S. 468, 486 (1989) (“[A]mbiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (“[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”).

84. *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (internal quotation marks omitted).

85. *Volt Info.*, 489 U.S. at 477.

Supreme Court has declared that the FAA preempts state law insofar as the state law poses an “obstacle” to the FAA’s legislative objectives.<sup>86</sup> By including section 2, Congress ostensibly “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>87</sup> Although the Court’s early interpretations of the FAA appear to belie this view,<sup>88</sup> the FAA’s contemporary construction prevents states from giving arbitration clauses “suspect status”<sup>89</sup> by prohibiting courts from invalidating such agreements pursuant to state laws that specifically target arbitration provisions.<sup>90</sup> Such preemptive force extends not only to specific statutory carve-outs that establish a right to a judicial tribunal for certain claims,<sup>91</sup> but also to state laws that impose extra conditions on the enforceability of arbitration agreements.<sup>92</sup>

Even agreements to apply state law are inadequate to overcome the FAA’s preemptive power. This was not always so. The Court’s decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University*<sup>93</sup> suggested that a contract containing a general choice-of-law clause manifested sufficient intent to apply state arbitration rules.<sup>94</sup> There, the contract included both a general choice-of-law clause<sup>95</sup> and a provision that claims arising out of the agreement be arbitrated pursuant to the rules of the American Arbitration Association (AAA).<sup>96</sup> “There is no federal policy favoring arbitration under a certain set of procedural rules,” the majority declared.<sup>97</sup> Because the parties “agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA,” even when the result was inconsistent with FAA procedure.<sup>98</sup>

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86. *Id.*

87. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

88. *See infra* Part II.B.

89. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

90. *Id.*; *accord* *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (invalidating California law requiring judicial forum for wage disputes); *Southland*, 465 U.S. at 10 (invalidating California law requiring judicial forum for certain state statutory claims).

91. *See, e.g., Perry*, 482 U.S. at 491; *Southland*, 465 U.S. at 10.

92. *See, e.g., Doctor’s Assocs.*, 517 U.S. at 687 (invalidating Montana law conditioning enforcement of arbitration agreements on compliance with “special notice requirement” not generally applicable to contracts); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (invalidating California judicial rule deeming class action waivers unconscionable).

93. 489 U.S. 468 (1989).

94. *See id.* at 477.

95. *Id.* at 470.

96. *Id.* at 471. The contract’s incorporation of the AAA rules is noteworthy given their provision that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” AM. ARBITRATION ASS’N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, Rule 6(a) (2016), [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004362&revision=latestreleased](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased) [<https://perma.cc/J8XB-SA2C>]. This Note addresses the implications of this inclusion in Part II.A.2, *infra*.

97. *Volt Info.*, 489 U.S. at 476.

98. *Id.* at 479.

Following *Volt*, one might have reasonably presumed that a boilerplate choice-of-law clause was enough to place an arbitration provision beyond the FAA's preemptive clutches. That would change less than a decade later, when the Court decided *Mastrobuono v. Shearson Lehman Hutton, Inc.*<sup>99</sup>

As in *Volt*, the contract in *Mastrobuono* included a general choice-of-law clause and incorporated a similar set of private arbitration rules.<sup>100</sup> Rather than affirm its earlier holding that state law governs the parties' dispute over the extent of the arbitrator's power, the Court altered course. Choosing to follow the implicit guidance of the arbitration rules, the Court held that "the best way to harmonize the choice-of-law provision with the arbitration provision is to read [the state choice-of-law language] to encompass substantive principles that [state] courts would apply."<sup>101</sup> But there was a catch: any "special rules" of state law limiting arbitrator power would not qualify as "substantive principles."<sup>102</sup> That is, when it comes to arbitrator authority, the incorporation of private arbitration rules that neither party drafted overrides state law even when the contracting parties expressly agree that the contract is governed by a specific state's contract law.

*Mastrobuono's* impact on the legal landscape has been remarkable. For example, the Ninth Circuit has adopted a strong presumption against the application of non-federal arbitration rules, requiring a showing of "clear and unmistakable evidence" that the contracting parties intended to replace FAA rules with non-federal rules.<sup>103</sup> Thus, in the Ninth Circuit, even an arbitration clause explicitly designating a non-federal source of law for the arbitrator to follow remains too "ambiguous" to overcome the FAA's presumptive application concerning the threshold question of arbitrability.<sup>104</sup> This rule stands in sharp contrast to the initially permissive standard under *Volt*.

The incorporation of severability doctrine into the FAA presents yet another obstacle to state contract law. The Supreme Court declared that "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."<sup>105</sup> Should a claimant challenge the validity of a contract containing an arbitration clause, that challenge "must go to the arbitrator."<sup>106</sup> Even if state law bars the severability of terms from contracts deemed illegal or void, the FAA's "rule of severability"<sup>107</sup>—established in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>108</sup>—

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99. 514 U.S. 52 (1995).

100. *Id.* at 58–59.

101. *Id.* at 63–64.

102. *Id.*

103. *Cape Flattery Ltd. v. Titan Mar., LLC*, 647 F.3d 914, 921 (9th Cir. 2011).

104. *Id.*

105. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006).

106. *Id.* at 449.

107. *Id.* at 446.

108. *See* 388 U.S. 395, 400–04 (1967).

effectively mandates the enforcement of arbitration clauses that parties have slipped into ultimately unenforceable contracts.<sup>109</sup> The statute's preemptive weight has left arbitrators with near-limitless discretion—most notably, as the next Section suggests, with respect to arbitrator jurisdiction.

## 2. *Unlimited Jurisdiction*

The process of delineating an arbitrator's jurisdiction all but erodes the Supreme Court's benign portrayal of the FAA as putting contracts and arbitration agreements on "equal footing."<sup>110</sup> According to the Court, "The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the 'question of arbitrability,' is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise."<sup>111</sup> Consistent with the FAA's contractual logic, parties to an arbitration agreement are only required to arbitrate cases covered by that agreement.<sup>112</sup> The resulting regime, however, has been one in which arbitrators have become masters of their own jurisdiction.

Despite the seemingly high standard for delegating the arbitrability question, the ubiquitous incorporation of arbitrator rules into arbitration agreements<sup>113</sup> has effectively rendered the question a nullity. The Court's decision in *Rent-A-Center v. Jackson*<sup>114</sup> is instructive. There, an employee brought a federal discrimination suit against his former employer.<sup>115</sup> The employer moved to compel arbitration, citing an agreement that the plaintiff had signed as a condition of his employment.<sup>116</sup> The agreement included language assigning the arbitrator "exclusive authority" to decide disputes relating to the employment agreement, including those regarding the "enforceability" of the agreement itself.<sup>117</sup> Although the plaintiff challenged the validity of the agreement as unconscionable, the Court found that the parties had delegated the question of arbitrability to the arbitrator.<sup>118</sup> The Court explained:

We have recognized that parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.

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109. See *Buckeye Check Cashing, Inc.*, 546 U.S. at 448–49.

110. *Id.* at 443.

111. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (internal quotation marks omitted).

112. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

113. See, e.g., AM. ARBITRATION ASS'N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 10 (2013), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_002540](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540) [<https://perma.cc/K68U-T2UW>]; JAMS, *supra* note 4, at 2.

114. 561 U.S. 63 (2010).

115. *Id.* at 65.

116. *Id.* at 65–66.

117. *Id.* at 68.

118. *Id.* at 68–69.

This line of cases merely reflects the principle that arbitration is a matter of contract. An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.<sup>119</sup>

The FAA's text demanded nothing less—or so the Court claimed. Section 2 conclusively states that agreements to arbitrate are “valid, irrevocable, and enforceable” notwithstanding the validity of the underlying contract.<sup>120</sup> Therefore, it would appear that challenging all or part of the contract is irrelevant to the enforceability of an arbitration clause contained in that contract.<sup>121</sup> To the contrary, the rule of severability<sup>122</sup> requires the clause to be enforced. By divorcing arbitration clauses from state contract law, the Court's interpretation of the FAA has afforded arbitrators virtually limitless jurisdiction over party disputes, even when the validity of the contract itself is in question.

### B. Eroding Erie

Arbitration's preemptive force raises special concerns regarding the FAA's identification along the procedural–substantive spectrum. Section 4 only permits a federal district court to compel arbitration where the court would have jurisdiction over the underlying dispute notwithstanding the agreement to arbitrate.<sup>123</sup> This unique scheme is the undoubted inspiration for footnote 32 to *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*.<sup>124</sup> There, the Court describes the FAA as “something of an anomaly”<sup>125</sup> in the world of federal subject-matter jurisdiction. “It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under [the federal question statute] or otherwise.”<sup>126</sup>

#### 1. Erie in Brief

The absence of an independent jurisdictional basis in the FAA poses significant federalism concerns—particularly those interests at issue in *Erie Railroad Company v. Tompkins*<sup>127</sup> and its progeny. The *Erie* doctrine has come to stand for the principle that the federal government cannot not use the

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119. *Id.* at 68–70 (internal quotation marks and citations omitted).

120. *Id.*

121. *Id.*

122. *See supra* Part II.A.1.

123. *See* 9 U.S.C. § 4 (2012).

124. 460 U.S. 1 (1983).

125. *Id.* at 25 n.32.

126. *Id.*

127. 304 U.S. 64 (1938).

accident of diversity jurisdiction as a basis for making substantive law. The Court's explanation of *Erie* in *Guaranty Trust Company v. York*<sup>128</sup> is useful:

In essence, the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies [*Erie*] is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.<sup>129</sup>

To be sure, Congress may nevertheless enact *procedural* rules that apply in federal court notwithstanding the accident of diversity.<sup>130</sup> This is true even if the enacted federal procedure arguably alters the enforcement of the underlying substantive right.<sup>131</sup> Yet by limiting federal lawmaking this way, *Erie* preserves the integrity of substantive areas of law historically controlled by the states, which includes the law of contracts, torts, and property. Thus, *Erie* serves as a sort of bulwark against the erosion of our federalist governmental system, which functions to “secure[] the freedom of the individual” by “allow[ing] States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”<sup>132</sup> The upshot is that the *Erie* doctrine is more than a choice-of-law principle meant to ease the administrative burdens of federal courts sitting in diversity jurisdiction. It is a cornerstone of state sovereignty, which makes the Court's assessment of the FAA's scope especially noteworthy.

## 2. *The FAA as Substantive Law*

From the beginning, the Court put a substantive gloss on the FAA. In *Bernhardt v. Polygraphic Company of America*,<sup>133</sup> the Court determined whether an arbitration provision was enforceable in a diversity matter.<sup>134</sup> Rejecting the Second Circuit's finding that arbitration was akin to an “advisory trial,”<sup>135</sup> and thus procedural, the Court emphasized that the breach at issue “deal[s] . . . with a right to recover that owes its existence to one of the States, not to the United States.”<sup>136</sup> The Court then looked to *Erie*, which “indicated

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128. 326 U.S. 99 (1945).

129. *Id.* at 109.

130. *See Hanna v. Plumer*, 380 U.S. 460, 472–74 (1965).

131. *See id.*

132. *Bond v. United States*, 564 U.S. 211, 221 (2011).

133. 350 U.S. 198 (1956).

134. *Id.* at 202.

135. *Id.*; *see also* FED. R. CIV. P. 39(c).

136. *Bernhardt*, 350 U.S. at 202.

that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases.”<sup>137</sup> Accordingly, a federal court sitting in diversity is “in substance only another court of the State.”<sup>138</sup> The federal court “cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.”<sup>139</sup>

Even so, the Court appeared cautious in its finding that compelling arbitration where a state court would bar it “might” affect that litigation’s ultimate outcome.<sup>140</sup> Arbitration’s purported benefits notwithstanding, “[t]he nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action.”<sup>141</sup> The Court noted several forum-induced disparities, including (1) the lack of a right to a jury trial; (2) arbitrators’ comparatively deficient instruction on the law; (3) the potential for summary disposition of cases without the type of explanation required by a court of law; (4) incomplete records of proceedings; and (5) strict limitations on judicial review.<sup>142</sup> Taken together, these factors led the Court to conclude that “[t]he change from a court of law to an arbitration panel may make a radical difference in ultimate result.”<sup>143</sup>

The Court seemed to alter course when it heard and decided *Prima Paint*.<sup>144</sup> This case likewise involved a contract dispute filed in federal court pursuant to diversity jurisdiction.<sup>145</sup> After finding that, under the FAA, general claims of fraudulent inducement did not specifically undermine the enforceability of an arbitration clause contained in the same contract,<sup>146</sup> the Court proceeded to the *Erie* question—specifically, whether its severability rule was procedural or substantive in nature. But instead of addressing *Erie* directly, the Court avoided it by reframing the issue. The majority determined that “the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate.”<sup>147</sup> Citing Congress’s “incontestable” power to regulate interstate commerce, the Court summarily found it “clear beyond dispute” that there was no legislative overreach.<sup>148</sup>

The dissent in *Prima Paint* warrants closer examination given its almost-prophetic implications. Joined by Justices William Douglas and Potter Stewart,

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137. *Id.*

138. *Id.* at 203 (quotations omitted).

139. *Guaranty Tr. Co. v. York*, 326 U.S. 99, 108–09 (1945).

140. *See Bernhard*, 350 U.S. at 203.

141. *Id.*

142. *See id.* at 203–04.

143. *Id.* at 203.

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

145. *Id.* at 398.

146. *See id.* at 403–04.

147. *Id.* at 405.

148. *Id.*

Justice Hugo Black opened by questioning the majority's constitutional footing: "I am by no means sure that . . . forcing a person to forgo his opportunity to try his legal issues in the courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is not a denial of due process."<sup>149</sup> However, he continued, it was the Court's reasoning, not the FAA's intended scope, that needed adjusting. The dissent's key concern was with how far the Court was willing to depart from the FAA's textual and historical parameters to reach its ultimate holding.<sup>150</sup> To Justice Black, "both Congress and the framers of the Act were at great pains to emphasize that nonlawyers designated to adjust and arbitrate factual controversies arising out of valid contracts would not trespass upon the courts' prerogative to decide the legal question of whether any legal contract exists upon which to base an arbitration."<sup>151</sup>

Justice Black began with a brief overview of the FAA's text and legislative history, both of which cast considerable doubt on the notion that the FAA was thought to permit arbitrators to determine the legal enforceability of the contracts containing the arbitration agreements responsible for their jurisdiction.<sup>152</sup> He then reiterated the due process implications of "submit[ting] to an arbitrator an issue which will determine his compensation."<sup>153</sup> Notwithstanding the specific issues at stake in *Prima Paint*, Justice Black attributed the majority's "statutory mutilation" of the FAA to its failure to address more fully the FAA's *Erie* implications in *Bernhardt*.<sup>154</sup>

To Justice Black, the "outcome determinative" focus of *Bernhardt*, which recognized the constitutionally problematic notion of an arbitration agreement enforceable in federal but not state court, "posed a choice of two alternatives" for lower courts.<sup>155</sup> Under the first approach, a court could find that Congress originally passed the FAA pursuant to Congress's pre-*Erie* power to enact general federal law for diversity matters. Courts sitting in diversity would thus be barred from compelling arbitration under the FAA.<sup>156</sup> Alternatively, lower courts could find that Congress passed the FAA pursuant to Congress's Commerce Clause powers, thereby avoiding a potential collision with *Bernhardt* and preserving the FAA's continued application to diversity matters.<sup>157</sup>

Although the majority adopted the latter approach, it ventured one arguably unnecessary step further. Rather than limiting itself to holding that the

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

150. *See id.* at 407–08.

151. *Id.* at 408.

152. *See id.* at 412–16.

153. *Id.* at 416.

154. *See id.*

155. *Id.* at 417 (citations omitted).

156. *See id.*

157. *See id.*

Commerce Clause provided an independent basis for the enforcement of arbitration clauses in contracts involving interstate commerce—that is, without reference to *Erie*'s requirement that federal courts sitting in diversity look to the substantive law of the states in which they sit—the Court supplanted *Erie* altogether.<sup>158</sup> And it did so all in the name of staying true to the FAA's pro-arbitration purpose.<sup>159</sup> Justice Black explained:

[The Court] is not content to hold that the Act does all that it was intended to do: make arbitration agreements enforceable in federal courts if they are valid and legally existent under state law. The Court holds that the Act gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means. Even if Congress intended to create substantive rights by passage of the Act, I am wholly convinced that it did not intend to create such a sweeping body of federal substantive law completely to take away from the States their power to interpret contracts made by their own citizens in their own territory.<sup>160</sup>

It would take another two decades for the Court to adopt its pro-arbitration mantra formally.<sup>161</sup> But to Justice Black, the deed was already done.

### 3. *Turning Erie on Its Head*

The case that would ultimately enshrine the FAA's "national policy favoring arbitration" was *Southland Corporation v. Keating*.<sup>162</sup> What remained unclear before *Southland* was whether the FAA, as substantive federal law, trumped state contract law. Unlike *Bernhardt* and *Prima Paint*, *Southland* was not brought under federal diversity jurisdiction. Rather, it came pursuant to 28 U.S.C. § 1257(2), which empowered the Supreme Court to review state high court decisions upholding statutes challenged under federal law.<sup>163</sup> The case involved franchisee claims against a franchisor, whose franchise agreement included an arbitration clause covering all disputes.<sup>164</sup>

The Supreme Court of California had held that the franchisee's statutory claims brought under the state's Franchise Investment Law required a judicial forum and thus fell beyond the FAA's reach.<sup>165</sup> Specifically, the statute held that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."<sup>166</sup> Accordingly, the California high court

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158. *See id.* at 420–21.

159. *See id.* at 421.

160. *Id.* at 422.

161. *See infra* Part II.B.3.

162. 465 U.S. 1, 10 (1984).

163. *See id.* at 6.

164. *See id.* at 3–4.

165. *See Keating v. Superior Ct.*, 31 Cal. 3d 584, 604 (1982).

166. CAL. CORP. CODE § 31512 (West 1977).

recognized that “certain principles of substantive federal law” contained in the FAA transcended typical forum-based limitations.<sup>167</sup> But the court eschewed the invitation to find such principles “so unyielding” that enforcing an arbitration agreement would take precedence over state regulations.<sup>168</sup> The California legislature had crafted the regulatory statute deferring such determinations to the judiciary “in conformity with analogous federal policy.”<sup>169</sup> That difference, the court decided, was enough to avoid a potential FAA conflict.

The Supreme Court of the United States was not convinced. Joined by six other Justices, Chief Justice Warren Burger found that by including section 2 in the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>170</sup> The resulting regime placed only two limits on the enforceability of arbitration agreements. First, the FAA only applies to written maritime contracts or contracts “evidencing a transaction involving commerce.”<sup>171</sup> And second, arbitration agreements are only revocable “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>172</sup> No other limitations apply.<sup>173</sup>

But the majority’s subsequent analysis would reveal that even those limitations have limitations. Reiterating the FAA’s Commerce Clause footing, and by extension, substantive-law status under *Prima Paint*, the Court began with the irrelevance of contrary state law.<sup>174</sup> Now beyond *Erie*’s grasp, the Court made clear that *Prima Paint* was hardly limited to federal courts exercising diversity jurisdiction. By rooting the FAA in the Commerce Clause, the Court did not simply undermine the enforceability of contrary state law in federal diversity matters; rather, it invalidated such law altogether. In fact, the Court credited Justice Black’s dissent in *Prima Paint* for warning that legislation made pursuant to the Commerce Clause tended to establish rules that apply with equal force in state and federal courts.<sup>175</sup> The majority likewise cited House Reports to suggest that “Congress had in mind something more than making arbitration agreements enforceable only in the federal courts.”<sup>176</sup>

According to the Chief Justice, the FAA had two objectives. First, the FAA sought to end “the old common-law hostility toward arbitration”<sup>177</sup> by

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167. *Keating*, 31 Cal. 3d at 604.

168. *Id.*

169. *Id.*

170. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

171. 9 U.S.C. § 2 (2012).

172. *Id.*

173. *See Southland*, 465 U.S. at 11.

174. *See id.* at 11–12.

175. *See id.* at 12.

176. *Id.* at 12–13.

177. *Id.* at 14; *accord supra* Part I.A.

according such agreements the same protections as other contractual provisions.<sup>178</sup> Second, the FAA ostensibly aimed to address “the failure of state arbitration statutes to mandate enforcement of arbitration agreements.”<sup>179</sup> A finding against preemption would thus thwart what the majority believed to be the “broad enactment” that Congress had envisioned when it set out to remedy the situation.<sup>180</sup> Therefore, given Congress’s plenary power over interstate commerce, state laws limiting the enforceability of arbitration clauses ran afoul of the Supremacy Clause.<sup>181</sup>

The FAA raises unique implications absent in the Court’s earlier Commerce Clause jurisprudence. To be sure, Congress no doubt enjoys considerable discretion in its regulation of interstate commerce. Ever since the Court decided *Gibbons v. Ogden*<sup>182</sup>—which the *Southland* majority duly cited—two stalwart principles of constitutional law remain: (1) Congress has broad, albeit limited, regulatory discretion over interstate commerce<sup>183</sup> and (2) states may not discriminate against interstate commerce.<sup>184</sup> The FAA, while undoubtedly touching a matter that substantially affects interstate commerce, nonetheless raises concerns about state sovereignty by limiting the autonomy of each state to shape its own law of contracts. Aside from its questionable inferences about the FAA’s legislative history, the Court’s reasoning appears consistent with the longstanding doctrine of deference toward congressional regulation of interstate commerce. Yet the Court has refused to offer an equally robust analysis of the FAA’s *Erie* implications. Such avoidance has in turn fashioned a sort of inverse *Erie* doctrine—namely, states may not modify their own substantive law of contracts in a manner that determines the outcome of a motion to compel arbitration.

Dissenting in *Southland*, Justice Sandra Day O’Connor—joined by then-Justice William Rehnquist—sought once more to force *Erie* back into the analysis. Following a recapitulation of the FAA’s explicit limitation to federal matters—namely, section 3’s reference to proceedings “in any of the courts of the United States” and section 4’s requirement that “any United States district court” have an independent subject-matter jurisdiction—Justice O’Connor cut

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178. See H.R. REP. NO. 68-96, at 1 (1924).

179. *Southland*, 465 U.S. at 14.

180. *Id.* at 14.

181. See *id.* at 11–16.

182. 22 U.S. (9 Wheat.) 1 (1824).

183. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating Violence Against Women Act as insufficiently affecting interstate commerce); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down Gun-Free School Zones Act as exceeding Congress’s Commerce Clause authority).

184. See, e.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating protectionist state statute barring importation of interstate waste); *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333 (1977) (striking down state statute prohibiting display of state grading information on imported apples).

to the chase.<sup>185</sup> In 1925, Congress thought it was passing the FAA pursuant to “its power to dictate either procedure or ‘general federal law’ in federal courts.”<sup>186</sup> Following *Erie*’s abolition of the federal general common law,<sup>187</sup> the Court tried to recast the FAA as substantive law<sup>188</sup> that was nevertheless controlling in federal *diversity* matters.<sup>189</sup>

Rebutting the majority’s view of the legislative history, Justice O’Connor cited extensive legislative discussions of the FAA as “procedural” and passed pursuant to Congress’s *Swift*-era<sup>190</sup> power to enact general law to be enforced in federal courts.<sup>191</sup> She then returned to an important distinction: *Southland* was litigated in *state* court, beyond the reach of federal procedural rules. Echoing Justice Black’s dissent in *Prima Paint*, Justice O’Connor expressed concern that giving the FAA preemptive effect in state courts went too far to preserve the FAA’s legislative intent without running afoul of *Erie*’s federalist aims.<sup>192</sup>

Finally, Justice O’Connor took issue with the majority’s concerns that allowing state courts to invalidate otherwise enforceable arbitration agreements would encourage forum shopping.<sup>193</sup> Deeming the Court’s worries “unfounded,” she explained that “the FAA makes the federal courts equally accessible to both parties to a dispute,” making forum shopping impossible under her more limited construction.<sup>194</sup> For instance, cases lacking complete diversity would not have access to federal courts in the first place. Meanwhile, complete diversity would afford both parties the option of raising the issue in federal court under section 4.<sup>195</sup> “Ironically, the FAA was passed specifically to rectify forum-shopping problems created by this Court’s decision in *Swift v. Tyson*,” Justice O’Connor argued, noting the federal resistance to state arbitration laws that the FAA had aimed to remedy.<sup>196</sup> Far from the standard-bearer status that it has since assumed, the FAA was initially meant to be a baseline for the enforcement of arbitration agreements in federal court, not to be a “bludgeon” to a state whose law of contracts might yield some procedural

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185. See *Southland Corp. v. Keating*, 465 U.S. 1, 22 (1984) (O’Connor, J., dissenting) (internal modifications omitted).

186. *Id.* at 23.

187. See 304 U.S. 64, 78 (1938) (“There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.”).

188. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202–03 (1956).

189. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404–05 (1967).

190. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (establishing general federal common law).

191. See *Southland Corp. v. Keating*, 465 U.S. 1, 25–29 (1984) (O’Connor, J., dissenting).

192. See *id.* at 30.

193. See *id.* at 15–16 (majority opinion).

194. *Id.* at 33–34 (O’Connor, J., dissenting).

195. *Id.* at 34.

196. *Id.*

variation.<sup>197</sup> However, subsequent sections of this Note show how the Court turned a modest legislative fix into system-wide reform.

### C. *Withering Judicial Review*

As the scope of the FAA continues to subsume state law, courts' ability to review arbitration awards likewise continues to wane. This Section proceeds with a brief overview of the relevant statutory provisions, followed by an analysis of their practical application. Section 9 holds that where parties have agreed to be bound by an arbitral award, the court "must" enter a judgment affirming that award "unless the award is vacated, modified, or corrected as prescribed under sections 10 and 11 . . . ."<sup>198</sup> This narrow language suggests that sections 10 and 11 establish the exclusive standards by which such awards are to be reviewed by courts.

Section 10 provides four grounds upon which a court may order an arbitration award vacated and grants the court discretion to order a rehearing of the matter by the arbitrator.<sup>199</sup> A party may seek an order vacating an award:

- 1) where the award was procured by corruption, fraud, or undue means;
- 2) where there was evident partiality or corruption in the arbitrators, or either of them;
- 3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- 4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>200</sup>

Section 11 grants courts the authority to modify or correct arbitration awards.<sup>201</sup> Upon application by one of the parties, a district court may modify or correct an award:

- a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- c) Where the award is imperfect in matter of form not affecting

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197. *See id.* at 34–35.

198. 9 U.S.C. § 9 (2012).

199. *See id.* § 10.

200. *Id.*

201. *See id.* § 11.

the merits of the controversy.<sup>202</sup>

These limitations on judicial review have largely withstood the test of time. In 1953, the Supreme Court, in *Wilko v. Swan*, suggested that there might be an additional ground for overturning arbitration awards.<sup>203</sup> But it proved fleeting.

In *Wilko*, a buyer sued a broker for misrepresentation under the Securities Act of 1933. The broker moved to stay the proceedings and compel arbitration by citing a clause in the purchase agreement that stated that the parties would arbitrate future disputes related to the purchase.<sup>204</sup> *Wilko* presented a difficult question: Given that the Securities Act made “void” any “condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision” of the Act,<sup>205</sup> which statute would have to give way to the other?

In its discussion of these competing statutory interests, the Court noted the “advantageous” provisions of the Securities Act and deplored the idea that those protections would have a “lessened” effect in arbitration.<sup>206</sup> Fearing the “limited” grounds for vacating awards available under the FAA, the Court elaborated in dicta upon the difficulties associated with ensuring the proper arbitration of Securities Act claims:

While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would ‘constitute grounds for vacating the award pursuant to section 10 of the [FAA],’ that failure would need to be made clearly to appear. In unrestricted submissions . . . the interpretations of law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation.<sup>207</sup>

Although the Court’s holding that the arbitration agreement violated the Securities Act’s anti-waiver provision<sup>208</sup> was later overturned,<sup>209</sup> a body of law would develop around the *Wilko* dicta’s suggestion that arbitration awards are subject to review for “manifest disregard” of the law. By the time the Court finally agreed to examine the legitimacy of this new standard, every circuit in the country had already begun using it to some degree.<sup>210</sup> Even the Supreme

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202. *Id.*

203. 346 U.S. 427 (1953).

204. *Id.* at 428–29.

205. 15 U.S.C. § 77n (2012).

206. *Wilko*, 346 U.S. at 435.

207. *Id.* at 436–37 (emphasis added).

208. *Id.* at 434–35.

209. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

210. See, e.g., *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362, 1366 (Fed. Cir. 2001); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 760–61 (5th Cir. 1999); *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149–50 (4th Cir. 1994); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990); *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 532–33 (D.C. Cir. 1989); *O.R. Secs., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 746–48 (11th Cir. 1988); *Jenkins v. Prudential-Bache Secs., Inc.*, 847 F.2d 631, 634 (10th Cir. 1988); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 749–50 (8th Cir. 1986); *Anaconda Co. v. Dist. Lodge No. 27 of Int'l Ass'n of Machinists &*

Court—albeit via passing mention—appeared to condone the manifest disregard standard more than four decades after *Wilko*.<sup>211</sup> But legitimacy of this standard would soon fall prey to doubt.

The first blow to the manifest disregard standard happened when the Supreme Court decided *Hall Street Associates, LLC v. Mattel, Inc.* in 2008.<sup>212</sup> The case involved a landlord-tenant dispute over the terms of a lease.<sup>213</sup> Following a bench trial on one of the claims, the parties proposed—and the trial court approved—that the remaining claim be submitted to arbitration.<sup>214</sup> The arbitration agreement included the following language, which the district court entered as an order:

The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.<sup>215</sup>

Following arbitration, Hall Street moved to vacate the award, arguing that the arbitrator erred by ignoring an applicable state statute.<sup>216</sup> Citing the parties’ agreement, as well as the Ninth Circuit’s earlier holding that parties were at liberty “to draft a contract that sets rules for arbitration and dictates an alternative standard of review,”<sup>217</sup> the district court vacated the arbitrator’s award and ordered rehearing, which in turn reversed its initial award.<sup>218</sup> Mattel appealed.

Upon review, the Ninth Circuit concluded that its earlier decision allowing parties to agree upon alternative standards of review had been in error. The panel cited *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*,<sup>219</sup> wherein the appellate court had determined that “private parties have no power to determine the rules by which federal courts proceed, especially when Congress has explicitly prescribed those standards.”<sup>220</sup> Thus, federal courts

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Aerospace Workers, AFL-CIO, 693 F.2d 35, 37–38 (6th Cir. 1982); Nat’l R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co., 551 F.2d 136, 143–44 (7th Cir. 1977); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1127–28 (3d Cir. 1969); San Martine Compania De Navegacion, S.A. v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961); Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960).

211. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (“[P]arties [are] bound by arbitrator’s decision not in manifest disregard of the law.”) (internal quotation marks omitted).

212. 552 U.S. 576 (2008).

213. *Id.* at 579.

214. *Id.*

215. *Id.* (internal modifications omitted).

216. *Id.*

217. *Id.* at 580; see also *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997) (affirming parties’ ability to contractually bolster the standard of review for arbitral awards).

218. *Hall Street*, 552 U.S. at 580.

219. 341 F.3d 987 (9th Cir. 2003).

220. *Id.* at 1000.

must follow the judicial review standards of the FAA “and no others.”<sup>221</sup> Applying *Kyocera*’s holding in *Hall Street*, the court held that “the terms of the arbitration controlling the mode of judicial review are unenforceable and severable.”<sup>222</sup>

To resolve a circuit split on the issue, the Supreme Court granted *certiorari* in *Hall Street* and adopted the Ninth Circuit’s *Kyocera* rationale.<sup>223</sup> Right away, the Court addressed the *Wilko* dicta’s implicit endorsement of protractible judicial review. But that broad understanding, the Court explained, “was not what *Wilko* decided[.]”<sup>224</sup> Despite the Court’s seemingly favorable disposition toward greater judicial review in *Wilko*, “arguable is as far as it goes.”<sup>225</sup> Justice David Souter offered the following rationale for the Court’s reluctance to affirm a more expansive view:

Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.”<sup>226</sup>

The Court then rejected an argument that such a reading of the FAA stood at odds with its limited purpose of placing arbitration agreements on the same plane as other contracts.<sup>227</sup> Paying passing homage to the FAA’s equalizing mission, the majority nevertheless felt constrained by the statute’s text.<sup>228</sup> Sections 10 and 11 were simply incompatible with a contractual right to expand judicial review of arbitration awards<sup>229</sup> because these sections only provide for vacatur, modification, or correction in the event of “egregious departures from the parties’ agreed-upon arbitration[.]”<sup>230</sup> To read general evidentiary and legal review into the statute would thus render superfluous the text’s apparent “emphasis on extreme arbitral conduct.”<sup>231</sup> Besides, the Court resolved, section 9’s “must grant . . . unless” language “carries no hint of flexibility.”<sup>232</sup>

The FAA’s limiting language aside, the Court was careful to note that other avenues of expanded judicial review may still be available: “The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for

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221. *Id.*

222. 113 Fed. App’x 272, 272–73 (9th Cir. 2004).

223. *Hall Street*, 552 U.S. at 586.

224. *Id.* at 584.

225. *Id.*

226. *Id.* at 585 (internal citations omitted).

227. *See id.* at 585–86.

228. *See id.*

229. *See id.* at 586.

230. *Id.*

231. *Id.*

232. *Id.* at 587.

example, where judicial review of different scope is arguable.”<sup>233</sup> But this more searching standard of review appears unlikely given the nearly impossible standard the Court has set for escaping the FAA’s reach.<sup>234</sup> And when considered alongside the “national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway,”<sup>235</sup> it seems downright impossible.

Although *Hall Street* did not officially overrule the manifest disregard standard, courts ultimately received this message. A few months later, one court explained:

The Supreme Court has made clear that sections 10 and 11 of the FAA provide the exclusive grounds for vacating and modifying an arbitration award. It is also clear from *Hall Street* that parties cannot contractually alter the FAA’s grounds for vacating or modifying arbitration awards. In other words, parties cannot contractually agree to expand the scope of judicial review to give courts the power to vacate an arbitration award due to the arbitrator’s “manifest disregard of the law” in a proceeding governed by the FAA. *But does this suggest that courts can no longer vacate an arbitration award based on judicially-created grounds such as “manifest disregard of the law”?* After *Hall Street*, this Court believes the answer to that question is yes. It would be somewhat inconsistent to say that the parties cannot contractually alter the FAA’s exclusive grounds for vacating or modifying an arbitration award, but then allow the courts to alter the exclusive grounds by creating extra-statutory bases for vacating or modifying an award.<sup>236</sup>

Other courts followed suit.<sup>237</sup> Still others maintained that *Hall Street* simply “reconceptualized [the manifest disregard doctrine] as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA,”<sup>238</sup> thereby preserving the doctrine’s legitimacy. Despite the Court’s curative aims, *Hall Street* seemed only to resolve one split by creating another.<sup>239</sup> Amidst such

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233. *Id.* at 590.

234. *See supra* Part II.A.2.

235. *Hall Street*, 552 U.S. at 588.

236. *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 999 (D. Minn. 2008) (emphasis added).

237. *See, e.g.*, *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (acknowledging *Hall Street* as invalidating the manifest disregard standard of review); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008) (finding that *Hall Street* “undercut the rationale for the Second Circuit’s prior adherence to the manifest disregard standard.”).

238. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

239. *Brandy M. Wingate & Robert B. Gilbreath, Review of Arbitration Awards After Hall Street Associates v. Mattel: Supreme Court Says “No” to Contractual Expansion . . . and to “Manifest Disregard of the Law”?*, 20 APP. ADVOC. 277, 282 (2008) (“The Court’s decision sets the stage for more confusion, and until this issue is resolved, practitioners should keep abreast of how the divergent lines of authority are developing.”).

confusion, however, there remained one certainty: the federal policy favoring private arbitration and the awards it renders was unquestionable.

### III.

#### THE FAILURE OF PAST CHALLENGES TO FORCED ARBITRATION

Rather than attacking the FAA as an improper delegation of judicial power to a non-Article III body, contemporary resistance to forced arbitration has fallen primarily into one of two categories. The first takes umbrage with arbitration's deprivation of a party's Seventh Amendment right to a civil jury trial.<sup>240</sup> The second attacks the legitimacy of the contract containing the arbitration agreement. This approach raises standard contract defenses as a basis for non-enforcement. In the interest of brevity, this Note addresses only the defense of unconscionability. Both arguments, however, crumble beneath the FAA's super-legal weight.

##### A. *The Seventh Amendment*

To understand the futility of Seventh Amendment challenges to forced arbitration, it is important first to consider the Amendment's text and construction. The Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."<sup>241</sup> A Seventh Amendment challenge thus seems fitting. The Supreme Court has repeatedly acknowledged the integral function that juries serve in the American legal system.<sup>242</sup> As Justice Story put it, "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."<sup>243</sup> Nevertheless, even the Seventh Amendment has proven no match for the FAA.

To be sure, the right to a jury trial has never been construed as extending to all cases litigated in the United States. Jury trials are not required in civil actions brought in state court.<sup>244</sup> Nor do all federal civil suits fall within its ambit. Only those federal claims made "at common law" whose value exceeds

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240. See U.S. CONST. amend. VII.

241. *Id.*

242. See *Chauffers, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) ("Since the merger of the systems of law and equity, this Court has carefully preserved the right to trial by jury where legal rights are at stake." (citation omitted)); *United States v. Wood*, 299 U.S. 123, 142 (1936) ("We have frequently adverted to the firm place which the jury as a fact-finding body holds in our history and jurisprudence."); *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

243. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

244. *Hardware Dealers Mut. Fire Ins. Co. of Wis. v. Glidden Co.*, 284 U.S. 151, 158 (1931) ("The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure.").

twenty dollars qualify.<sup>245</sup> Ascertaining the Seventh Amendment's applicability to a given claim requires a historical assessment of whether the claim at issue would have required a jury trial in the eighteenth century.<sup>246</sup> For those claims more closely resembling cases at equity or admiralty, no jury trial is required.<sup>247</sup> Because jury trials were only "customary in suits brought in English *law* courts," only those claims best suited to eighteenth century courts of law require a jury trial.<sup>248</sup>

To assess a contemporary claim's proper classification under the Seventh Amendment, two factors come into play: "the nature of the action and of the remedy sought."<sup>249</sup> The first prong asks in which court, law or equity, the instant claim would have been brought had the merger of law and equity courts never occurred.<sup>250</sup> If law, the court must determine whether the requested remedy is consistent with eighteenth century England's conception of legal remedies.<sup>251</sup> Assuming the claim at issue satisfies both prongs, waiver of the jury trial right is subject to strict legal controls.

Because of its fundamental nature, "every reasonable presumption against waiver" must be entertained when a defendant claims that the plaintiff has waived her right to a jury trial.<sup>252</sup> This presumption applies with undiminished force in the contractual context.<sup>253</sup> According to the Supreme Court, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."<sup>254</sup> Notwithstanding the robust doctrine that has come to guard against the encroachment of invalid jury trial waivers,<sup>255</sup> courts are loath to invoke it in the context of arbitration agreements, electing to maintain their validity notwithstanding many arbitration clauses' non-compliance with traditional waiver requirements.<sup>256</sup>

This is hardly surprising. As discussed above, the FAA has achieved distinguished standing in the world of contract law. Arbitration's "favored" status has thus resulted in a steady diminution of traditional contract defenses that has marched lockstep with the continued expansion of what are considered

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245. See U.S. CONST. amend. VII.

246. See *Tull v. United States*, 481 U.S. 412, 417 (1987).

247. See *id.*

248. See *id.*

249. *Id.*

250. See *id.*

251. See *id.*

252. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

253. See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669, 677 (2001) (collecting cases).

254. *Brady v. United States*, 397 U.S. 742, 748 (1970).

255. *But see D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185–86 (1972) (suggesting that the waiver standard for civil constitutional rights may be different from the stricter criminal constitutional rights waiver standard).

256. See Sternlight, *supra* note 253, at 695–98.

arbitrable disputes.<sup>257</sup> Instead of the typical waiver standard that presumes an absence of waiver,<sup>258</sup> the Court has made clear that if there is an agreement to arbitrate, “the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>259</sup>

Under this special framework, the party challenging the claim’s arbitrability bears the burden of proving such intent.<sup>260</sup> The Court has held that congressional intent can be ascertained via three means: the text of the statute, its legislative history, or the presence of an “inherent conflict” between arbitration and the statute’s “underlying purposes.”<sup>261</sup> However, even this inquiry must be conducted “with a healthy regard for the federal policy favoring arbitration.”<sup>262</sup> With a strong incentive to clear courts’ dockets, such a pro-arbitration policy has left most statutes lacking the requisite congressional intent to deny arbitrability.<sup>263</sup> What remains, critics mourn, is a Seventh Amendment jury trial right stripped of its original potency.<sup>264</sup>

Indeed, the Court’s analytical maneuvering around traditional waiver principles does not resolve the larger concerns, both legal and social, with binding arbitration. Even if jury trial waivers were subject to traditional strictures, potential victims of FAA overreach remain. After all, not all litigation is subject to the Seventh Amendment.<sup>265</sup> For instance, if Article III permits the adjudication of a matter by an administrative agency or some other non-Article III body, there is no “independent bar” under the Seventh Amendment to prevent fact-finding by these juryless bodies.<sup>266</sup> This longstanding limitation leaves innumerable claimants vulnerable to the “far-reaching power play”<sup>267</sup> of forced arbitration irrespective of the Seventh Amendment’s contemporary vitality. Further, the Seventh Amendment has

257. *See id.* at 696–98.

258. *See Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

259. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

260. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

261. *See id.*

262. *See id.*

263. *See Vicki Zick, Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 MARQ. L. REV. 247, 272–73 (1999).

264. *See id.* (noting the contemporary “low state of importance” that has come to define the Seventh Amendment as the Court’s concerns with judicial economy have come to re-shape the jury trial right as a burdensome nuisance rather than a guardian of personal liberty).

265. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–54 (1989) (“[The Seventh Amendment only applies where] the cause of action is *legal in nature*.” (emphasis added)).

266. *Id.*; *accord Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 460–61 (1977).

267. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [https://perma.cc/K8KN-C2QU].

never been incorporated into the Fourteenth Amendment, and thus provides little assistance to those bringing state law claims.<sup>268</sup>

Moreover—and more important to the focus of this Note—beginning with Seventh Amendment analysis implicitly presumes the FAA’s constitutional legitimacy. But this presumption is not well-established. As Professor Perlstadt explains:

While there has been some scholarly debate over how to reconcile arbitration with the Seventh Amendment’s right to a jury, the Seventh Amendment question is rendered moot by the potential Article III problem. The Seventh Amendment does not apply to adjudications before non-Article III tribunals, and thus, determining whether the FAA is consistent with Article III makes the Seventh Amendment inquiry unnecessary. If private arbitration under the FAA violates Article III, it is irrelevant whether it also violates the Seventh Amendment; conversely, if private arbitration under the FAA may proceed despite its non-Article III status, the Seventh Amendment is simply not implicated. In addition, given that the vast majority of federal cases are resolved by dispositive motion prior to ever reaching a jury, the practical significance of protecting a Seventh Amendment right to a jury seems dwarfed by the importance of protecting access to an Article III tribunal.<sup>269</sup>

Of course, this Note is sympathetic to the criticism of the FAA’s erosion of the constitutional right to trial by jury, and the longstanding doctrine of waiver that should accompany it. But the Seventh Amendment has proven neither an anesthetic nor an antidote.

### B. Unconscionability

State law contract defenses have proven similarly ineffective. Consider, for example, the defense of unconscionability. The FAA’s “savings clause” allows courts to find arbitration agreements unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>270</sup> While this clause enables courts to invalidate arbitration clauses for “generally applicable contract defenses, such as fraud, duress, or unconscionability,” the Supreme Court has held that the FAA preempts state law defenses that apply only to arbitration provisions.<sup>271</sup> The Court’s decision in *AT&T Mobility LLC v. Concepcion*<sup>272</sup> is illustrative of this difference-lacking distinction.

*Concepcion* involved a contract dispute about a cellphone agreement under California law.<sup>273</sup> When the subscribers filed suit, the provider moved to

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268. However, most states have included similar jury trial guarantees in their own constitutions.

269. Perlstadt, *supra* note 16, at 208–09 (citations omitted).

270. 9 U.S.C. § 2 (2012).

271. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

272. 563 U.S. 333 (2011).

273. *See id.* at 336–37.

compel arbitration pursuant to an arbitration clause.<sup>274</sup> The clause required that all claims be brought in the claimants' individual capacities, "not as a plaintiff or class member in any purported class or representative proceeding."<sup>275</sup> The plaintiffs opposed the motion, arguing that the arbitration clause was unconscionable under California law because of its class waiver.<sup>276</sup>

The state unconscionability rule, announced in *Discover Bank v. Superior Court*,<sup>277</sup> held that class waivers in consumer contracts of adhesion are unconscionable and should not be enforced under certain circumstances.<sup>278</sup> In *Discover Bank*, those circumstances included a party's use of superior bargaining power to enact "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."<sup>279</sup> Because the scheme effectively sought to shield the defendant from liability for its own harmful conduct, the California Supreme Court deemed it unconscionable.<sup>280</sup>

However, the Supreme Court framed the so-called *Discover Bank* rule more categorically in *Concepcion*. Justice Antonin Scalia described the rule as "classifying most collective-*arbitration* waivers in consumer contracts as unconscionable" and warned that state courts were "frequently appl[ying] this rule to find arbitration agreements unconscionable."<sup>281</sup> From there, the Court had little difficulty invalidating *Discover Bank* as a "defense[] that appl[ies] only to arbitration or that derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue."<sup>282</sup>

The Court did not seem concerned that *Discover Bank* was decided pursuant to a broader state law governing unconscionability.<sup>283</sup> Nor was it swayed by California's longstanding prohibition against class waivers (both in litigation and in arbitration), which seemed to undermine any contention that such a rule applied uniquely to arbitration clauses.<sup>284</sup> Instead, the majority reasoned that "the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration."<sup>285</sup> The Court said *Discover Bank* was akin to a categorical finding that consumer arbitration agreements lacking a provision for judicially

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274. *Id.* at 337–38.

275. *Id.* at 336.

276. *Id.* at 337–38.

277. 113 P.3d 1100 (Cal. 2005).

278. *See id.* at 1110.

279. *Id.*

280. *Id.*

281. *Concepcion*, 563 U.S. at 340 (emphasis added).

282. *Id.* at 339.

283. *See id.* at 340 (explaining the two-fold test of unconscionability "framework" upon which *Discover Bank* was decided).

284. *See id.* at 341.

285. *Id.*

managed discovery are unconscionable.<sup>286</sup> From there, Justice Scalia resolved that:

A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to “any” contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.<sup>287</sup>

The Court’s “disproportionate impact” analysis is telling. Not only does it spell the demise of unconscionability defenses that are more likely to prevail against the enforcement of arbitration agreements; further, it suggests that the FAA preempts any popular contract defense precisely because of its success.<sup>288</sup> Contrary to the Court’s own pronouncement that all contract defenses except those “that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue”<sup>289</sup> remain viable, this protracted approach ensures that the FAA’s “liberal federal policy favoring arbitration”<sup>290</sup> is not shackled by state attempts to preserve the rights of consumers to litigate (or arbitrate) collectively.<sup>291</sup>

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286. *Id.* at 341–42.

287. *Id.* at 342 (citation omitted).

288. *See id.*

289. *Id.* at 339.

290. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

291. To the contrary, the Court made it clear that “class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.” *Concepcion*, 563 U.S. at 348. This, of course, turns contract law on its head by presuming the waiver of an ordinarily available right (here, to collective legal action) unless the agreement specifically provides for its continued existence. *See* RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. LAW INST. 1981) (“When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.”). The Court justifies this departure on the notion that “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.” *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010). Expanding the purported policy mandate of the FAA, the Court reasoned that a presumption of waiver with respect to class arbitration was necessary to the so-called “benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” *Id.* at 685. In so doing, however, the Court ironically violated its own presumption that “gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy,” are left to the arbitrator’s discretion when the agreement (and the arbitrator rules it typically incorporates) so determines. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–70 (2010). Though ordinarily unavailing for claimants who argue that they never agreed to arbitrate in the first place, the absence of

What's more telling is the degree to which the Court appears willing to ignore longstanding precedent to reach its desired ends. In *Discover Bank*, the California Supreme Court explained:

[T]he principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.<sup>292</sup>

By brushing aside the state high court's pronouncement of its own law of contract, *Concepcion* sends a clear signal that the Court will not be moved by contract defenses that stand in the FAA's way, even if it means the unraveling of the centuries-old value that "state courts are the ultimate expositors of state law."<sup>293</sup> Though the FAA may have given arbitration agreements "equal footing"<sup>294</sup> relative to other contracts, *Concepcion* suggests that some agreements are more equal than others.

#### IV.

##### FORCED ARBITRATION AS AN IMPROPER DELEGATION OF JUDICIAL POWER

Though federalism appears no match for the FAA regime, one constitutional principle remains a viable contender: separation of powers. Article III of the U.S. Constitution states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>295</sup> Article III provides "an inseparable element of the constitutional system of checks and balances," furnishes a "guarantee of judicial impartiality," and "defines the power and protects the independence of the Judicial Branch."<sup>296</sup>

The Supreme Court has repeatedly recognized the "inexorable command" that "[t]he judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."<sup>297</sup> These attributes include life tenure and undiminished compensation.<sup>298</sup> Together, these elements of the constitutional scheme work to preserve judicial independence from the political

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an "effective means of review" for the defendants in this scenario was enough to dissuade the Court from imposing the "tie goes to the arbitrator" logic that has come to define its FAA jurisprudence. See *Concepcion*, 563 U.S. at 351. But the larger implications of the Court's reasoning here are for another paper.

292. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005).

293. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (citing *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); *Winters v. New York*, 333 U.S. 507 (1948)).

294. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

295. U.S. CONST. art. III, § 1.

296. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982).

297. *Id.* at 58–59.

298. See U.S. CONST. art. III, § 1.

branches.<sup>299</sup> The Framers did not merely prefer this arrangement. They deemed it “essential” to our national charter’s defining scheme of “divided power.”<sup>300</sup>

The notion of a politically insulated judiciary dates back to the American Revolution. Included amongst the various grievances in the Declaration of Independence was that the British crown had “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”<sup>301</sup> In the Federalist Papers, Alexander Hamilton urged the “complete independence” of the federal courts as being “peculiarly essential” to the constitutional scheme.<sup>302</sup> He noted how fixed compensation was a necessity second only to permanence of office<sup>303</sup> because “[i]n the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”<sup>304</sup>

To properly insulate the judicial power from the political branches, Article III “commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.”<sup>305</sup> The component of that guardianship most relevant here is preserving “the integrity of judicial decisionmaking” by preventing the delegation of judicial power to non-Article III bodies.<sup>306</sup> The Supreme Court has long recognized that Article III prohibits Congress from “withdraw[ing] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.”<sup>307</sup> Similarly, Congress may not “bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.”<sup>308</sup> Of course, there are “public rights” matters which Congress may make judicially cognizable, or rather, delegate to non-Article III tribunals.<sup>309</sup>

But “[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789, and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests

299. *Northern Pipeline*, 458 U.S. at 59.

300. *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) (citations, quotations, and modifications omitted).

301. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

302. THE FEDERALIST NO. 78 (Alexander Hamilton) (McLean ed., 1788), <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-78> [<https://perma.cc/D83M-Y95C>].

303. THE FEDERALIST NO. 79 (Alexander Hamilton) (McLean ed., 1788), <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-79> [<https://perma.cc/D83M-Y95C>].

304. *Id.* (emphasis added).

305. *Northern Pipeline*, 458 U.S. at 60.

306. *See Stern*, 131 S. Ct. at 2609.

307. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

308. *Id.*

309. *See id.*

with Article III judges in Article III courts.”<sup>310</sup> No matter how “mundane” or “glamorous,” the Court recently urged, “[t]he *Constitution* assigns that job . . . to the Judiciary.”<sup>311</sup> And yet, the Court has not confronted the obvious tension between this rigid constitutional mandate and its deferential demeanor toward the FAA’s monumental delegation of judicial power to arbitral tribunals. This is all the more troubling given that arbitrators are *private* tribunals.

It is worthwhile, then, to consider the Court’s hostility to congressional delegations of judicial power to *public* non-Article III bodies, including administrative agencies, federal magistrate judges, bankruptcy courts, and international tribunals. Is the FAA’s delegation of comparable (or greater) power to private arbitrators whose awards are entered as judgments with “no effective means of review”<sup>312</sup> compatible with Article III? And if not, how can the Court now reconcile its FAA jurisprudence with longstanding separation-of-powers principles without causing systemic chaos? This Part endeavors to answer the first question.

#### A. *Administrative Tribunals*

Were the FAA a regulatory scheme enforced by a regulatory body, it would fail to pass Article III muster. Forced arbitration lacks each of the critical qualities that the Court suggested are necessary to legitimize congressional applications of Article I involving the exercise of adjudicatory authority by non-Article III tribunals.

The Court’s careful, limited reconciliation of administrative tribunals to Article III is best illustrated by its decision in *Commodity Futures Trading Commission v. Schor*.<sup>313</sup> Under the Commodity Exchange Act (CEA), the CFTC was permitted to hear state law counterclaims in reparation proceedings brought before the agency.<sup>314</sup> Such proceedings involve the resolution of customer claims against professional commodity brokers for violations of the CEA.<sup>315</sup> To further the CEA’s legislative purpose of providing an “inexpensive and expeditious” alternative to normal legal proceedings, the CFTC issued a regulation permitting counterclaims “arising out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint” to be adjudicated in the same reparations proceeding.<sup>316</sup>

The dispute in *Schor* involved one such counterclaim. However, when the administrative law judge ruled against the claimant on both the reparations claim and the counterclaim, the claimant challenged the CFTC’s authority to

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310. *Stern*, 131 S. Ct. at 2609.

311. *Id.*

312. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).

313. 478 U.S. 833 (1986).

314. *Id.* at 835–36.

315. *Id.* at 836.

316. *Id.* at 836–37 (internal quotation marks omitted).

adjudicate the broker's counterclaim.<sup>317</sup> After finding that the CEA could not be construed in a manner allowing the Court to avoid the Article III question,<sup>318</sup> Justice O'Connor explained that "conclusory reference" to Article III was insufficient to determine the constitutionality of a congressional delegation of adjudicatory power to a non-Article III tribunal.<sup>319</sup> Instead, Article III compliance is determined via "practical attention to substance rather than doctrinaire reliance on formal categories."<sup>320</sup> Through this more pragmatic lens, the Court reasoned that despite the Article III guarantee of an impartial judiciary for litigants, this protection is subject to waiver just like any other constitutional right. Here, the claimant had "indisputably waived" it.<sup>321</sup>

Moreover, the non-waivable institutional interest in "the constitutional system of checks and balances" was not threatened here.<sup>322</sup> The Court was careful to note that the interest in preventing Congress from "emasculating" the judiciary and "the encroachment or aggrandizement of one branch at the expense of the other" is not subject to waiver because individual litigants cannot be expected to protect institutional interests.<sup>323</sup>

Nevertheless, Justice O'Connor refused to draw a bright line between constitutional and unconstitutional delegations of adjudicative power.<sup>324</sup> Deeming the interest in congressional innovation superior to that of constitutional clarity, the Court found a factor-based test more appropriate.<sup>325</sup> To avoid the unnecessary constriction of congressional power, the test weighed:

[1] the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.<sup>326</sup>

From there, the Court found no constitutional problem with the agency's initial adjudication of state law counterclaims in reparations proceedings given the CFTC scheme's narrow scope of legal expertise, requirement of a district court

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317. *Id.* at 838.

318. After a long discussion of statutory construction and constitutional avoidance, the Court determined that there was "abundant evidence that Congress both contemplated and authorized the CFTC's assertion of jurisdiction over [the broker's] common law counterclaim," thus warranting review of the regulation's Article III legitimacy. *See id.* at 841-47.

319. *See id.* at 847.

320. *Id.* at 847-48.

321. *Id.* at 848-49.

322. *See id.* at 850-51.

323. *Id.* at 850 (quotations omitted).

324. *Id.* at 851.

325. *See id.*

326. *Id.*

order to effectuate agency awards, provision for *de novo* review of agency rulings, and general limitation of the agency's adjudicatory power.<sup>327</sup>

Finally, the private right character of the counterclaim in *Schor*, though entitled to an Article III court, was accommodated by the elective nature of CFTC proceedings, the scheme's considerable Article III supervision, and its legitimate legislative purpose.<sup>328</sup> Further, the counterclaim was "incidental to, and completely dependent upon" the resolution of the underlying reparations claim.<sup>329</sup> Only after careful analysis of the "unique aspects" of the scheme did the Court find that any separation-of-powers encroachment was at most "*de minimis*."<sup>330</sup>

But the same characteristics that saved the CFTC scheme from invalidation are altogether lacking in the FAA. A far cry from *de novo* review, the FAA gives courts no choice but to enter an arbitration award as a judgment unless it can be invalidated on the admittedly ineffective grounds<sup>331</sup> provided by statute.<sup>332</sup> Moreover, private arbitrators are not limited to a specific area of expertise in a manner comparable to administrative agencies. To the contrary: arbitrators are free to both determine the scope of their own jurisdiction<sup>333</sup> and pronounce the meaning of any law that a claimant might invoke.<sup>334</sup>

The *Schor* criteria's applicability to state-law counterclaims are also pertinent given that many cases subject to the FAA raise purely state-law claims. The Court's analysis was not affected by the presence of a claim not ordinarily entitled to an Article III tribunal, but instead focused on the character of the forum in which that claim was to be adjudicated.

The Court's earlier decision in *Thomas v. Union Carbide Agricultural Products Co.*<sup>335</sup> likewise bears mentioning. The case challenged the Article III legitimacy of a legislative scheme by which pesticide manufacturers could seek, via binding arbitration, compensation for registration data used in subsequent registration procedures.<sup>336</sup> The compensation system was meant to resolve a Fifth Amendment uncompensated taking issue.<sup>337</sup> The Court responded to a claim that the arbitration requirement violated Article III

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327. *See id.* at 852–53.

328. *See id.* at 854–55.

329. *Id.* at 856.

330. *See id.* at 855–57.

331. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011) (describing the FAA as providing for "no effective means of review").

332. *See* 9 U.S.C. §§ 10–11 (2012); *see also* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 585–86 (2008) (describing sections 10 and 11 as providing for vacatur, modification, or correction of an award only in the event of "extreme arbitral conduct").

333. *See* Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68–70 (2010).

334. *See* Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Univ., 489 U.S. 468, 474–75 (1989).

335. 473 U.S. 568 (1985).

336. *See id.* at 571.

337. *Id.* at 572.

because compensation claims involved a private right requiring an Article III tribunal by rejecting a formalist view of public and private rights.<sup>338</sup> Although the government's absence as a named party in the dispute made compensation claims seem private in nature, the Court explained that the right created under the statute closely resembled a public right aimed at guarding public health by allocating costs among program participants.<sup>339</sup> Moreover, the scheme did not rely on the judicial branch for enforcement and still provided for Article III review of arbitrators' "findings and determination" both for fraud, misconduct, and misrepresentation, as well as for constitutional error.<sup>340</sup>

The same cannot be said of arbitration under the FAA. The Court in *Hall Street* made clear that the FAA's "must grant . . . unless" language "carries no hint of flexibility" when it comes to judicial review of arbitrator awards.<sup>341</sup> Further, the claims raised in *Thomas* were limited to a public right-like scheme aimed at the fair allocation of pesticide registration costs.<sup>342</sup> The same cannot be said of claims that parties are compelled to arbitrate under the FAA. Lastly, the Court in *Thomas* emphasized that "Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among *voluntary* participants in the program without providing an Article III adjudication."<sup>343</sup> The lack of voluntariness in forced arbitration is thus noteworthy in weighing the FAA's Article III legitimacy. In addition to lacking a narrowly tailored regulatory purpose, the FAA compels individuals to arbitrate claims notwithstanding their clear desire to litigate in court.<sup>344</sup> This system not only contravenes the longstanding principle that "contractual provisions, which seek to limit the place or court in which an action . . . may be brought, are invalid as contrary to public policy,"<sup>345</sup> but also ignores the limited degree of voluntariness that can reasonably be construed from an unsophisticated party's agreement to a boilerplate arbitration clause that the other, more sophisticated party has slipped into a much larger agreement.

At bottom, forced arbitration under the FAA lacks the qualities the Court has deemed essential to the legitimacy of congressional regulatory schemes. If faced with an Article III challenge, it is difficult to conceive how the Court might preserve the FAA in its current form without upsetting the balance it has struck with Congress's exercise of regulatory power.

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338. *See id.* at 587–88.

339. *See id.* at 589–90.

340. *Id.* at 592.

341. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 587 (2008).

342. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571 (1985).

343. *Id.* at 589 (emphasis added).

344. *See generally* Silver-Greenberg & Gebeloff, *supra* note 267 (describing negative consumer experiences with arbitration clauses).

345. *See* Francis M. Dougherty, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404, 409 § 3 (1984).

### B. Magistrates and Bankruptcy Courts

The Court's similar caution in blessing the power of magistrates and bankruptcy courts—though slightly more permissive relative to administrative tribunals—further underscores the FAA's precarious constitutional footing. More notable, though, is the contingent of the Court that has found itself in dissent as the power of these Article I judges continues to grow.

#### 1. Magistrate Judges

The relatively recent advent of magistrate judges on the federal judicial landscape provides a useful starting point. In 1968, Congress passed the Federal Magistrates Act (FMA)<sup>346</sup> to consolidate and better systematize the district courts' longstanding use of "commissioners" to assist with judicial business.<sup>347</sup> District court judges would appoint magistrates to perform a limited set of duties for eight-year (full-time) or four-year (part-time) renewable terms.<sup>348</sup> Those tasks included presiding over misdemeanor trials with defendant consent, serving as special masters in civil cases, and assisting district judges with non-trial law-and-motion work.<sup>349</sup> The statute also gave district judges the authority to assign magistrates any "additional duties as are not inconsistent with the Constitution and laws of the United States."<sup>350</sup>

As the judicial workload continued to increase, so too did district judges' reliance on magistrates. And as district judges came to increasingly rely on their "additional duties" power to lighten their own loads, Congress and the Supreme Court engaged in a long colloquy about the extent to which these Article I judges may help manage Article III business.<sup>351</sup> A closer look at two cases in that larger conversation will suffice here.

##### a. *Peretz v. United States*<sup>352</sup>

The Court in *Peretz* simply framed the FMA as something short of a true delegation of judicial power. The parties there sought clarification of an earlier decision in which the Court held that the scope of the "additional duties" clause did not include jury selection in a felony trial without defendant consent.<sup>353</sup> After a jury selected before a magistrate convicted the defendants of importing four kilograms of heroin, one defendant challenged the verdict's legitimacy

346. 28 U.S.C. §§ 631–639 (2012).

347. See FED. JUDICIAL CTR., HISTORY OF THE FEDERAL JUDICIARY: MAGISTRATE JUDGESHIPS, [http://www.fjc.gov/history/home.nsf/page/judges\\_magistrate.html](http://www.fjc.gov/history/home.nsf/page/judges_magistrate.html) [https://perma.cc/6BVZ-9EC4] (last visited Dec. 16, 2015).

348. *Id.*

349. See 28 U.S.C. § 636.

350. § 636(b)(3).

351. See HISTORY OF THE FEDERAL JUDICIARY, *supra* note 347.

352. 501 U.S. 923 (1991).

353. See *id.* at 924–25; *Gomez v. United States*, 490 U.S. 858, 871–76 (1989).

even though he had consented to the use of a magistrate.<sup>354</sup> The issue before the Court, then, was relatively simple: Does defendant consent make a difference to the constitutional legitimacy of the use of magistrates for felony jury selection?<sup>355</sup>

Article III was scarcely a concern. After finding that the FMA permits the assignment of *voir dire* to magistrates with litigant consent, the Court detected “no constitutional infirmity” given the defendant’s failure to object.<sup>356</sup> Applying the *Schor* criteria, the Court reiterated the waivability of personal rights, even fundamental ones.<sup>357</sup> As for Article III’s *institutional* integrity, the Court found no real threat in permitting magistrates to preside over felony jury selections with defendant consent.<sup>358</sup> Noting district judges’ appointment and removal powers over magistrates, parties’ ability to veto magistrate assistance, and district judges’ final empanelment power over magistrate-selected juries, the Court resolved that “the entire process takes place under the district court’s total control and jurisdiction.”<sup>359</sup> Thus, the Court found “no danger that use of the magistrate involve[d] a congressional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts.”<sup>360</sup> Finally, insofar as Article III requires *de novo* review of magistrate rulings, the Court found no violation here since such review must be requested.<sup>361</sup> In a word, consent is king.

Justice Scalia dissented. After criticizing the majority’s statutory interpretation, the venerable FAA ringleader<sup>362</sup> offered the following critique of the Court’s constitutional analysis:

[W]hile there may be persuasive reasons why the use of a magistrate in these circumstances is constitutional, the Court does not provide them today. The Court’s analysis turns on the fact that courts *themselves* control the decision whether, and to what extent, magistrates will be used. But the Constitution guarantees not merely that no branch will be forced by one of the *other* branches to let someone else exercise its assigned powers—but that none of the branches will *itself* alienate its assigned powers. Otherwise, the doctrine of unconstitutional delegation of legislative power (which delegation cannot plausibly be compelled by one of the other

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354. *Peretz*, 501 U.S. at 925.

355. *See id.* at 927–28.

356. *Id.* at 936.

357. *See id.* at 936–37.

358. *See id.* at 937–39.

359. *Id.* at 937 (quoting *United States v. Raddatz*, 447 U.S. 667, 681 (1980)).

360. *Id.* (internal quotations and modifications omitted).

361. *Id.* at 939.

362. Justice Scalia was the primary opinion writer in the Court’s major expansions of the FAA. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

branches) is a dead letter . . . .<sup>363</sup>

There is a marked friction between Justice Scalia's logic here and his repeated insistence that the FAA's federal policy favoring arbitration is binding on the Court.<sup>364</sup> If institutional roles are sacrosanct as his dissent suggests, the FAA hardly seems immune to the same critique. Whether characterized as a congressional delegation or a judge-made doctrine, the FAA's alienation of virtually unchecked judicial power to private arbitral tribunals makes the issue in *Peretz* appear relatively trivial. Still more perplexing is that while Justice Scalia laments the majority's criteria justifying magistrate-managed *voir dire* as insufficiently introspective, the delegation of judicial power effected under the FAA lacks even those qualities of the FMA that he thought woefully inadequate to guard against unconstitutional delegations of power. *Peretz* thus reveals another analytical impasse regarding judicial delegations of Article III power that a future challenge to the FAA could force the Court to address.

*b. Roell v. Withrow*<sup>365</sup>

The Court doubled down on its *Peretz* decision on magistrate power in *Roell*, but the dissents from stalwart FAA proponents only grew more numerous—and forceful. There, a prisoner brought a federal civil rights action, and the parties agreed that the trial court refer them to a magistrate.<sup>366</sup> Although the plaintiff gave written consent, the defendants were less forthright. They filed answers with the magistrate but never explicitly stated their consent.<sup>367</sup> When the magistrate entered judgment for the defendants, the plaintiff appealed, and the appellate court remanded the case to ensure that the parties had actually consented.<sup>368</sup> The magistrate determined that although the defendants implicitly consented by their voluntary participation and failure to object, ultimately circuit precedent barred the inference of consent from party conduct.<sup>369</sup>

Once again, consent, this time only implicit, was sufficient. Writing for the majority, Justice Souter looked first to the 1979 expansion of the Federal Magistrate Act to permit magistrates to conduct “any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case,” provided they are “specially designated . . . by the district court” and acting with party consent.<sup>370</sup> This provision permitting magistrates to enter final judgment without district court review thus complicates their ability to infer

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363. *Peretz*, 501 U.S. at 956 (Scalia, J., dissenting) (citations omitted).

364. *See, e.g., Italian Colors*, 133 S. Ct. at 2304; *CompuCredit Corp.*, 132 S. Ct. at 665; *Concepcion*, 563 U.S. at 333.

365. 538 U.S. 580 (2003).

366. *Id.* at 582–83.

367. *Id.* at 583.

368. *Id.*

369. *Id.* at 584.

370. 28 U.S.C. § 636(e)(1) (2012).

consent from party behavior.<sup>371</sup> Observing the aims of continuing to eschew textual requirements for consent, Congress’s pragmatic goal of reducing district judges’ caseloads, and the interest in avoiding party gamesmanship, the Court swiftly concluded that permitting implied consent furthered these objectives while leaving Article III interests intact.<sup>372</sup>

In dissent, Justice Clarence Thomas—joined by Justices John Paul Stevens, Scalia, and Anthony Kennedy—excoriated the majority’s fleeting separation-of-powers analysis. Citing the shaky grounds upon which the majority hung its implied consent logic, the Court’s apparent avoidance of Article III failed to surprise Justice Thomas.<sup>373</sup> “Rather, all the majority can muster is that ‘the Article III right is *substantially* honored.’”<sup>374</sup> Justice Thomas took a more absolutist stance: “litigants’ rights under Article III are either protected or they are not.”<sup>375</sup>

Arbitration appears to be the exception. Again, such concerns remain notably absent from decisions favoring far greater delegations of judicial power to arbitrators. Yet these private adjudicators are far less accountable to Article III courts than any magistrate judge. Further, if Justice Thomas thinks implied consent by party conduct during litigation is a shaky basis for Article III waiver, a consumer’s purchase or a worker’s employment decision in the arbitration context should be even less compelling given the “constitutional implications” of the consent issue.<sup>376</sup>

In sum, these cases reveal an important fracture in the Court’s Article III jurisprudence that the FAA might have some difficulty surmounting. Such reticence toward magistrates’ exercise of judicial power among the same Justices responsible for the FAA’s contemporary evolution suggests that the Court could eventually be forced to roll back its federal policy favoring arbitration—or alternatively, to pronounce unconstitutional delegation a “dead letter” once and for all.<sup>377</sup>

## 2. *Bankruptcy Courts*

The same paradox persists in the bankruptcy world. Though similar to the issue raised in *Roell*, what makes this particularly noteworthy is the continued resistance to congressional delegation of judicial power by the same Justices responsible for the rapid expansion of the FAA. The Court’s recent reiteration

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371. See § 636(c)(1)–(3).

372. *Roell*, 538 U.S. at 587–91 (“Judicial efficiency is served; the Article III right is substantially honored.”).

373. See *id.* at 592 (Thomas, J., dissenting).

374. *Id.* at 596.

375. See *id.* at 597.

376. See *id.* at 596.

377. See *Peretz v. United States*, 501 U.S. 923, 956 (1991) (Scalia, J., dissenting).

of its view on the place bankruptcy courts hold in the Article III scheme in *Wellness International Network v. Sharif*<sup>378</sup> illustrates this point.

Following a contentious suit that left Sharif liable to Wellness for more than \$650,000 in attorney fees, Sharif filed for Chapter 7 bankruptcy.<sup>379</sup> As a creditor, Wellness initiated adversary proceedings to collect the fees and included a claim for a declaratory judgment considering a trust administered by Sharif a part of the bankruptcy estate.<sup>380</sup> The bankruptcy court agreed, and Sharif appealed.<sup>381</sup>

While the appeal was pending in district court, the Supreme Court decided *Stern v. Marshall*,<sup>382</sup> which held that Article III does not allow bankruptcy courts to enter final judgment on claims seeking to “augment the bankrupt estate” but are “in no way derived from or dependent upon bankruptcy law.”<sup>383</sup> In Sharif’s case, however, he had failed to timely raise a *Stern* objection, and the district court affirmed the bankruptcy court’s ruling.<sup>384</sup> The Seventh Circuit, while acknowledging Sharif’s apparent waiver of his *Stern* objection, held that constitutional separation of powers did not permit such waiver and reversed the bankruptcy court’s ruling for lack of constitutional authority to enter final judgment on Wellness’s claim.<sup>385</sup>

Writing for the majority, Justice Sonia Sotomayor explained that delegation of judicial power to non-Article III bodies with party consent was a longstanding practice that made “clear” the sufficiency of party consent to adjudicate *Stern* claims without triggering separation-of-powers concerns.<sup>386</sup> The Court cited *Peretz* and *Schor* to underscore the “importance of consent to the constitutional analysis” and ultimately reaffirmed the personal, and thus waivable, nature of the right to an Article III adjudicator.<sup>387</sup>

Turning to structural interests, the Court again eschewed “formalistic and unbending rules” in favor of weighing the “practical effect” of permitting the adjudication of *Stern* claims before bankruptcy courts with party consent.<sup>388</sup> Looking to *Schor*,<sup>389</sup> the *Sharif* Court found bankruptcy judges to be similar to magistrates and administrative law judges: limited in legal power and expertise, subject to Article III judicial oversight and control, and in no way reflective of a congressional “effort to aggrandize itself or humble the Judiciary.”<sup>390</sup>

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378. 135 S. Ct. 1932 (2015).

379. *Id.* at 1940.

380. *Id.*

381. *Id.* at 1941.

382. 131 S. Ct. 2594 (2011).

383. *Id.* at 2618.

384. *Sharif*, 135 S. Ct. at 1941.

385. *Id.* at 1941–42.

386. *Id.* at 1942–43.

387. *Id.* at 1942–44.

388. *Id.* at 1944 (quotations omitted) (quoting *CFTC v. Schor*, 478 U.S. 833, 851 (1986)).

389. *See Schor*, 478 U.S. at 851.

390. *Sharif*, 135 S. Ct. at 1944–46.

Detractors abounded. Although concurring in the judgment, Justice Samuel Alito distanced himself from the majority's Article III logic and argued that the Court's analysis should have ended at Sharif's failure to raise his *Stern* claim on appeal. Sharif thereby forfeited his right to have the issue adjudicated under appellate procedural rules.<sup>391</sup>

Meanwhile, Chief Justice John Roberts, joined by Justices Scalia and Thomas, dissented that private parties may not consent to an Article III violation. Refusing to "yield so fully to functionalism," the Chief Justice maintained that "[t]he Framers adopted the formal protections of Article III for good reasons" that exceeded mere pragmatic considerations with which the majority seemed most engrossed.<sup>392</sup> He then warned:

The impact of today's decision may seem limited, but the Court's acceptance of an Article III violation is not likely to go unnoticed. The next time Congress takes judicial power from Article III courts, the encroachment may not be so modest—and we will no longer hold the high ground of principle. The majority's acquiescence in the erosion of our constitutional power sets a precedent that I fear we will regret.<sup>393</sup>

Chief Justice Roberts urged that congressional delegation of power is limited to the "narrow exceptions" of territorial and local DC courts, military tribunals, public rights disputes, and certain bankruptcy proceedings.<sup>394</sup> Thus, for those claims "involv[ing] the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," Congress lacked the power to assign their resolution to a non-Article III body.<sup>395</sup>

Justice Thomas echoed the Chief Justice's concerns with greater fervor. Distinguishing the "far more complex" adjudication of *Stern* claims from the issue of jury trial waiver, Justice Thomas maintained that bankruptcy courts were exercising power that the Constitution's text exclusively vested elsewhere.<sup>396</sup> Accordingly, he continued, "to the extent *Schor* suggests that individual consent could authorize non-Article III courts to exercise judicial power, it was wrongly decided and should be abandoned."<sup>397</sup> That is, while consent may be enough to waive the *personal* right to an impartial adjudicator, non-Article III courts remain barred from exercising power reserved to Article III courts.

Taken together, the dissenting Justices in *Sharif*, *Peretz*, and *Roell* amount to the same five-justice majority responsible for the FAA's rapid metastasis. Yet the historical and textual limitations expressed in those questionable congressional delegations of judicial power have not dissuaded these same

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391. *Id.* at 1949 (Alito, J., concurring).

392. *Id.* at 1950 (Roberts, C.J., dissenting).

393. *Id.*

394. *Id.* at 1951.

395. *Id.* at 1952 (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011)).

396. *Id.* at 1962.

397. *Id.* (citations omitted).

Justices from expanding the power of private arbitrators who lack the accountability and consent safeguards necessary to satisfy even the purportedly liberal standard in *Schor*. The state-law nature of many claims that the FAA covers makes their irrelevance to the constitutional separation of powers worth repeating. Congress's power to delegate judicial power to non-Article III tribunals is not contingent on the state-versus-federal claim distinction. Rather, the permissibility of such delegation turns on the broader test of whether the claim "involv[es] the stuff of the traditional actions at common law tried by the courts at Westminster in 1789."<sup>398</sup> The FAA thus stands to test the commitment of these Justices to the exclusive exercise of federal judicial power by Article III courts.

### C. International Tribunals

The Supreme Court's struggle to fit international tribunals into the constitutional scheme further illustrates arbitration's unique position in its jurisprudence. Although the Court does not appear to have addressed the Article III legitimacy of international tribunals, its reluctance to recognize the decisions of such tribunals remains pertinent to this Note's comparative critique. The contrast between the Court's inimical view of international tribunals and its vigorous enforcement of arbitration agreements is too sharp to ignore.

Perhaps in no case is this hostility more palpable than its decision in *Medellin v. Texas*.<sup>399</sup> There, the Court attempted to reconcile the Vienna Convention with state procedural default rules.<sup>400</sup> A few years earlier, the International Court of Justice (ICJ) held that Mexican nationals convicted in the United States were entitled to judicial review of their convictions notwithstanding state default rules to the contrary.<sup>401</sup> Two years later, the U.S. Supreme Court nevertheless affirmed the application of state default rules in those cases.<sup>402</sup> President George W. Bush responded with a memorandum promising that the United States would "discharge its international obligations" in accordance with the ICJ decision.<sup>403</sup>

*Medellin* sought to determine the legal weight of the ICJ decision and the president's memo. *Medellin*, one of the Mexican nationals, filed a second state *habeas* application challenging his murder conviction and subsequent death sentence because he had been denied his consular notification rights.<sup>404</sup> Because *Medellin* had procedurally defaulted under Texas law by failing to

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398. *See id.* at 1952.

399. 552 U.S. 491 (2008).

400. *Id.* at 497–98.

401. *Avena and Other Mexican Nationals (Mexico v. U.S.)*, Judgment, 2004 I.C.J. 12, 72–73 (Mar. 31), 2004 WL 2450913.

402. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006).

403. *Medellin*, 552 U.S. at 498.

404. *See id.* at 498–99.

raise his Convention rights at trial, the district court denied his initial *habeas* petitions.<sup>405</sup> But the ICJ judgment and President Bush’s memo gave Medellín new hope. Invoking the Supremacy Clause, he argued that the Vienna Convention preempted state and federal procedural default rules governing *habeas* petitions.<sup>406</sup>

The Court disagreed. Though ICJ rulings constitute international law requiring U.S. compliance, “not all international law obligations automatically constitute binding federal law enforceable in United States courts.”<sup>407</sup> Notwithstanding the proper ratification of the Vienna Convention nearly four decades earlier,<sup>408</sup> its domestic legal effect remained in question. While some treaties automatically bear the weight of ordinary legislation (“self-executing”), others require further legislative enactment to become binding domestic law.<sup>409</sup>

Because the Convention’s text did not sufficiently manifest an intent to self-execute, the Court held that the Vienna Convention fell into the latter category.<sup>410</sup> After parsing the text of the Convention, Chief Justice Roberts—joined by Justices Stevens, Scalia, Kennedy, Thomas, and Alito—determined that the “most natural reading” of the Convention was “as a bare grant of jurisdiction” to the ICJ to resolve covered disputes.<sup>411</sup> But as for ICJ judgments, the Convention was silent and thus required additional legislation for such decisions to be binding beyond that limited scope.

Though not an Article III decision, the Court’s hostility to international tribunal rulings here is nonetheless relevant to this Note’s comparative analysis. First, *Medellin*’s outcome contrasts sharply with the almost automatic recognition of arbitration awards that the Court has deemed mandatory under the FAA—including, ironically, those awards resulting from the enforcement of international agreements to arbitrate.<sup>412</sup> Second, the Court’s aversion to federal preemption in *Medellin* is notably absent from its arbitration cases, which privilege the FAA over state contract law that it deems hostile to a federal pro-arbitration policy. Lastly, the *Medellin* majority (sans Justice Stevens) is the same majority responsible for the FAA’s contemporary expansion. Thus, *Medellin* fits neatly within the theme of cognitive dissonance that this Note aims to underscore.

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405. *Id.* at 501–02.

406. *Id.* at 504.

407. *Id.*

408. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77 (1970).

409. *See Medellin*, 552 U.S. at 505.

410. *See id.* at 505–06.

411. *Id.* at 507.

412. *See* 9 U.S.C. §§ 201–208 (2012).

*D. Arbitration and the Article III Scheme*

The foregoing matters notwithstanding, arbitration remains unique, at least to some extent, relative to these other non-Article III schemes. Unlike administrative, bankruptcy, and magistrate courts, the FAA's purview is not relegated to subject matter ordinarily reserved to Article III courts.<sup>413</sup> Quite often, claims subject to the FAA's sweeping policy are brought in state courts—i.e., the only federal question is the FAA's applicability.<sup>414</sup> Accordingly, the dearth of Article III safeguards in arbitration does not necessarily pose the same separation-of-powers concerns that the Supreme Court's *Schor* framework addresses in these other forums. One might argue that the FAA's Article III weaknesses need something more to elevate them to the level of unconstitutionality. Not so.

Given the pervasiveness of its pro-arbitration policy, this Note contends that the FAA's invocation is enough to trigger the Article III safeguards developed in *Schor* and its ilk. Borrowing from the Supreme Court's logic in *Osborn v. Bank of the United States*,<sup>415</sup> this view maintains that the FAA provides an adequate federal "ingredient" to trigger separation-of-powers scrutiny.<sup>416</sup> In *Osborn*, the Court found that "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give [federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it."<sup>417</sup> This ingredient is not difficult to find in federal question and diversity matters filed in federal court. But the inquiry is a bit more nuanced in purely state-law matters.

As *Osborn* makes clear, the federal issue need not be determinative of the underlying controversy to broach the Article III threshold.<sup>418</sup> Following the plain text of the majority opinion, it arguably follows that by passing the FAA, Congress gave federal courts jurisdiction over matters in which the underlying claims alone do not satisfy federal subject matter jurisdiction.<sup>419</sup> That is, the FAA's preemptive force over state court decisions suffices to elicit the separation-of-powers safeguards outlined in *Schor*, which function to prevent Congress from unconstitutionally delegating judicial power to coordinate branches. That the underlying claims are based on state law is thus immaterial, as state courts would not feel the FAA's force but for the preemptive weight of

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413. The FAA treats arbitrators as courts of general jurisdiction, not as special subject-matter courts.

414. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

415. 22 U.S. (9 Wheat.) 738 (1824).

416. See *id.* at 823.

417. *Id.* To be sure, *Osborn* involved a federal charter that specifically conferred the right to "sue and be sued" in federal court. *Id.* at 805.

418. See *id.*; see also *id.* at 875 (Johnson, J., dissenting).

419. See *id.* at 823.

its pro-arbitration policy—a policy that is ultimately administered by an Article III court’s enforcement of a congressional delegation of judicial power.<sup>420</sup>

The Supreme Court’s interpretation of the Judiciary Act of 1789<sup>421</sup> to justify its review of state court decisions is further illuminating. When deciding *Martin v. Hunter’s Lessee*<sup>422</sup> in 1816, the Court relied on the Act to conclude that it had jurisdiction over state court decisions regarding matters of federal law.<sup>423</sup> Over the following two centuries, the Court developed a doctrine that gave it jurisdiction over state high court decisions that lacked an adequate state-law basis to support their judgments.<sup>424</sup> The modern permutation of the doctrine holds that the Article III case or controversy requirement is satisfied if the state court’s decision “fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.”<sup>425</sup>

This is constitutionally significant to the Court’s FAA jurisprudence. But for this power to review state court decisions, states like California would have prevailed in their repeated attempts<sup>426</sup> to shape their own arbitration doctrines. Instead, as Justice William Johnson predicted in *Osborn*<sup>427</sup> and the foregoing Sections have shown,<sup>428</sup> the Court has so eroded state contract law that arbitration agreements can no longer be treated as a part of that legal universe. The resulting regime is a congressional mandate that an Article III court (namely, the Supreme Court) must force state courts to delegate their judicial power in a manner that the Court’s own Article III jurisprudence would prohibit in cases raising federal claims.

This cognitive dissonance is untenable. Relying on this distinction—a distinction that, it bears repeating, lacks a difference when it comes to the Court’s own power to review state court decisions—would make a mockery of the constitutional separation of powers. The forceful delegation of state judicial power to arbitral tribunals where the same would be intolerable in a federal question matter<sup>429</sup> simply lacks the stuff of sound doctrine. It follows, then, that

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420. This view is consistent with Chief Justice Roberts’s dissent in *Sharif*, which suggests that the constitutionality of a congressional delegation of seemingly judicial power turns on the claim’s traditionally legal (non-equitable) nature rather than its federal (non-state) nature. See *Wellness Int’l Network v. Sharif*, 135 S. Ct. 1932, 1952 (2015) (Roberts, C.J., dissenting).

421. Ch. 20, 1 Stat. 73 (1789).

422. 14 U.S. (1 Wheat.) 304 (1816).

423. See *id.* at 351.

424. See *Michigan v. Long*, 463 U.S. 1032, 1038–41 (1983); *Staub v. City of Baxley*, 355 U.S. 313, 318–20 (1958); *Fox Film Corp. v. Muller*, 296 U.S. 207, 209–10 (1935).

425. See *Long*, 463 U.S. at 1040–41.

426. See, e.g., *DIRECTV, Inc. v. Imburgia*, 225 Cal. App. 4th 338, 347 (2014), *overruled by* 136 S. Ct. 463 (2015); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

427. See *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat) 738, 875 (1824) (Johnson, J., dissenting).

428. See *supra* Part III.B (“Unconscionability”).

429. Though not the focus of this Note, the federalism concerns that the Court’s FAA jurisprudence raises also warrant consideration. In *Michigan v. Long*, Justice O’Connor listed

insofar as the FAA manifests a congressional disregard for separation of powers in cases raising federal claims, the same shortcomings bar a concomitant delegation of judicial power with respect to purely state-law claims. Otherwise, the constitutional separation of powers becomes little more than “an arid ritual of meaningless form.”<sup>430</sup>

## V.

### RESCUE VERSUS RUIN: THE FALSE CHOICE PRESERVING THE STATUS QUO

The question that remains, then, is whether the Court’s uneven analysis can be remedied without creating systemic chaos. This Note argues that it can. As public concern over the questionable use of arbitration clauses to subvert consumer and employee rights only continues to rise,<sup>431</sup> garnering popular support does not seem to pose a serious hurdle to reform. Moreover, as the previous Part elucidates, there is a majority of the Court whose separation-of-powers jurisprudence counsels against the congressional delegation of even a fraction of the judicial power that arbitral tribunals exercise under the FAA. In fact, if *Schor* remains the most permissive Article III test represented on the current Court, unanimity may even be possible. By examining one scholar’s attempt to shield the FAA from scrutiny and distinguishing the enforcement of arbitration clauses from other forum-oriented procedural devices, this Part demonstrates that any potential disruption caused by the FAA’s invalidation—whether complete or partial—pales in comparison to the institutional interests of Article III.

#### A. Rutledge’s Modified Appellate Review Theory

The more complicated question is how. If a majority of the Court were to agree that the FAA violates Article III, how might the Court bring it into compliance without creating systemic turmoil? To be sure, this Note is not the first article to question the FAA’s Article III legitimacy or proffer a theory on the proper place of arbitration in the constitutional scheme. One of the first to do so was Professor Peter Rutledge, who introduced his “modified appellate review theory” as a means of preserving the “essential components of

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“[r]espect for the independence of state courts” and “avoidance of rendering advisory opinions” as the “cornerstones” of the Court’s doctrine regarding the review of state court decisions. 463 U.S. at 1040. Thus far, however, the Court has largely ignored the impact of the FAA’s preemptive reach on state court independence in its continued expansion. But this issue is for another paper.

430. See *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

431. See generally CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015) (studying the use of arbitration agreements in consumer financial markets), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/XP83-JQL7>]; Silver-Greenberg & Gebeloff, *supra* note 267.

arbitration while putting it on surer constitutional footing vis-à-vis Article III . . . .”<sup>432</sup>

Modified appellate review theory begins with the premise that arbitration poses an Article III problem that waiver alone is insufficient to remedy.<sup>433</sup> Drawing on Professor Richard Fallon’s appellate review theory, which seeks to rescue the decisions of legislative and administrative tribunals from Article III scrutiny,<sup>434</sup> Rutledge looks to ensure arbitration’s constitutionality by modifying Fallon’s theory to take stock of the “different sets of values” that a given dispute resolution scheme offers before determining the sufficiency of the Article III review provided.<sup>435</sup> For arbitration compelled under the FAA, those values are the “voluntariness” of the decision to arbitrate and whether a sovereign is party to the dispute.<sup>436</sup> Notwithstanding the FAA’s extremely deferential standard of review, Rutledge offers a positive prognosis.

After describing the issue as “close,” Rutledge nevertheless finds commercial arbitration palatable to Article III.<sup>437</sup> Viewed through the lens of his modified appellate review theory, the lack of significant judicial review under the FAA is of minimal concern.<sup>438</sup> This is true not just of review for factual errors, but constitutional questions as well.<sup>439</sup> Regardless of the question presented, the statute’s deferential standard “suffices.”<sup>440</sup> He explains:

In some cases, courts can rule on constitutional issues at the outset of the arbitration by ruling on a motion to compel arbitration or stay litigation. In other cases, courts can rule on constitutional issues when reviewing the arbitral award: several . . . standards under the New York Convention or the FAA incorporate constitutional norms. For example, both laws provide that an award can be denied enforcement (or vacated under the FAA) in cases where a party lacked proper notice of the arbitral proceedings. Courts applying these standards generally have imported due process norms to evaluate those claims. Thus, under modified appellate review theory, the current regime provides Article III courts with sufficient oversight of constitutional questions.<sup>441</sup>

But as the next Section discusses, this view is problematic.

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432. Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1204 (2008).

433. *See id.* at 1194–204.

434. *See generally* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 933 (1988) (appellate review theory’s “core claim” is that “sufficiently searching review” by an Article III court of legislative and administrative tribunal decisions preserves the structural interest of Article III).

435. *See* Rutledge, *supra* note 432, at 1212.

436. *Id.* at 1216.

437. *Id.* at 1226.

438. *See id.*

439. *See id.*

440. *Id.*

441. *Id.* (citations omitted).

B. *The Shortcomings of Modified Appellate Review Theory*

The problem lies with the steadfastness of Rutledge's first principles. Like others attempting to rescue the FAA from constitutional ruin,<sup>442</sup> Rutledge seems to begin with a questionable presumption that Professor Richard Reuben advances. The premise is that "it is implausible to imagine the Supreme Court striking down the [FAA] at this point, given the body of law that has developed under it and the widespread national and international reliance on its validity."<sup>443</sup> This, however, is far from certain. As the previous Part shows, the Court's current Article III doctrine raises serious doubts about the extent to which the FAA is compatible with the Court's strongly held views of the institutional interest in preventing the congressional delegation of judicial power.<sup>444</sup> In fact, those Justices responsible for the FAA's current scope adhere to the most stringent, unaccommodating Article III doctrines. Thus, the statute's survival of such a constitutional challenge would require a radical shift in the separation-of-powers jurisprudence of at least one of those Justices.

Further, though Rutledge's theory uses voluntariness—that is, voluntary consent to arbitrate—as a "proxy" for fairness,<sup>445</sup> its practical utility appears limited under the current FAA regime.

First, Rutledge sets a considerably low bar for voluntariness. His only example of a "truly involuntary arbitration" is one required pursuant to bilateral investment treaties (or BITs), which compel non-signatories falling within their scope to arbitrate their claims.<sup>446</sup> Rutledge acknowledges this criticism. But such a low threshold, he argues, actually benefits parties bound by adhesive contracts because they reduce company dispute resolution costs—savings he claims can be passed along to ordinary consumers.<sup>447</sup> This logic not only

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442. See, e.g., Perlstadt, *supra* note 16, at 252 (proposing his "waiver theory" as the "only possible salvation" for arbitration given its Article III implications).

443. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 978 n.123 (2000); see also Rutledge, *supra* note 432, at 1201–03. Reuben proffers this view after citing *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932), wherein the Court recognized the FAA as a legitimate exercise of Congress's admiralty powers. This point is not merely questionable for the reasons discussed in the body of this Note. It is a bit of a non sequitur. While Congress is free to exercise its admiralty powers, it must do so within the greater constitutional system of checks and balances.

444. This Note does not attempt to reconcile this assertion with the notably business-friendly posture of the Roberts Court. See generally Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013) (finding the Roberts Court to be the most pro-business Supreme Court since World War II). To be sure, commercial actors who rely on arbitration clauses in consumer and employee agreements would likely advise against a finding that the FAA runs afoul of Article III. The purpose of this Note is not to assuage the concerns of those who cite the Court's pro-business disposition as a reason to be skeptical that such a ruling is possible. To the contrary, this Note aims simply to highlight the existence of a coalition on the Court whose steadfast resistance to past delegations of judicial power would require these Justices to reconcile these views with the institutional concerns raised by the FAA if it were faced with an Article III challenge.

445. See Rutledge, *supra* note 432, at 1216.

446. See *id.* at 1216–17, 1230–31.

447. *Id.* at 1233.

embarks on a slippery slope by which the security of countless other rights becomes an economic inquiry. It also reduces the institutional interest of Article III to a banal recitation of the contract analysis that takes place when a court determines the threshold question of enforceability. Rutledge's conflation of these inquiries suggests that this distinction from waiver is no distinction at all—something that at least four Justices on the current Court would have trouble endorsing.

Second, Rutledge's theory relies, at least in part, on the presumption that *Hall Street* was wrongly decided to the extent that it invalidated the manifest disregard doctrine,<sup>448</sup> as several courts have found that it did.<sup>449</sup> Given that Rutledge's theory relies on the existence of a manifest disregard standard of review to justify forced arbitration's Article III legitimacy,<sup>450</sup> it is unworkable in practice, and thus unlikely to be availing to a Court that will have considerable incentive to salvage the FAA's Article III legitimacy if it can. But without such a life raft, the Court's textualist majority will be hard-pressed to uphold the FAA in its current state.

A third and final criticism of Rutledge's theory is that it attempts to rescue the entire FAA for the sake of preserving those qualities of arbitration that need not fall if the Court were to deem the current statute unconstitutional. Sections 9 and 10 are not integral to the FAA's survival.<sup>451</sup> Indeed, it would be preferable to have legislative revision providing for greater judicial review by and accountability to Article III courts. But if Congress is unwilling to act, these practical difficulties do not require the Court's "acquiescence in the erosion of our constitutional power."<sup>452</sup> If Congress lacks the power to assign the resolution of claims to unaccountable arbitrators in the manner accomplished by the FAA, a few decades of statutory construction lost should not stand in the way of preserving Article III's structural mandate. Stripped of its dubious presumption that reversing course is impossible, Rutledge's theory is no match for the institutional interests of Article III that it proposes to address.

### C. *Distinction from Other Procedural Mechanisms*

One critique of this Note's improper delegation argument is that the FAA is really no different than any other procedural device. Just as *forum non conveniens*, forum selection clauses, and choice-of-law provisions regularly prevent federal courts from hearing Article III cases, so too does the FAA

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448. *See id.* at 1227.

449. *See supra* text accompanying notes 236–37.

450. *See* Rutledge, *supra* note 432, at 1228 ("The question is extremely close, but the manifest disregard doctrine, in my opinion, saves private commercial arbitration from constitutional defect.")

451. *See* 9 U.S.C. §§ 9–10 (2012) (providing the judicial review standards for arbitration awards).

452. *Wellness Int'l Network v. Sharif*, 135 S. Ct. 1932, 1950 (Roberts, C.J., dissenting).

prevent federal courts from hearing matters they might ordinarily take. Three considerations temper this criticism.

The first is perhaps most obvious. The FAA is the only procedural device that compels parties to resolve their claims in private tribunals. For example, the well-established doctrine of *forum non conveniens* presumes the existence of a more appropriate public tribunal than the one that originally hears the matter.<sup>453</sup> In fact, some courts condition dismissal for *forum non conveniens* on a defendant's willingness to litigate in the forum that it argues is more convenient.<sup>454</sup> The FAA stands alone in its ability to force claimants to forego all public recourse and subject their claims to private adjudication.

Second, the enforcement of a forum selection clause, on the other hand, terminates the jurisdiction of the original court.<sup>455</sup> Unlike other jurisdiction-terminating procedural mechanisms, the FAA requires federal courts—often the same courts that make the orders compelling arbitration—to enter judgments effectuating the awards of these private tribunals.<sup>456</sup> Forum selection clauses, by contrast, do not require any recourse to the court in which the matter was originally filed. A court in the agreed-upon forum enters any resulting judgment. Meanwhile, having no power to effectuate the awards they issue, private arbitral tribunals uniquely rely upon courts to ensure the integrity of their decisions.

But the final distinction is the most critical: these procedural devices do not run afoul of the constitutional vestment of the judicial power in Article III courts. Forum selection clauses and choice-of-law provisions do not necessarily deprive litigants of the Article III tribunal to which they might otherwise be entitled.<sup>457</sup> Such a clause might limit a claimant's venue or legal claims, to be sure. There remains, however, a notable distinction between the effects of such clauses vis-à-vis the compulsory power of the FAA. Courts enforce these procedural mechanisms by assessing the propriety of an alternative venue based on either the parties' consent to another court's jurisdiction or a waiver of claims. A choice-of-law provision might force a litigant to waive certain legal claims and thus forego an Article III tribunal. A forum selection clause could represent a party's consent to the personal jurisdiction of a limited number of courts. And *forum non conveniens* might apply, not pursuant to a prior agreement, but per a court's assessment of convenience relative to other available forums.

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453. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007).

454. See, e.g., *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1381 (11th Cir. 2009); *Reed v. Norfolk & W. Ry. Co.*, 635 F. Supp. 1166, 1168 (N.D. Ill. 1986).

455. See *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 580 (2013) (finding § 1404(a) transfer and *forum non conveniens* to be the "appropriate enforcement mechanisms" for forum selection clauses).

456. See 9 U.S.C. § 9 (2012).

457. See *Forum Selection Clauses*, <http://www.kentlaw.edu/perritt/courses/civpro/forum-selection-provisions.htm> [<https://perma.cc/AU3Z-K44M>] (sample clauses).

The FAA lacks an analogous jurisdictional foundation. A party seeking to compel arbitration need not demonstrate a lack of personal jurisdiction, subject matter jurisdiction, or even improper venue to prevail. To the contrary, the movant relies on the jurisdiction of the otherwise proper court to compel an unwilling claimant to arbitrate her claims notwithstanding her clear satisfaction of these basic jurisdictional requirements. Thus, the FAA is unique in its ability to force matters into non-Article III tribunals without first demonstrating how an Article III court is jurisdictionally deficient.<sup>458</sup>

#### CONCLUSION

While practical considerations undoubtedly play a prominent role in the legislative process, their place in maintaining the constitutional separation of powers is limited by interests greater than those that a given statute might serve. The FAA's shaky constitutional footing should not necessarily beget increased flexibility in our constitutional scheme of checks and balances. No doubt Justice Scalia's sudden passing last year<sup>459</sup> raises an important unknown about the Court's jurisprudential trajectory. However, the Trump Administration's successful nomination of Justice Neil Gorsuch to Justice Scalia's seat suggests that any resulting shift on the Court would militate toward an even more robust defense of judicial power.<sup>460</sup> Thus, given the state of the Court's Article III jurisprudence and contemporary public concern over arbitration, assertions of impending Article III accommodation of the FAA are implausible.

But a more rigid separation-of-powers doctrine should hardly be cause for concern. Nor is it a sign of impending systemic pandemonium. The Court need not invalidate the FAA in full to ensure its constitutionality. Even if the Court invalidated the entire scheme, the resulting need for increased accommodation of judicial business would place the pressure precisely where the constitutional separation of powers allocates such responsibility. As the gatekeeper of Article III courts,<sup>461</sup> Congress has the power to expand the federal bench to

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458. This is not to say that choice-of-law provisions and forum selection clauses have not given rise to a similarly disconcerting limitation on the ability of claimants to have their cases heard in courts that would be procedurally proper but for such jurisdiction-limiting agreements. Such concerns, however, are better left to discussion in another paper.

459. See Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [<https://perma.cc/7K6K-PP25>].

460. See Jeffrey Rosen, *A Jeffersonian for the Supreme Court*, ATLANTIC (Feb. 1, 2017), <https://www.theatlantic.com/politics/archive/2017/02/a-jeffersonian-on-the-supreme-court/515319> [<https://perma.cc/HL69-BD69>]; see also *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (criticizing non-Article III administrative agencies' ability "to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design" and praising "the wisdom of a government of separated powers").

461. See U.S. CONST. art. III, § 1 (empowering Congress to "ordain and establish" inferior federal courts).

accommodate additional litigants, or it can pass an arbitration statute that meets *Schor*'s already permissive Article III criteria. As the only politically insulated branch of government, the judiciary should not risk the erosion of its integrity to avoid another branch's political inconvenience, as doing so would surely work the type of "aggrandizement" that Article III was designed to avert.<sup>462</sup>

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462. See *CFTC v. Schor*, 478 U.S. 833, 850 (1986).