

THE FEDERAL ARBITRATION ACT: THE SUPREME  
COURT'S ERRONEOUS STATUTORY INTERPRETATION,  
STARE DECISIS, AND A PROPOSAL  
FOR CHANGE

*Larry J. Pittman\**

- I. INTRODUCTION
- II. HISTORICAL PERSPECTIVE ON ARBITRATION
  - A. *A Brief Historical Analysis of Arbitration in England*
  - B. *A Brief History of American Arbitration*
  - C. *The Federal Arbitration Act*
- III. THEORIES REGARDING STATUTORY INTERPRETATION
  - A. *Originalism*
  - B. *Textualism*
  - C. *Dynamic Statutory Interpretation and the "Evolutive" Approach*
  - D. *The Author's General Critique of Statutory Interpretation Theories*
- IV. TOWARDS A NEW THEORY OF STATUTORY INTERPRETATION FOR THE COURT'S PROBLEMATIC STATUTORY INTERPRETATION PRECEDENTS
  - A. *Proposed Theory and Its Justification*
  - B. *Application of the New Proposal for Problematic Statutory Interpretation Precedent*
    - 1. *Impermissible Partiality/Conflict of Interest in Statutory Interpretative Outcomes*
    - 2. *Statutory Interpretative Outcomes Based Upon the Court's Own Political Decisions Instead of Upon Congressional Intent*
      - a. *General Applicability of the FAA*

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\* Associate Professor of Law, University of Mississippi School of Law; B.B.A., 1983, University of Mississippi; J.D., 1986, University of Mississippi School of Law; LL.M., 1992 Harvard Law School. The Lamar Order of The University of Mississippi School of Law provided financial support for this Article.

- b. *Pre-Southland Corp. v. Keating Court Precedent Showing the Court's Scrutiny of Arbitration Agreements Relating to Statutory Claims*
  - c. *The Court's Non-Statutory Claims Precedents Before Southland Corp. v. Keating*
  - d. *Southland Corp. v. Keating and Federalism*
  - e. *Post-Southland Corp. v. Keating Precedents*
  - f. *Extension of the Court's Broad Interpretation of FAA to Employment Contracts*
3. *Lower Courts' Strict Construction of the Supreme Court's Erroneously-Decided Precedent*

## V. CONCLUSION

### I. INTRODUCTION

For the past thirty or more years, there has been a general movement in America supporting different types of alternative dispute resolution (ADR) processes.<sup>1</sup> Arbitration—the use of arbitrators to decide disputes—is one such process.<sup>2</sup> Arbitration differs from a jury trial in that arbitration uses an arbitrator (who frequently has expertise in the relevant subject matter) who will issue an award in favor of one of the parties after hearing abbreviated presentations from attorneys representing the parties.<sup>3</sup>

Although the use of arbitration dates back many centuries—even to the glory days of Greek civilization<sup>4</sup>—the use of arbitration in America

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1. Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847, 873 (1996) (“Ferment in the courts, the government, and among the growing ranks of ADR providers led to explosive ADR growth that continued to fuel corporate interest in ADR.”); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEG. STUD. 1, 1-2 (1995) (“Interest in ADR has grown over the years, and today utilization of ADR is widespread. Moreover, ADR is increasingly encouraged by courts and legislation; in various areas of dispute, plaintiffs and defendants are required to use ADR before they are given recourse to trial.”).

2. LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 3 (1997).

3. See STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, *ARBITRATION: CASES and MATERIALS* 2 (1998) (citing different sources that define arbitration).

4. FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 3 (1948).

has recently caused controversy, leading to a call for reform in the way that the system is used to resolve modern disputes.<sup>5</sup>

More specifically, there has been, and currently is, a legitimate concern over the use of adhesion contracts that force consumers to accept arbitration to resolve future disputes, including personal injury claims as well as contractual claims, arising out of their purchases of consumer goods.<sup>6</sup> Frequently, one cannot purchase a car, apply for a credit card, open a checking or savings account in a bank, purchase stock on a major stock exchange, or take a cruise trip on a major cruise line without having to accept a non-negotiable contract that contains an arbitration clause mandating the arbitration of any and all disputes arising out of that contract.<sup>7</sup> Further, it is not unreasonable to expect that someday soon attorneys who work in law firms, like stock brokers, will be forced to sign employment contracts that contain non-negotiable arbitration clauses.<sup>8</sup> Therefore, many Americans, regardless of their social and economic backgrounds, will one day be denied a jury trial by their peers because they have previously been forced to sign adhesion contracts with arbitration clauses.

Importantly, some states have enacted statutes to protect their citizens, including statutes prohibiting the arbitration of disputes arising from both consumer contracts<sup>9</sup> and from employment contracts.<sup>10</sup> However, the federal government has intruded into states' abilities to protect their citizens, principally through the terms and conditions of section 2 of the Federal Arbitration Act (FAA) which makes an arbitration agreement in "a contract evidencing a transaction involving commerce," "valid, irrevocable, and enforceable" for both existing and future disputes "arising out of such contract [or] transaction."<sup>11</sup> Through statutory interpretation, the Supreme Court, in *Southland*

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5. See Maureen A. Weston, *Checks On Participant Conduct in Compulsory ADR: Reconciling The Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 593-97 (2001) (discussing concerns regarding ADR abuses).

6. See *id.*

7. Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 888 ("Binding arbitration clauses are now a common feature of banking, credit card, financial, health care, insurance, and communication service agreements, and agreements for the sale of consumer goods."); see *id.* at 909-11 (discussing the use of adhesion contracts).

8. Cf. *EEOC v. Luce, Forward, Hamilton & Scripps LLP*, 122 F. Supp. 2d 1080 (C.D. Cal. 2000) (issuing an injunction against law firm's use of arbitration agreement, as a condition of employment, to bind a secretary to arbitration of future Title VII discrimination claim); Mark Momjian, *Enforceability of Mandatory Binding Arbitration Clauses in Retainers*, 14 NO. 6 MATRIMONIAL STRATEGIST 1 (1996) (discussing a law firm's possible use of arbitration agreements in retainer agreements with clients).

9. See, e.g., N.Y. GEN. BUS. LAW § 399-c (McKinney 1996).

10. See, e.g., ARIZ. REV. STAT. ANN. § 12-1517 (West 1994); KAN. STAT. ANN. § 5-401(c) (2) (1991 & Supp. 2000).

11. 9 U.S.C. § 2 (2000).

*Corp. v. Keating*,<sup>12</sup> has interpreted section 2 of the FAA so that the statute is applicable in both federal and state courts, and in such a way that it preempts any state law that specifically regulates arbitration agreements and their potential abuses.<sup>13</sup> This Article argues that the Court should both reconsider and overrule *Southland's* statutory interpretation of the FAA.<sup>14</sup>

Part II contains a brief discussion of the historical development of arbitration in England and in America. Asserting that England is doing a better job than America, this section emphasizes the movement away from the initial use of community relations and norms to enforce arbitration agreements to a more formalized system of laws designed to maintain arbitration's flexibility while also ensuring fairness during the enforcement of arbitration agreements and awards. Part II also concludes that the Supreme Court should reexamine *Southland*, which holds that the FAA is applicable in state court proceedings.<sup>15</sup>

Part III discusses and critiques three theories of statutory interpretation (originalism, textualism, and the "evolutive" approach to a dynamic interpretation) that the Court and scholars should consider when deciding whether *Southland* and the Court's other precedents interpreting the FAA should be overruled. Part III concludes generally that the Court should employ an originalist theory of statutory interpretation.

Part IV offers a proposal that the Court should not use stare decisis to prevent the overruling of a Court precedent when it is infected by a Justice's partiality or other impermissible interest in the precedent's statutory interpretative outcome. The proposal further provides that the Court should not use stare decisis when a challenged statutory interpretation precedent is primarily based upon the Court's own political decision in favor of an interpretative outcome, instead of upon congressional intent and the purposes that underlie a disputed federal statute.

Additionally, Part IV's proposal asserts that lower-level federal courts should strictly construe the Court's erroneously-decided statutory interpretation precedents, making necessary exceptions to avoid a broad application to factual situations that are not directly on point with the erroneously-decided precedents. Also, Part IV contains a detailed discussion of the Court's major precedents that interpret section 2 of the FAA, showing how the Court has erroneously decided these precedents for the purpose of promoting its own preference for arbitration as a means of reducing courts' caseloads. Finally, Part V contains a sum-

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

13. *See id.* at 16. Generally applicable state laws can regulate arbitration agreements as long as these laws are applicable to non-arbitration contracts. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

14. *See infra* text accompanying notes 394-434.

15. *Southland*, 465 U.S. at 16.

mary of the discussions and conclusions stemming from the other parts of this Article.

## II. HISTORICAL PERSPECTIVE ON ARBITRATION

### A. *A Brief Historical Analysis of Arbitration in England*

The primary conclusion from this section is that, although England has struggled with courts' enforcement and judicial review of arbitration agreements and awards. England, unlike America, has struck a better balance between arbitration and consumer protection.

Arbitration, as a dispute resolution process, has existed for a long time. Merchants in England used arbitration at least as far back as the Medieval period.<sup>16</sup> One of the chief motivating factors supporting arbitration was traveling merchants' need for a speedy and efficient dispute resolution mechanism as they traded with other merchants in foreign markets.<sup>17</sup> Although community norms, enforced by ostracism, might have been sufficient to force merchants who resided in the same communities to honor their contracts, such influences were not sufficient to obtain the cooperation of merchants trading in foreign markets.<sup>18</sup> Therefore, merchants used arbitration to resolve contractual disputes with other merchants. They primarily used arbitration because arbitrators were merchants who had expertise in the relevant trade and were familiar with business norms and industry practices.<sup>19</sup> Merchants believed that arbitration was more expedient and economical than court adjudication, and that arbitration gave merchants a quick resolution of their disputes without the delay and acrimony of litigation, thereby allowing merchants to continue their trade relationships.<sup>20</sup> Therefore, despite English courts' initial hesitancy to enforce arbitration agreements and awards, the use of arbitration continued during the seventeenth and eighteenth centuries in England, at which time there were some amendments of English statutory laws to provide for the enforcement of arbi-

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16. 14 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 187 (A.L. Goodhart & H.G. Hanbury eds., 1964); WILLIAM CATRON JONES, *History of Commercial Arbitration in England and the United States: A Summary View*, in *INTERNATIONAL TRADE ARBITRATION: A ROAD TO WORLD-WIDE COOPERATION* 127, 129-30 (Martin Domke ed., 1958).

17. JOHN F. PHILLIPS, *ARBITRATION, LAW PRACTICE AND PRECEDENTS* 9-10 (1988).

18. *See id.*

19. Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 *UMKC L. REV.* 449, 459-60 (1996) (examining merchants' understanding and use of arbitration).

20. *See id.* By the Tudor period, merchant companies, when trading with other merchants, included arbitration agreements in their charters mandating arbitration of disputes with other merchants. JONES, *supra* note 16, at 130.

arbitration awards.<sup>21</sup>

However, despite an increase in the use of arbitration, courts of law did not readily enforce either arbitration agreements or arbitration awards.<sup>22</sup> Technical rules of law developed regarding the enforcement of arbitration awards,<sup>23</sup> including a rule that litigants could revoke arbitration agreements at any time before the arbitrator rendered his award.<sup>24</sup> However, by the close of the seventeenth century, England's courts considered submissions to arbitration (an arbitration agreement plus the appointment of an arbitrator) to be valid contracts.<sup>25</sup> They awarded monetary damages for breaches of the submissions, but still would not order specific performance of arbitration agreements.<sup>26</sup> Technical rules against the specific enforcement of arbitration agreements<sup>27</sup> were, in part, based upon courts' efforts to preserve their jurisdiction over legal disputes, a practice that some labeled the "ouster of jurisdiction" rule.<sup>28</sup>

Slowly, courts were forced to offer more protection for arbitration agreements and arbitration awards. In the eighteenth and the nineteenth centuries, England enacted several laws governing arbitration, which provided for increased court protection and enforcement of arbitration agreements.<sup>29</sup> However, along with increased protection, courts began

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21. JONES, *supra* note 16, at 131-34. In England, beginning in the eleventh century, merchants' use of arbitration led to the Law Merchant, a set of procedures governing the resolution of merchants' disputes through the use of arbitrators who were not lawyers, but who were learned in the norms and dealings of trades involving the merchants' commercial disputes. *See id.* Subsequently, the English courts incorporated Law Merchant by making it a part of the British judicial system, thereby subjecting arbitration to judicial rules that limited the enforcement of arbitration agreements and awards. *See* Michael A. Landrum & Dean A. Trongard, *Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights*, 24 WM. MITCHELL L. REV. 345, 402-03 (1998) (discussing the rise and fall of the British Law Merchant); *see also* Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 269-71 (1990) (examining the roots of arbitration in the British Law Merchant).

22. *See* 14 HOLDSWORTH, *supra* note 16, at 188-203 (discussing technical rules of English arbitration and various laws that were enacted to provide for better enforcement of arbitration agreements).

23. *See id.* at 188-96 (discussing technical rules that limited the enforcement of arbitration agreements and awards).

24. *See id.* at 190.

25. *See id.* at 189.

26. *See id.* The monetary damages were mostly nominal. *See* 14 HOLDSWORTH, *supra* note 16, at 189. In a further attempt to force compliance with agreements to arbitrate, a party to arbitration could have an opposing party give a bond payable in the event the party did not abide by arbitration agreement. *See* 14 *id.* However, an unwilling party could still refuse arbitration and pay the bond instead. *See* 14 *id.*

27. *See id.* at 193.

28. *See id.* at 190.

29. *See* 14 HOLDSWORTH, *supra* note 16, 196-97. It appears that the English statute of 1698 was instrumental in promoting court's enforcement of parties' agreement to arbitrate in that it provided that parties could agree that "their submission shall be made a rule of court," meaning that the court could then issue an order to enforce the arbitration agreement. *Id.* at 197. A subsequent law in 1833 provided that an agreement to arbitrate under the 1698 statute could not be

to exercise more control over arbitrators' awards and the arbitration process.<sup>30</sup> Breaking with past practices, courts of equity, in addition to other acts of judicial review, began to set aside arbitrators' awards "for errors in law or fact appearing on the face of the award."<sup>31</sup>

Subsequently, during the twentieth century, the English Parliament enacted several arbitration acts, including the Arbitration Acts of 1950, 1975, 1979, and 1996, in part to reconcile the tension between courts' judicial review of arbitration awards and concerns regarding the speed and finality of arbitration awards.<sup>32</sup> Several provisions of the Arbitration Act of 1996 (Act of 1996) are important. First, in certain circumstances, a party to an arbitration agreement can obtain judicial review of "question of law arising out of an award."<sup>33</sup> Second, arbitration agreements involving consumer contracts are not enforceable if they have "not been individually negotiated" and they "cause[] a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."<sup>34</sup>

By comparison, the FAA,<sup>35</sup> as discussed below, does not contain these two protections.<sup>36</sup> Therefore, one can reasonably conclude that English arbitration offers more consumer protection than arbitration under the FAA, which is the most important arbitration law in America for contracts affecting interstate commerce. At a minimum, Congress should engage in a debate to determine whether additional consumer protection measures are needed in America to protect American citizens. At best, Congress should amend the FAA to exclude consumer contracts from the scope of section 2, and, in some situations, should provide for judicial review of questions of law that an arbitrator has decided during arbitration.<sup>37</sup> An amendment providing for judicial re-

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revoked without leave of court. *Id.* Later, pursuant to the Common Law Procedure Act of 1854, courts had the power to stay any court filing in contravention of a party's agreement to arbitrate and to appoint an arbitrator to enforce an agreement to arbitrate. *See id.*

30. *See id.* at 198-204.

31. 14 HOLDSWORTH, *supra* note 16, at 201. With more court enforcement of arbitration agreements, courts of equity, including those in the nineteenth century, created equitable rules to avoid injustices that might result from an arbitrator's faulty decision. *See id.* at 201. One commentator states that "if on partiality a court of equity should not relieve, arbitrators would have too great a power, and might abuse it from corrupt motives." *Id.* This commentator concluded that the substantial control that courts had over the judicial review of arbitrators' awards was instrumental in maintaining the development of the rule of law, despite the resolution of disputes by arbitrators through arbitration which was a non-judicial private means of resolving disputes. *See id.*

32. Matthieu De Boisseson, *The Arbitration Act of 1996 and the New ICC Arbitration Rules 1998: A Comparative Approach*, 1(2) INT'L ARB. L. REV. 68, 68-73 (1998).

33. The Arbitration Act of 1996, c. 69(1) (Eng.).

34. *See id.* at c. 89(1); Unfair Terms in Consumer Contracts Regulations, SI 1999, No. 2083, reg. 5.

35. 9 U.S.C. § 1 (2000).

36. *See generally* 9 U.S.C. §§ 1-16 (2000) (central provision of the FAA).

37. After the Court's recent decision in *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302

view of questions of law would especially be appropriate when consumers, employees, and others are bound by adhesion arbitration contracts against their free will. In such cases, one cannot legitimately say that these persons have voluntarily given up their rights to judicial review in return for some other benefits that arbitration might provide. Therefore, it would only be appropriate for Congress to provide these coerced persons with an important right to have judicial review of questions of law so that they would have at least one important right that their fellow citizens (who have not been coerced into arbitration) have. Admittedly, providing for judicial review of arbitrators' decisions on questions of law would possibly slow down the resolution of disputes, increase courts' caseloads, and increase the costs of dispute resolution.

But, fundamental fairness and justice seems to dictate that persons who have been coerced into arbitration should have judicial review of arbitrators' legal decisions even if delay and costs of dispute resolution increase. However, until Congress takes such action, the Court has the responsibility of properly interpreting section 2, a responsibility that it has not adequately performed, as discussed below in Part IV.

### B. *A Brief History of American Arbitration*

Mostly, the English arbitration tradition influenced the development of arbitration in America.<sup>38</sup> Although during the Colonial period Americans arbitrated all types of disputes, the use of arbitration grew slowly,<sup>39</sup> due in part to technical rules surrounding the enforcement of

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(2001), wherein the Court interpreted section 1 of the FAA (which excludes from the FAA's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce") as excluding only transportation employees' employment contracts from the arbitration requirements of section 2, several congresspersons introduced a bill in Congress to exclude all employment contracts from the FAA's coverage. *Id.* at 1306 (quoting 9 U.S.C. § 1); H.R. 2282, 107th Cong. § 1 (2001). A similar bill to exclude consumer contracts and provide for judicial review of an arbitrator's decision involving questions of law should be introduced and enacted. The rationale for a consumer contract exclusion is that it would provide recognition that a substantial number of consumer contract arbitration agreements are contracts of adhesion that consumers have involuntarily entered into because they had no real choice; a consumer contract exclusion would provide them with necessary protection against such coercion.

38. Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 425-26 (1998). Harding stated that:

[a]lthough arbitration was commonly practiced in the United States since the colonial period, federal and state courts, following common law inherited from England, refused to specifically enforce agreements to arbitrate, regardless of whether the agreement concerned arbitration of an existing controversy or of a dispute that arose after execution of the agreement to arbitrate.

*Id.* (footnotes omitted).

39. See KELLOR, *supra* note 4, at 4-8 (discussing the early use of arbitration in America).



arbitration agreements and awards,<sup>40</sup> disputants' preference for court adjudication in a legal system without a backlog in cases,<sup>41</sup> and the fact that prior to the Arbitration Society of America there was no organized movement or organization that promoted and educated others about arbitration's uses and benefits.<sup>42</sup> However, in 1920, New York passed an arbitration act that made agreements to arbitrate existing and future disputes binding and enforceable.<sup>43</sup> Thereafter, along with the creation of the Arbitration Society of America, the use of arbitration increased and other states and the federal government enacted arbitration acts based upon the New York law.<sup>44</sup>

Despite initial judicial hostility to the enforcement of arbitration agreements, early arbitration in America had some similar features to arbitration in England. Both systems of arbitration recognized the importance that community relationships and societal norms played in arbitration.<sup>45</sup> As in England, local arbitration in the American colonies initially depended upon community norms, good faith enforcement, and ostracism, while foreign arbitrations depended upon a need for a quick resolution of disputes so that trading merchants could continue their trading relationships.<sup>46</sup> Like in England, when local communities became less insular and citizens of one town became involved in disputes with those of other towns, formal rules were needed to ensure that merchants and others honor their arbitration agreements and awards.<sup>47</sup> Therefore, legislatures passed laws that gave courts the responsibility of enforcing arbitration agreements and awards.<sup>48</sup> With more involvement by courts, arbitration became more formal and, as in England, more formality led to courts playing a larger part in reviewing the procedures and substantive results of arbitration,<sup>49</sup> eventually under the guidance of state arbitration statutes such as the one in New York.<sup>50</sup>

Several general principles from this brief history are relevant to the

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40. See *id.* at 5.

41. See *id.* at 6.

42. See *id.* at 11-14.

43. See *id.* at 10; W.F. Dodd, *Significant Phases of Current Legislation Arbitration*, 6-Sept. A.B.A. J. 1, 20 (1920) (discussing arbitration laws in New York and Illinois).

44. See KELLOR, *supra* note 4, at 11-13.

45. See PHILLIPS, *supra* note 17, at 9-10 (discussing local community relationship and enforcement of arbitration agreements); see generally Bruce H. Mann, *The Formalization of Informal Law Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443 (1984)

46. See COLE, *supra* note 19, at 458-60 (discussing merchants' use of arbitration agreements); Mann, *supra* note 45, at 448-56 (same).

47. See Mann, *supra* note 45, at 456-63.

48. See *id.* at 468-77 (discussing Connecticut's enactment of a statute to regulate arbitration).

49. See *id.* at 475-76 ("After the statute, disputants submitted to arbitration with increasingly legalistic expectations. . . . The factors that led to procedural formalization also produced a substantive formalization of awards.").

50. See KELLOR, *supra* note 4, at 10-13.

future of arbitration in America. First, community and community relationships are not as important today for either the enforcement of contracts or for the operation of disputes resolution processes, and this fact should play a part in courts' understanding and enforcement of arbitration agreements.<sup>51</sup> Regarding fundamental fairness, to the extent that arbitration does not allow the same type of judicial review and procedures as court adjudication, state legislatures (for disputes within their jurisdictions) and the federal government (through amendments to the current FAA) should make certain that arbitration provides appropriate procedures and substantive protections. Different states might have different opinions regarding the type of procedural and substantive protections that are warranted to protect their citizens during arbitration. Each state should have the opportunity to fashion its own laws to provide procedural and substantive protections during arbitration. Therefore, it is all the more important that the United States Supreme Court re-evaluate its decision in *Southland Corporation v. Keating*<sup>52</sup> and hold that the FAA is not applicable to state court proceedings, as discussed in Part IV of this Article. This would allow states to provide whatever procedural and substantive protections they deem necessary to protect their citizens. Generally, states have provided such protection when arbitration has become more formalized.<sup>53</sup>

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51. See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 81-84 (1999) (discussing merchants' and trade organizations' use of arbitration because they had a community of norms and customs that allowed them to self-regulate the resolution of their disputes). Regardless of the importance of arbitration in early colonial America and in England—where merchants and others used arbitration because arbitrators understood community and business norms and customs—today, in modern America with its technological advances in the rapid transfer of people and information throughout the nation, consumers are less wedded to any particular seller (especially for many consumer goods that consumers can purchase from many different sellers). Cf. M. Chase Burritt, *Lodging Industry Fundamentals Remain Strong Despite Cautious Stance on New Development*, REAL EST. ISSUES, Apr. 1, 2001, at 16, available at 2001 WL 22416856 (asserting that Generation X, "as a result of the Internet and the Information Age, are more consumer savvy and have less consumer loyalty than boomers"). Unlike in Colonial America, or in seventeenth or eighteenth century England, today's consumers appear less interested in maintaining ongoing relationships with sellers of consumer goods. As such, they appear to be less concerned about whether the filing of lawsuits (if they experience problems or injury from consumer goods) will terminate their relationships with sellers. Because there does not appear to be a necessity for consumers to deal with any one particular seller of consumer goods, the same arguments that were made in England and in early Colonial America, that arbitration was needed from a quick and less acrimonious resolution of disputes to preserve trading relationships between purchasers and sellers, are not persuasive today. In other words, consumers should be given a real option of deciding whether they want to engage in arbitration to maintain trading relationships with sellers, or whether they want to file lawsuits and engage in court adjudication despite a possibility that their trading relationships will be destroyed. The enforcement of adhesion arbitration agreements, which sellers force upon consumers, does not provide such choices.

52. 465 U.S. 1 (1984).

53. See Mann, *supra* note 45, at 475-77.

### C. *The Federal Arbitration Act*

As stated above, courts in America initially had the same hesitancy towards arbitration as English courts. Although merchants and others experimented with various means of obtaining enforcement of arbitration agreements—including the use of deeds, bonds, and promissory notes—these methods were inadequate as there were no guarantees that courts would specifically enforce arbitration agreements.<sup>54</sup> Eventually, states began to enact statutes that provided for the specific enforcement of arbitration agreements, with New York being the first state to codify such a law in 1920.<sup>55</sup> Subsequently, various trade and business groups and the American Bar Association lobbied for passage of the Federal Arbitration Act of 1925,<sup>56</sup> which created a mechanism for the specific enforcement of arbitration agreements and awards.<sup>57</sup> Section 2 of the FAA provides as follows:

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>58</sup>

The language in section 2 has raised questions regarding its scope. The Court has interpreted section 2 on several occasions, and the remaining portions of this Article involve the Court's statutory construction of section 2, and the Court's use of *stare decisis* to avoid a reexamination of *Southland Corporation v. Keating*,<sup>59</sup> one of its leading cases interpreting section 2's scope, which held that the FAA is applicable to state court proceedings. However, before engaging in a detailed discussion of the Court's cases interpreting section 2, Part III of

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54. *See id.* at 458-63.

55. KELLOR, *supra* note 4, at 10.

56. 9 U.S.C. § 1 (2000). By enacting the FAA, Congress intended "to override a longstanding judicial hostility to arbitration agreements," "to place agreements to arbitrate on an equal footing with other contract provisions," and "to provide for more speedy and cost-effective adjudication." William F. Kolakowski III, Note, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171, 2187 (1995).

57. 9 U.S.C. §§ 1-16 (2000).

58. *Id.* § 2. Other provisions of the FAA grant courts the authority to enforce arbitration agreements and provide for limited judicial review. *See id.* §§ 3-16.

59. 465 U.S. 1 (1984).

this Article discusses several schools of thought regarding statutory interpretation, a subject that is one of the primary focuses of this Article. One's attitude towards the Court's use of its precedents to enforce section 2 probably depends upon one's attitude regarding these schools of thought, and the schools' conclusions regarding the Court's proper role when interpreting federal statutes.

### III. THEORIES REGARDING STATUTORY INTERPRETATION

#### A. *Originalism*

An exhaustive discussion of the many different theories regarding the proper method of statutory interpretation is beyond the scope of this Article.<sup>60</sup> A discussion of only three relevant theories follows. First, some courts and legal commentators adhere to the originalist or "intentionalism" school, and they believe that courts, when evaluating the meaning and scope of statutes, should arrive at an interpretation or meaning that enforces the intent of the original drafters of the statutes.<sup>61</sup> Originalists, in part, base their views upon a constitutional separation of powers among the legislature, the executive, and the judiciary branches of government,<sup>62</sup> and upon Article 1, section 7's scheme mandating congressional enactment and presentment of laws to the president.<sup>63</sup> Therefore, originalists believe that the appropriate role of the judiciary is the role of an interpreter of statutes that Congress has enacted, and not the role of a judicial legislator that creates its own laws through statutory interpretation.<sup>64</sup> Consistent with an originalist philosophy, a court that is interpreting a statute should ascertain the intent of the original drafters of the statute through an examination of the statute's language and legislative history.<sup>65</sup> The question that the originalist interpreter asks is: What meaning would the original drafting by Congress give to the relevant statute, and how would it apply the statute's meaning to the interpretative question that the present court must answer?<sup>66</sup>

Some commentators have divided originalism into at least two subgroups. One group is intentionalism, which mandates an evaluation of a

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60. See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994) (providing a detailed and exhaustive discussion of various theories of statutory interpretation and their histories).

61. *Id.* at 14.

62. *Id.*

63. *Id.* at 19-20.

64. Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 810-11 (1994).

65. *Id.* at 813.

66. See *id.* at 813-14.

statute's language and legislative history to ascertain either an overt statement of congressional intent or a "latent" statement of congressional intent.<sup>67</sup> The other group is purposivism, which mandates an evaluation of the same sources—a statute's language and legislative history—to obtain the purposes that underlie the statute so that the interpreting court can apply the purposes to specific facts when deciding how the statute should be applied to the case before the court.<sup>68</sup> Purposivism, unlike intentionalism, does not rely too heavily upon an ascertainment of Congress's true intent and true purpose because ascertainment might either be too difficult or impossible to obtain. Instead, those in the purposivism camp would attempt an ascertainment of the reasonable purposes underlying the statute, and they would try to apply these purposes to the present facts to obtain an interpretation that is consistent with the statute under interpretation as well as with other statutes in the surrounding statutory framework.<sup>69</sup> Therefore, purposivism, through the application of general purposes to new or different factual situations, gives courts more discretion when interpreting a statute than intentionalism.<sup>70</sup>

In some respect, both subgroups of originalism support democracy to the extent that Congress—the body whose intent is decisive when interpreting a statute—is elected by the people who must comply with the statute.<sup>71</sup> As such, it seems only reasonable that originalism should be a desirable theory of statutory interpretation given the separation of powers and functions among the different branches of government.<sup>72</sup> Congress, the branch with the assigned constitutional role of enacting federal statutes (and implicitly the role of establishing the public policy norms underlying such statutes) should have its intent enforced by the judicial branch through a proper statutory interpretation of federal statutes.<sup>73</sup> The Supreme Court has ostensibly accepted its role as an "interpreter," frequently asserting that, during statutory interpretation, the Court's objective is to ascertain and apply congressional intent.<sup>74</sup>

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67. *Id.*

68. *Id.* at 815-17.

69. Redish & Chung, *supra* note 64, at 817.

70. *Id.*

71. *Id.* at 811.

72. *But see* William N. Eskridge, Jr., *All About Words, Early Understandings of The "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) (providing an argument that Congress's discussion of statutory interpretation occurred during Congress's debate of Article III and "judicial powers" among the various federal courts and, therefore, notions of separation of powers and bicameralism are not appropriate sources to support originalism).

73. Redish & Chung, *supra* note 64, at 811.

74. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). The Court stated that, "[s]ince pre-emption claims turn on Congress's intent, we begin as we do in any exercise of statutory construction with the text of the provision

However, some scholars persuasively argue that originalism, in both its intentionalism and purposivism forms, is not workable in hard cases primarily because it produces indeterminate answers to the interpretative questions before the court.<sup>75</sup> In other words, these scholars argue that, despite the statutory language and legislative history, it is still sometimes difficult to ascertain congressional intent; Congress might have had no intent regarding the specific interpretative question because it did not think about the specific issue or subject presently before the court, and because key legislators might have engaged in "strategic behavior" when they drafted legislative history materials and reports to mislead courts and others regarding the meaning of a statute.<sup>76</sup> Critics also assert that it would be difficult to apply intentionalism as envisioned by Hart and Sacks' legal process theory<sup>77</sup> if, in addition to ascertaining the purpose of a specific statute an interpreter must "fit the statute and its application into an ongoing, coherent legal system."<sup>78</sup>

### B. Textualism

The second school of thought is textualism. Textualists believe that the specific language of a statute is the only authoritative source that courts should review when interpreting a statute.<sup>79</sup> The only relevant congressional intent is the intent that a court can glean from the plain meaning of the statutory language.<sup>80</sup> A Textualist eschews and rails against judicial review of legislative history and other materials that are not contained in a statute's language;<sup>81</sup> they believe that a prohibition

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in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *Id.* (citations omitted).

75. ESKRIDGE, *supra* note 60, at 16-33.

76. *Id.*

77. *But see id.* at 36 (asserting that, given arguments against Hart and Sack's legal process version of intentionalism, a beneficial role of their theory might be that, instead of being a theory based upon the supremacy of legislative enactment, the theory "is about the development and maintenance of a rational legal system in which the courts are the shepherds of purpose and the guardians of principle").

78. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 35 (1988) (describing the goals and limitation of Hart and Sack's legal process version of intentionalism).

79. See Redish & Chung, *supra* note 64, at 818-19. For a discussion of and support for textualism, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14-25 (Amy Gutmann ed., 1997). Justice Scalia states that "[r]egardless, the decision was wrong because it failed to follow the text. The text is the law, and it is the text that must be observed." *Id.* at 22. See also Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 64 (1994) (supporting textualism and defining it as "sticking to lower levels of generality, preferring the language and structure of the law whenever possible over its legislative history and imputed values").

80. SCALIA, *supra* note 79, at 22; Easterbrook, *supra* note 79, at 64; Redish & Chung, *supra* note 64, at 818.

81. Redish & Chung, *supra* note 64, at 819.

against using extrinsic sources will prevent courts from engaging in judicial activism through the manipulation of legislative history and other extrinsic materials.<sup>82</sup> Consistently, textualists believe that a plain meaning interpretation furthers the constitutionally mandated separation of powers between the different branches of the American government, and that a statute's language is the only authoritative source that effectuates the meaning of the presentment requirement contained in Article 1, Section 7 of the United States Constitution.<sup>83</sup>

Justice Scalia is the most outspoken textualist member of the Court; he supports a "holistic textualism" approach whereby a court should obtain the plain meaning of the relevant statutory provision by examining both similar language in other provisions of the same statute and similar language in other statutes.<sup>84</sup> Dictionaries and canons of statutory interpretation assist textualist in their efforts to garner a statute's plain meaning.<sup>85</sup>

Critics have emphasized many of textualism's weaknesses. First, the meaning of statutory language is often indeterminate, as Congress frequently drafts statutes that contain ambiguous language.<sup>86</sup> Therefore, in relying upon statutory language only, and by trying to holistically construe that language in conformity with the language of other statutes (some of which might be more current than the statute under interpretation), a textualist approach can lead to an interpretation that is contrary to the congressional intent underlying a statute.<sup>87</sup> Therefore, some scholars are critical of textualist beliefs that the only relevant intent is expressed in statutory language; these scholars believe that courts should review legislative history at least for the purpose of confirming a plain meaning interpretation of a statute.<sup>88</sup>

Second, textualism, to the extent that a statute's language does not fully disclose the underlying congressional intent and purpose, can cause just as much judicial activism as do other approaches to statutory interpretation.<sup>89</sup> In other words, conservative judicial activism can occur when statutory language is ambiguous and a holistic textualism cannot produce an applicable plain meaning interpretation of the statute (or when a statute's plain meaning is such that the statute appears inapplicable to the specific interpretative question); however, legislative his-

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82. *Id.* at 819-21.

83. SCALIA, *supra* note 79, at 14-25; ESKRIDGE, *supra* note 60, at 34, 112-118; Redish & Chung, *supra* note 64, at 822.

84. Redish & Chung, *supra* note 64, at 820; ESKRIDGE, *supra* note 57, at 41-47.

85. Redish & Chung, *supra* note 64, at 819-20.

86. ESKRIDGE, *supra* note 60, at 38.

87. *See id.* at 41-47 (discussing "indeterminacy and inadequacy of holistic textualism").

88. *See* Redish & Chung, *supra* note 64, at 830.

89. *See id.*

tory and other extrinsic materials offer, if the Court would only reasonably examine them, a reasonable interpretation of the congressional intent and purpose underlying the statute, which establishes the applicability of the statute.<sup>90</sup> In such situations, a textualist interpretation that the statute is not applicable would be against an identifiable congressional intent. The textualist interpretation would be judicial activism in favor of the status quo. Whether this is a conservative status quo or a liberal status quo depends upon the Court's background, values, and agenda.<sup>91</sup>

Third, some scholars decry textualism's ability to teach or coerce Congress into drafting clearer and less ambiguous statutes, because "it ignores the inescapable ambiguities and uncertainties that inherently flow from attempting to apply general directives to specific fact situations."<sup>92</sup>

### C. *Dynamic Statutory Interpretation and the "Evolutive" Approach*

Unlike textualism (which limits courts to finding congressional intent from plain meaning language) and originalism (which asserts that courts should look to the past to find the enacting Congress's intent and purpose for a statute), "dynamic statutory interpretation" employs an "evolutive" approach to statutory interpretation. Although describable in different ways, the evolutive approach essentially means that courts should be forward looking, and that instead of being limited to the enacting legislature's intent and purpose, courts should look to the present context into which the statute is being interpreted and incorporate the societal and legal changes that have occurred since the enactment of the statute.<sup>93</sup> Professor William N. Eskridge, Jr. describes this school of thought as follows:

Because they are aimed at big problems and must last a long

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90. See *id.* at 819 (discussing the "seemingly unlimited judicial interpretation discretion every time an ambiguity is found to exist").

91. ESKRIDGE, *supra* note 60, at 42. Professor Eskridge makes the following observations:

This holistic textualism is the best effort textualism can make to be the foundationalist method for statutory interpretation. This methodology, too, fails because it does no better than plain meaning to yield determinate interpretations, because the interpreter's perspective remains critical, and because even the most ardent new textualist is willing to sacrifice plain meaning for other values.

*Id.*

92. Redish & Chung, *supra* note 64, at 831.

93. See ESKRIDGE, *supra* note 60, at 48-53. For additional discussion of, and support for, a dynamic statutory interpretation, see generally William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (arguing for a "critical pragmatism" that honestly acknowledge that the Court goes beyond the text during statutory interpretation). Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Yonger*, 84 MINN. L. REV. 199 (1999) (arguing the same point).



time, statutory enactments are often general, abstract, and theoretical. Interpretation of a statute usually occurs in connection with a fact-specific problem (a case or an administrative record) which renders it relatively particular, concrete, and practical. As an exercise in practical rather than theoretical reasoning, statutory interpretation will be dynamic. It is a truism that interpretation depends heavily on context, but the elasticity of context is less well recognized. The expanded context of cases and problems engenders dynamic interpretations. Because statutes have an indefinite life, they apply to fact situations well into the future. When successive applications of the statute occur in contexts not anticipated by its authors, the statute's meaning evolves *beyond* original expectations. Indeed, sometimes subsequent applications reveal that factual or legal assumptions of the original statute have become (or were originally) erroneous; then the statute's meaning often evolves *against* its original expectations.<sup>94</sup>

According to the "evolutive" approach, Congress often enacts statutes that contain general language that courts must apply to new situations, many of which Congress might not have anticipated.<sup>95</sup> In such situations, instead of having the ability to punt the issue to another decision-maker, courts must resolve the interpretative questions by taking into consideration present policies and contexts, including post-enactment developments in the societal and legal frameworks.<sup>96</sup> The "evolutive" approach acknowledges that courts' present interpretations of statutes might be inconsistent with Congress's "original expectations" as to statutory intent and purpose, especially if Congress's original assumptions were based upon erroneous facts and understandings.<sup>97</sup>

Because the "evolutive" approach can lead to a present statutory interpretation that is "beyond" and "against" Congress's original understanding, some criticize the approach. First, one criticism is that the approach can result in judicial lawmaking by judges who are not democratically elected and therefore not responsive to political control and pressures, in contravention of separation of powers notions and bicameralism as understood in Article 1, Section 7.<sup>98</sup> Second, some

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94. ESKRIDGE, *supra* note 60, at 48-49.

95. *See id.*

96. *See id.*; Redish & Chung, *supra* note 64, at 835-36.

97. ESKRIDGE, *supra* note 60, at 48-49.

98. Redish & Chung, *supra* note 64, at 831-58. Some scholars have offered rules to limit judges' discretion under the "evolutive" approach. Professor Eskridge states that:

the Court would overrule a statutory precedent when the reasoning underlying the precedent has been discredited over time; the precedent's consequences are positively troublesome, unfair, or contrary to current statutory policies; and practical experience suggests that the statutory goals are better met by a new rule that does not unduly undermine the reliance interests of Congress and private persons who

critics believe that supporters of a dynamic interpretation do not limit themselves to applying the "evolutive" approach to "hard cases," where the answers to interpretative questions cannot be easily ascertained.<sup>99</sup> They claim supporters also apply the doctrine to easy cases to obtain desirable substantive and normative outcomes.<sup>100</sup> Third, critics argue that, in using an "evolutive" approach, courts can manipulate statutory language and extrinsic materials, using their own conclusions regarding the evolution of social and legal norms to produce desired conclusions about the need for the court's updating of statutes.<sup>101</sup> Fourth, critics of the "evolutive" approach do not think that either congressional inertia or any other shortcomings in Congress warrant the grant of lawmaking authority to the judiciary.<sup>102</sup> In other words, Congress, not the courts, should have the responsibility of updating old statutes or enacting new ones to deal with the current social and legal frameworks.<sup>103</sup>

#### D. *The Author's General Critique of Statutory Interpretation Theories*

In an imperfect world, it seems reasonable that the originalist theory is the theory most in line with our representative democratic form of government. At a fundamental level, any critique of originalism should recognize that we live in an imperfect world with imperfect people, imperfect laws, an imperfect Congress, and imperfect judges. Recognition of this inherent imperfection should minimize one's criticism of originalism. First, it is not necessarily unreasonable to believe that Congress might enact laws that protect interest groups more than they protect the general public; that Congress might intentionally leave the statutory language of these laws ambiguous for strategic purposes; that Congress might intentionally manipulate legislative history to mislead courts and others about Congress's true intent and purposes; and that judges, pursuant to their own background frame of reference, might manipulate statutory language, legislative history, and current social and legal contexts. However, none of these arguments are sufficient to support either the textualist or the "evolutive" scholars' views that Congress's original intent and purpose should not be the controlling

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reasonably acted upon the basis of the old rule. The Court should simply abandon the rhetoric and grudging practice of the super-strong presumption against overruling statutory precedents and adopt this evolutive approach of normal *stare decisis*, as it has in some statutory cases, such as *Boys Market*.

William N. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1392 (1988).

99. See Redish & Chung, *supra* note 64, at 841-57 (criticizing "dynamic interpretation").

100. See *id.*

101. See *id.* at 844.

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

103. See *id.*

inquiry during statutory interpretation. Congress's original intent and purpose should be controlling because the Constitution provides for separation of powers and for bicameralism, as reflected in Article 1, Section 7.<sup>104</sup> Consistent with these notions, Congress has primarily functioned as the chief lawmaking institution in America, and there has been no sustained effort by the American citizenry to alter Congress's lawmaking functions. Therefore, Congress's original intent and purposes in enacting statutes should be given paramount importance during statutory interpretation.

Despite some arguments that the Constitution and bicameralism do not prevent the federal courts from making laws through statutory interpretation,<sup>105</sup> the United States Supreme Court has adopted the position that it does not make laws, but that it interprets laws that Congress makes.<sup>106</sup> Regardless of whether the Court's position stems from a mistake regarding the Court's constitutional authority or from the Court's belief that enacted laws should have a democratic foundation that can only stem from representatives who have been duly elected by the people, the Court has articulated its originalist position as to how it should conduct statutory interpretation. There is no proof that another ap-

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104. For criticism of arguments based upon bicameralism and separation of powers, see ESKRIDGE, *supra* note 60, at 230-33.

105. *See id.*

106. *Cf. Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 433 (1987) (O'Connor, J., dissenting) (citing *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) and asserting that the Court relies upon statutory language and legislative history when determining congressional intent). Regardless of what other meaning the word "originalism" might have, when this author advocates that the Court should use the originalism theory to control its statutory interpretation, he means that Congress's intent and purposes should determine how the Court interprets and applies federal statutes. If a statute's language alone discloses Congress's intent and purposes, then the Court might rely upon what appears to be a textualist analysis. However, even when the text is clear or appears to be clear, the Court should normally still review the statute's legislative history and other extrinsic sources to confirm whatever conclusion it might have reached from its textual analysis. Regarding a dynamic interpretation which might be appropriate when the Court is interpreting a constitutional provision, the Court should not use a dynamic interpretation that would produce an interpretative result that is at odds with Congress's original intent and purposes. Nor should the Court dynamically construe a statute to make it applicable to new facts and situations that were neither within the contemplation of Congress at the time of the statute's enactment, nor capable of falling within the general purposes of the statute when the Court reasonably interprets the purposes. However, at least one scholar believes that the Court's use of one of the three theories of statutory interpretation (originalism, textualism, and a dynamic approach) should depend upon the context in which the Court is analyzing the statute. William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 *Nw. U. L. Rev.* 629, 689 (2001) ("Judges tend to adopt the theory of interpretation appropriate to the community responsible for the issue before them. . . . Each theory and model is valid. The rub comes in determining which theory applies when."). For a comparison of the outcomes produced by textualism and a dynamic statutory interpretation, see generally Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 *Nw. U. L. Rev.* 1409 (2000) (discussing textualism's and dynamic interpretation's principles and criticisms and evaluating whether these theories of statutory interpretation affect the ultimate outcomes of Judge Richard Posner' and Judge Frank Easterbrook's judicial decisions).

proach to statutory interpretation would produce better results in the long run.

The fact that the Court might not always follow its own position, and that it might have engaged in secret judicial lawmaking, used a textualism approach to interpretation, or used a dynamic interpretation approach should not surprise anyone.<sup>107</sup> Similarly, that the members of the Court bring their own biases, prejudices, and frame of references to a legal text is not shocking either;<sup>108</sup> rather, it is a more compelling reason why those who are really concerned about democracy should not encourage the Court and lower-level federal courts to engage in extensive judicial lawmaking during statutory interpretation.

Just as the member of Congress might manipulate the lawmaking process in the various ways that some scholars have asserted in opposition to an originalist theory of statutory interpretation,<sup>109</sup> so can the Court and lower-level courts for the reasons that some scholars have noted in opposition to textualism and the "evolutive" approach. These reasons might include courts' desires to interpret statutes conservatively or liberally to enhance their judicial careers and futures,<sup>110</sup> their own conscious or unconscious racism or gender bias, and their own economic or political philosophies.<sup>111</sup>

As a criticism of textualism, the textualist argument that the statutory text should be the only authoritative source that courts interpret is not very persuasive given the fallibility and inherent imperfection of the Court and the federal judiciary in general (which is probably no greater than or less than that of the public in general). Because statutory text is subject to manipulation and judges are imperfect, confining courts to a review of statutory text is no more a guarantee of less judicial activism and judicial lawmaking than is allowing courts to review legislative history and other extrinsic sources in search of original congressional intent and purpose.<sup>112</sup> This is especially true because some scholars have recognized that a textualist plain meaning interpretation can lead

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107. See generally ESKRIDGE, *supra* note 60.

108. See *infra* notes 109-11.

109. See Redish & Chung, *supra* note 64, at 857.

110. See *id.*

111. Given the creative manner in which judicial manipulation can occur as judges interpret increasingly complex statutes with ambiguous statutory language and legislative histories, the only brake or mitigating factor against activist judges is that either an appellate court or Congress (in the case of the United States Supreme Court) can overrule the Court's decisions. Clearly federal judges, who have life tenure during good behavior, have little to fear from any popular criticism of their opinions. This is especially true of the insular Supreme Court, which is so aloft that it will not even allow cameras at its proceedings. Apparently, it is more concerned with protecting the anonymity of its Justices than it is about educating the masses about the judicial function.

112. See Redish & Chung, *supra* note 64, at 818-19.

to judicial activism<sup>113</sup> as liberal or conservative judges interpret alleged plain meaning language in a manner that promotes their own judicial philosophies and economic positions.<sup>114</sup>

In opposition to a dynamic interpretation or the “evolutive” approach to statutory interpretation, it is reasonable to believe that judicial fallibility and imperfection are caution enough against giving judges too much discretion to use the present context, with its changed social and legal frameworks, to interpret statutes in contravention of ascertainable congressional intent and purpose.<sup>115</sup> Just as textualist judges can manipulate text to secretly engage in their own brand of judicial lawmaking, the dynamic judge can also manipulate statutory text, legislative history, and extrinsic evidence of social and legal evolution.<sup>116</sup>

However, to the extent that dynamic interpretation scholars would cut back on their beliefs that a judge can, pursuant to a changed social and legal context, render interpretations contrary to knowable congressional intent and purpose, dynamic interpretation does not appear to be too distant from the purposivism branch of originalism as posited by Hart and Sacks’ legal process arguments.<sup>117</sup> In other words, an expansive use of congressional purpose (to the extent that congressional purpose is knowable) could arguably lead the Court and lower-level federal courts to engage in an “evolutive” interpretation of statutes such that old statutes can be applied to new facts operating in a changed or evolved social and legal context. This would be, to some extent, a happy meeting between originalism and dynamic interpretation.

In sum, as originalists advocate, the better approach would be one that attempts to preserve the separation of powers between the different branches of government, with their democratic and majoritarian underpinnings. To the extent that Congress’s intent and purposes are discernible, those should control. Whether statutes are applicable to new factual situations should depend upon whether congressional intent and purpose are served by the new application of the statutes. This conclusion also applies to “hard cases” where the courts should rely upon the best available evidence to ascertain and apply congressional intent and purpose.

Although it is not unreasonable to believe that congressional manipulation of statutory meaning does occur, it would appear that each congressperson has some means of knowing a great deal about the

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113. *See id.*

114. *See id.*

115. Redish & Chung, *supra* note 64, at 857.

116. *See id.*

117. Eskridge, *supra* note 60, at 25-34.

meaning of statutes before they are enacted if they would take the time to discover and learn the relevant facts.<sup>118</sup> If they do not take such time, and vote to enact statutes without knowing the specific congressional intent or purposes underlying the statutes, their ignorance is no excuse (as it frequently would not be if they were to sign a contract without reading it). In that event, one cannot reasonably blame courts for relying upon available statutory language and legislative history (even imperfect committee reports and floor debates) if these are the only sources of the enacting Congress's intent and purpose.

One would have to think that, if Congress's enactment of statutes was so haphazard that intelligent congresspersons and their staffs, many of whom are attorneys, cannot discover and understand the enacting Congress's intent and purpose, some of the congresspersons would take action to correct the problem. If they do not, then maybe it is not unreasonable to deem that they have acquiesced in the flawed systems because they obtain some benefit from it. In any event, their actions, as representatives of the people, are binding on the people. If the people become sufficiently displeased by a flawed congressional lawmaking process, they can change it, to some extent, by either electing new representatives or by otherwise advocating for change in the congressional process.<sup>119</sup> The fact that Congress might imperfectly perform its lawmaking function is not enough support for a radical altering of separation of powers principles, especially given that there does not appear to be another institution that is better able to perform the lawmaking function on a consistent and extensive basis. Because a proactive and more organized American public could, if it deemed necessary, make some changes in congressional lawmaking by refusing to reelect congresspersons who are not responsive to the public's needs, one could argue that the system of congressional lawmaking is not so broken as to require wholesale reform and that the American public should not look to the

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118. See Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 51-52 n.205 (1998) (discussing congresspersons' use of committee reports before voting on bills).

119. Both constitutionally and functionally, Congress appears to be more capable than the judiciary to resolve the conflicting, logrolling, and rent-seeking preferences that are endemic to lawmaking in this country. Helen Hershkoff, *State Courts and The "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1883-84 (2001). Hershkoff states that:

Article III justiciability doctrine supports this version of separation of powers in two related ways. First, as a matter of democratic theory, it assigns contested public questions to the elected branches on the view that they are more politically accountable than unelected federal judges. Second, as a matter of institutional competence, the doctrine allocates policymaking to those branches of government—Congress and the President—deemed better equipped than Article III courts to investigate issues, assess alternatives, and monitor results.

*Id.*

courts as a means of reforming congressional lawmaking through statutory interpretation.

Pursuant to the above discussion, it seems only reasonable that the Court, when interpreting a federal statute, should adopt an originalist theory of statutory interpretation.

#### IV. TOWARDS A NEW THEORY OF STATUTORY INTERPRETATION FOR THE COURT'S PROBLEMATIC STATUTORY INTERPRETATION PRECEDENTS

##### A. *Proposed Theory and Its Justification*

From the above arguments, it seems only appropriate that legal norms should be constructed in a manner that encourages lawmaking by Congress—the institution that is best able to make the various public policy choices—and not by the federal judiciary.<sup>120</sup> Therefore, scholars who write about statutory interpretation would advance the statutory interpretation enterprise if they would concentrate on devising theories that further limit courts' engagement in too much judicial activism. To some extent, this can be done by reexamining the standards that the Court uses to determine when it will override one of its judicial opinions. Currently, for opinions involving statutory interpretation, the Court employs a presumption against the overruling of precedent, as an essential feature of its *stare decisis* doctrine.<sup>121</sup> Some have called the

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120. *See id.* No one would doubt that some judicial lawmaking is desirable when Congress has delegated certain lawmaking powers to the courts, such as when a congressionally enacted statute imposes general standards and there is legislative history or other extrinsic references that Congress intended courts to engage in judicial lawmaking in order to fill either substantive or remedial gaps in the statute. But when statutory text and extrinsic legislative materials clearly show congressional intent and purpose, courts' interpretations and enforcement should effectuate and enforce such intent and purpose. If the public (or certain segments of the public) does not like such outcomes, it should mobilize by whatever means necessary and petition Congress for desired congressional relief. Clearly, on many different occasions Congress has taken post-court interpretation action by enacting corrective amends or statutes to overrule courts' unwelcome statutory interpretation. *See Powell v. City of Pittsfield*, 143 F. Supp. 2d 94, 127 (2001). The *Powell* court stated the following:

In partial response to *Patterson*, Congress enacted the Civil Rights Act of 1991 which, via the new subsection (b), more broadly defined the phrase "make and enforce contracts." Thus, that phrase was amended to "include[ ] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

*Id.* (citing 42 U.S.C. § 1981(b)) (internal cross-references omitted). The fact that congressional override of statutory interpretation is frequently a messy process, and the idea that strong interest groups have more influence than most members of the public, are more reflective of a broken system of the economic distribution of wealth, information, and knowledge than it is reflective of an irreparably broken congressional law making process. *See Eskridge, supra* note 98, at 1402-09 (discussing difficulties that Congress might encounter when trying to overrule a Court precedent).

121. *See Reno v. Bossier Parish School Board*, 528 U.S. 320, 362-63 (2000) ("The policy of

presumption a "super-strong presumption."<sup>122</sup> Consistent with the presumption, the Court has identified several rules that it will apply when deciding whether to overrule precedent, including whether there has been any of the following: (1) "special justification;"<sup>123</sup> (2) "intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress;"<sup>124</sup> (3) "changes [that] have removed or weakened the conceptual underpinnings from the prior decision;"<sup>125</sup> (4) "later law [that] has rendered the decision irreconcilable with competing legal doctrines or policies;"<sup>126</sup> (5) "precedent [that] may be a positive detriment to coherence and consistency in the law, . . . because of inherent confusion created by an unworkable decision;"<sup>127</sup> (6) "decision [that] poses a direct obstacle to the realization of important objectives embodied in other laws;"<sup>128</sup> (7) "precedent where . . . the opinion was rendered without full briefing or argument;"<sup>129</sup> or (8) "'case of a procedural rule . . . which does not serve as a guide to lawful behavior.'"<sup>130</sup>

Consistent with the above-specified rules, the Court frequently supports its unwillingness to overrule precedent on the grounds that Congress has the authority to legislatively overrule the Court's precedents involving statutory interpretation.<sup>131</sup> Similarly, but somewhat inconsistently, the Court will rely upon Congress's silence, or failure to legislatively overrule a long-standing precedent, as evidence of Congress's acceptance or acquiescence in the precedent.<sup>132</sup>

The Court's adherence to *stare decisis* is based upon its belief that "[s]tare decisis is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'"<sup>133</sup> Also, in the Court's opinion, "[s]tare decisis is a basic self-governing principle within the

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*stare decisis* is at its most powerful in statutory interpretation (which Congress is always free to supersede with new legislation)").

122. See Eskridge, *supra* note 98, at 1386-409 (1988) (arguing that the Court should abandon the super-strong presumption against the overruling of statutory interpretation precedent).

123. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

124. *Id.* at 173.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Hohn v. United States*, 524 U.S. 236, 251 (1998) (citing *Gray v. Mississippi*, 481 U.S. 648, 651 n.1 (1987), and questioning the precedential value of *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam)).

130. *Id.* (questioning *United States v. Goudin*, 515 U.S. 506, 521 (1995), and citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

131. See *id.*

132. Eskridge, *supra* note 98, at 1402-09.

133. *Hohn*, 524 U.S. at 251 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).



Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an arbitrary discretion."<sup>134</sup>

However, as a critique of stare decisis, the Court's refusal to overrule erroneously-decided opinions can lead to as much arbitrary discretion as the Court's overruling of such decisions. For example, Justices who are able to form a 5-4 majority of the Court on a given day can decide a case in conformity with their own frame of reference (including their desire to promote a conservative, liberal, or racially hostile philosophy) through a debatable statutory interpretation, and then rest safe in the fact that, by relying upon stare decisis, they will be able to bind the Court to that determination for years into the future.

Further, it seems that a majority of the Court can either adhere or not adhere to stare decisis depending upon whether or not the use of that doctrine achieves a particular majority's philosophical agenda. That seems to have been the situation in *Alexander v. Sandoval*,<sup>135</sup> where Justice Scalia, in conformity with his textualist interpretive viewpoint, was able to garner a majority vote (along with Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Thomas) that Congress did not intend to create a private right of action under the disparate impact regulations that the Department of Justice properly adopted pursuant to its authority under Title VI of the Civil Rights Act of 1964.<sup>136</sup> In so holding, the Court also cut back on its willingness to use *Cort v. Ash*<sup>137</sup> to imply a private cause of action under a federal statute, stating instead that "private rights of action to enforce federal law must be created by Congress."<sup>138</sup>

Attacking the *Alexander* majority opinion, the dissenters, Justices Stevens, Souter, Ginsburg, and Breyer stated that:

When that fact is coupled with our holding in *Cannon* and our unanimous decision in *Lau*, the answer to the question presented in this case is overdetermined. Even absent my continued belief that Congress intended a private right of action to enforce both Title VI and its implementing regulations, I would answer the question presented in the affirmative and affirm the decision of

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134. *Hubbard v. United States*, 514 U.S. 695, 711 (1995) (internal quotations omitted) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) and THE FEDERALIST NO. 78, (A. Hamilton)).

135. 532 U.S. 275 (2001). The majority reaffirmed a private right of action under the statutory provision of Title VI, section 601, but not under the regulations that the Department of Justice promulgated under Title VI, section 602. *See id.* at 286-87.

136. *Id.* at 293.

137. 422 U.S. 66 (1975).

138. *Alexander*, 532 U.S. at 286.

the Court of Appeals as a matter of *stare decisis*.<sup>139</sup>

The dissenters continued:

In order to impose its own preferences as to the availability of judicial remedies, the Court today adopts a methodology that blinds itself to important evidence of congressional intent. . . .

. . . .  
Like much else in its opinion, the present majority's unwillingness to explain its refusal to find the reasoning in *Cannon* persuasive suggests that *today's decision is the unconscious product of the majority's profound distaste for implied causes of action rather than an attempt to discern the intent of the Congress that enacted Title VI of the Civil Rights Act of 1964*. Its colorful disclaimer of any interest in "venturing beyond Congress's intent," *ante*, at 1520, has a hollow ring.<sup>140</sup>

If the dissenters are correct that the majority's opinion is for the purpose of "impos[ing] its own preference as to the availability of judicial remedies,"<sup>141</sup> and that the opinion is a "product of the majority's profound distaste for implied causes of action rather than an attempt to discern the intent of Congress,"<sup>142</sup> then it appears that the real threat to the Court's integrity and legitimacy is the negative public perception that stems from the political decisions that the Court makes, and not from any hypothetical fear of a public backlash from the Court's overruling of its own precedents. For example, in *Bush v. Gore*,<sup>143</sup> a majority comprised of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas held that the Florida Supreme Court's ordering of a vote recount in Florida during the 2000 presidential election was violative of the Equal Protection Clause because the Florida court did not impose a uniform recount standard.<sup>144</sup> Justice Stevens' dissenting opinion, joined by Justices Ginsburg and Breyer, concluded that: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."<sup>145</sup> Although Justice Stevens

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139. *See id.* at 301-02 (Stevens, J., dissenting).

140. *Id.* at 313, 317 (Stevens, J., dissenting) (emphasis added).

141. *Id.* at 313 (Stevens, J., dissenting).

142. *Id.* at 317.

143. 531 U.S. 98 (2000).

144. *Bush*, 531 U.S. at 110.

145. *Id.* at 128-29. A more complete statement by Justice Stevens is as follows:

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to pro-

might have been talking about the confidence in lower-level state court and federal judges, it is clear that the Court's decision in *Bush v. Gore* also may result in a loss of some of this country's confidence in the Justices of the United States Supreme Court "as [ ] impartial guardian[s] of the rule of law."<sup>146</sup>

Shortly after the election, a Gallup poll showed that among Democratic voters the Supreme Court had a seventy percent approval rating before its *Bush v. Gore* decision; after the decision, the percentage fell to forty-two percent, while the Republican's approval rating, which was sixty percent before the decision, increased to eighty percent after the decision.<sup>147</sup> As such, the Democratic voters registered a twenty-eight percent decline in their approval rating of the Court, a rating that had been ten percent higher than the Republican approval rating before the Court's decision. Arguably, these statistics show that many of the voters believed that the Court's decision was politically motivated.<sup>148</sup> An assessment of the full extent of the loss in the Court's prestige and respect will have to wait the test of time.

In any event, the Court's apparent policy, that it is more desirable to have an issue finally decided than it is to have it correctly decided, probably leads to more judicial activism than a policy giving top priority to the correctness of the Court's precedents.<sup>149</sup> First, a 5-4 majority (or other majority) might be more inclined to write opinions that are more reasoned and correct if it knew that its decisions could be more easily overruled.<sup>150</sup>

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ceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

*Id.* at 128-29.

146. *Id.*

147. *How Americans View the Supreme Court* (National Public Radio: Talk of the Nation broadcast, Feb. 7, 2001).

148. *Id.*; see also Richard Briles Moriarty, *Law Avoiding Reality: Journey Through the Void to the Real*, 50 DEPAUL L. REV. 1103, 1110 (2001) (criticizing *Bush v. Gore* on various grounds).

149. *Hubbard v. United States*, 514 U.S. 695, 712 n.11 (Brandeis, J., dissenting) (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932)). Justice Brandeis stated that:

*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation.

*Id.*

150. It seems logical that a Justice who knows that his or her opinions might be more readily overruled (if there was not a presumption against the overruling of statutory precedent) might be

Second, because the Justices can, through the selective use of various statutory interpretation theories (originalism, textualism, and the "evolutive" approach), manipulate their arguments and statutory interpretations to obtain desired substantive outcomes,<sup>151</sup> the Court, if it really desires to maintain its integrity and public respect, should probably experiment with rules that restrict the Justices' use of statutory interpretation theories. For example, the Court could (maybe by majority vote) adopt a rule that it, as an institution, will use either originalism, textualism, or the "evolutive" approach when interpreting a federal statute.<sup>152</sup> To some extent, such an adoption would be consistent with the Rehnquist Court's adoption of certain canons of statutory interpretation.<sup>153</sup>

Arguably, the Court has indicated that it will rely upon Congress's intent to resolve statutory interpretation questions by beginning "with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act."<sup>154</sup> However, this statement is too

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more careful in drafting the opinion to ensure that his or her decision is not subsequently overruled. Cf. Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 499 n.129 (1998) ("It may be that the United States Supreme Court currently reviews so few cases from the courts of appeals that the risk of reversal by the Court provides little constraint on courts of appeals judges."). In other words, when Justices know that, through stare decisis their opinions are only rarely subject to being overruled, they might be more apt to manipulate their statutory interpretations to obtain judicial outcomes that are more in line with their judicial philosophies than with congressional intent.

151. Arguably, this is the implication from Justice Stevens' dissent in *Alexander v. Sandoval*, 532 U.S. 275, 312 (2001) (Stevens, J. dissenting).

152. At least one state's courts have adopted rules of statutory interpretation. See Dana Richardson, *Sheldon v. Fettig: Interpreting the Substitute Service of Process Statute in Washington*, 72 WASH. L. REV. 655, 662 (1997). Richardson states that:

Washington courts have developed a set of statutory interpretation rules that reflect a belief that the judiciary should interpret statutes to effect the Legislature's purpose. Two of those rules were stated in *Wichert*: '(1) the spirit and intent of the statute should prevail over the literal letter of the law and (2) there should be made that interpretation which best advances the perceived legislative purpose.

*Id.* (footnotes omitted). However, regardless of the type of statutory interpretation rule that the Court might adopt, there is always the possibility that the Court will render a decision that is not consistent with congressional intent because the Justices are fallible humans and because some statutory interpretation theories might limit the Court's ability to use legislative history and other extrinsic materials. See Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 628 (1996) Gonzalez states that:

The second type of cost inherent in the agency relationship between Congress and the federal courts is the cost of *constraint*. Here the problem is that a set of statutory interpretation rules or practices may tie a court's hands from probing information that would illuminate the actual command or intent of the enacting Congress.

*Id.* As such, this Author believes that originalism and the use of any available legislative history and other relevant extrinsic materials are more likely to lead to a statutory interpretation that is consistent with congressional intent.

153. See ESKRIDGE, *supra* note 60, at 323-28 (listing canons that the Rehnquist Court has used).

154. New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Cos., 514 U.S. 645, 655 (1995) (stating the statutory interpretation standard that the Court uses both in general and when interpreting ERISA's preemption clause).

broad to confine the Court's statutory interpretation. Some Justices' analysis begins with the statutory text while others like Justice Scalia begins and ends with the text.<sup>155</sup> Others begin with the text and contextually use legislative history and other extrinsic information to give meaning to statutory language, or to construe statutory language in conformity with legislative purpose.<sup>156</sup> The Court needs to establish a more precise rule to control its mode of statutory interpretation. Since there does not appear to be a constitutional source establishing exactly how the Justices should discern congressional intent during statutory interpretation, there is no limitation that would prevent the Court from adopting rules that would, similar to the Rehnquist Court's canons of statutory interpretation, define the methods and means that the Justices use during statutory interpretation.<sup>157</sup> Although some Justices might raise arguments similar to the academic freedom arguments that law professors, and other professors, raise to support their almost exclusive control over the manner and means of their individual classroom teaching, one would have to ask the question whether such a "judicial freedom" standard is in the best interest of a Court that is concerned with judicial integrity and public respect.<sup>158</sup>

If one is willing to accept that the Justices will have different judicial philosophies and that they will use those philosophies to obtain desired results during statutory interpretation, one should also be willing to acknowledge that the Justices' political decisions should not be sacrosanct, especially in light of their protestations that their decisions are based only upon objective rules of the law.<sup>159</sup> Interestingly, some of the Justices recognize that factors other than an alleged objective rule of law influence statutory interpretation.<sup>160</sup> As such, these Justices and the

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155. See ESKRIDGE, *supra* note 60, at 226-29 (discussing Justice Scalia's reliance on statutory text).

156. See generally *Travelers*, 514 U.S. at 645.

157. For example, if the Justices would adopt, by majority vote, one of the above theories of statutory interpretation, is there any legitimate reason why all of the Justices would not follow the adopted theory?

158. Maybe the biggest benefit from the "judicial freedom" argument is that it allows Presidents, with interest groups' support, to appoint Justices who will, through their own individual judicial philosophies, promote certain political agendas through statutory interpretative outcomes, a benefit that does not appear to be in the public's best interest.

159. Richard H. Fallon, Jr., "The Rule of Law" As a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 (1997). Fallon makes the following observations:

In particular, uncertainty and confusion have mounted among those who, on the one hand, are disposed to accept (or at least find it hard to reject) the rough sketch of the Rule of Law drawn above and yet, on the other hand, believe that the American legal system must surely count as a paradigm of the Rule of Law. Respect for the Rule of Law is central to our political and rhetorical traditions, possibly even to our sense of national identity.

*Id.*

160. See *Alexander v. Sandoval*, 532 U.S. 275, 312 (2001) (Stevens J. dissenting) (asserting that Justices' preferences instead of congressional intent influenced the majority opinion); South-

Court should be more inclined to overrule erroneously-decided statutory interpretation precedents especially the ones based upon the Justices' political decisions that are contrary to Congress's apparent intent and purpose.<sup>161</sup>

In any event, the Court's use of a presumption against the overruling of statutory interpretation precedents is unwise and the Court should abandon the presumption. Some scholars have recognized this, and have offered suggestions for improvement. One opines that, instead of a presumption against overruling statutory interpretation precedents unless there is a "special justification," the Court should have a presumption in favor of overruling "demonstrably erroneous precedents" unless there is a "special justification" for not doing so.<sup>162</sup> Another scholar, in the "evolutive" interpretation tradition, recommends that the Court use an "evolutive approach:"

Under the evolutive approach suggested by the Court's common law decisions, the Court would overrule a statutory precedent when the reasoning underlying the precedent has been discredited over time; the precedent's consequences are positively troublesome, unfair, or contrary to current statutory policies; and practical experience suggests that the statutory goals are better met by a new rule that does not unduly undermine the reliance interests of Congress and private persons who reasonably acted upon the basis of the old rule.<sup>163</sup>

Another scholar still favors the presumption against the overruling of statutory precedents by asserting that the overruling of such precedents should be left to Congress.<sup>164</sup>

However, other scholars have correctly reasoned that arguments based upon Congress's ability to override the Court's statutory precedent are not persuasive. First, instead of showing Congress's acquiescence, Congress's inaction in the face of the Court's precedent might

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land v. Keating, 465 U.S. 1, 36 (1984) (O'Connor, J., dissenting) (asserting that the majority opinion was against congressional intent and was an "exercise in judicial revisionism").

161. The Court should be willing to overrule erroneously-decided precedent even if for no other reason than to acknowledge their imperfect humanity, an imperfection that is no greater than the public-at-large and one that the legal community and the larger public will no doubt accept. More importantly, or just as importantly, the overruling of erroneous precedents would avoid injuries (personal and monetary) to those citizens who are negatively impacted by the Court's erroneous precedents. In other words, it seems rather arrogant for the Court, in the name of stare decisis, to cause a continuation of pain by enforcing erroneously-decided opinions.

162. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 7 (2001) ("[O]ne who considered the prior decision demonstrably erroneous might require a special justification for adhering to it (such as the need to protect reliance interests).").

163. ESKRIDGE, *supra* note 98, at 1392.

164. See generally Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

indicate only that an override is not a legislative priority, and that other legislative matters should more urgently consume Congress's limited human and time resources.<sup>165</sup> Second, Congress might be unwilling to override a particular precedent if there is significant organized interest group opposition to the override.<sup>166</sup> Third, and more importantly, the action or the inaction of a future and different Congress should not be controlling during the Court's present statutory interpretation, because the Court has at times asserted that it is the enacting Congress's intent that is decisive for statutory interpretation purposes.<sup>167</sup>

Therefore, as there are multiple reasons why Congress might decide that the time is not right for a legislative override, the Court cannot reasonably believe that Congress will override all of the Court's disagreeable decisions. Nor can the Court seriously believe that Congress's failure to override necessarily shows its agreement with a particular precedent. Rather, in honor of the enacting Congress's intent, the Court should itself overrule erroneously-decided precedents unless there is substantial justification for not doing so.<sup>168</sup>

In addition to a presumption in favor of overruling erroneously-decided precedent, the following proposal in this Article attempts to more specifically deal with several problematic areas involving the Court's legitimacy and integrity, and the public perception thereof. The proposal employs a two-step process, with step one being applicable to the Court, and step two being applicable to lower-level federal courts that must decide whether to apply one of the Court's erroneously-

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165. Eskridge, *supra* note 98, at 1403-09. Professor Eskridge states that:

Garbage can decisionmaking gives us little confidence that the Supreme Court's shuttling a problem of statutory interpretation back to Congress will result in any serious consideration of the issue. In many cases, the Court's decision will not make the issue salient enough to find a place on the legislative agenda, and even when the issue is salient (as the baseball immunity issue has been) nothing will be done unless there is a well-considered proposal that fits in with the drift of public thinking and the personal agendas of important participants. Moreover, the garbage can model suggests that the legislative agenda is not infinitely elastic. The insertion of one issue into the agenda crowds out other issues. Is it desirable for the Court to add to the clutter? The issue of baseball's exemption from the antitrust laws is a worst case for such an addition: The issue is at bottom trivial, yet it is so controversial that it is bound to command legislative attention, especially in light of the patent "illogic" of the exemption.

*Id.* at 1408.

166. *See id.*

167. More importantly, unless the Congress that is called upon to make the override is the enacting Congress, the Court should not rely upon the inaction of a different Congress because, as the Court has previously stated, it is the enacting Congress's intent that is important for statutory interpretation purposes. If the enacting Congress's intent is the controlling intent when the Court is interpreting a statutory provision, the enacting Congress's intent should also be the relevant consideration when the Court is deciding whether it should either reconsider or overrule one of its precedents.

168. *See supra* note 162 and accompanying text.

decided opinions.

Regarding the first step, the Court should not apply *stare decisis* to one of its precedents if either: (1) the Court's former interpretation is infected by either perception that the Court or one of its Justices in the majority had an impermissible partiality to the relevant statutory interpretative outcome or had a conflict of interest in such outcome; or (2) the Court's interpretation, instead of being an interpretation based upon Congress's intent, is based upon a political decision that the Court has made for its own purposes.<sup>169</sup>

As to the second step, the primary proposition is that lower federal courts should strictly construe any of the Supreme Court's statutory interpretation precedents when there is evidence of a substantial likelihood that the Court has decided the precedent erroneously. Fundamentally, strict construction in this context means that lower courts will limit the application of the erroneously-decided precedent to the specific facts that were before the Court and that lower courts will create exceptions such that the erroneously-decided precedent will not be extended to other facts and cases.

*B. Application of the New Proposal for Problematic Statutory Interpretation Precedent*

*1. Impermissible Partiality/Conflict of Interest in Statutory Interpretative Outcomes*

Step one of the above-referenced proposal asserts that the Court should not give *stare decisis* effects to a statutory interpretation decision that is infected with a reasonable claim of partiality against one of the Justices in the majority. Although *Bush v. Gore* is a decision involving the Court's interpretation of the Constitution, the decision also serves as an example for future cases involving statutory interpretation. Generally, there has been concern that the Justices comprising the majority in the 5-4 *Bush v. Gore* decision might have been politically motivated in favor of George Bush winning the 2000 presidential election, and that the outcome of their decision might have been influenced by their political motivation.<sup>170</sup> However, the motivation of at least one of the Justices seems to stand above the others, and it is somewhat troubling.

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169. One infected Justice might have infected others, so one is enough for the Court to reconsider a challenged precedent.

170. See generally Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001). "The suspicion is that these justices, who cast judicial votes in . . . [the *Bush v. Gore*] case to terminate the process of the year 2000 presidential election, were prompted to their actions by a prior personal preference for a Bush victory." *Id.* at 679.



Justice O'Connor, allegedly while attending an "election-night party," engaged in the following conduct, as reported in a *Newsweek* article:

So at an election-night party on Nov. 7, surrounded for the most part by friends and familiar acquaintances, she let her guard drop for a moment when she heard the first critical returns shortly before 8 p.m. Sitting in her hostess's den, staring at a small black-and-white television set, she visibly started when CBS anchor Dan Rather called Florida for Al Gore. "This is terrible," she exclaimed. She explained to another partygoer that Gore's reported victory in Florida meant that the election was "over," since Gore had already carried two other swing states, Michigan and Illinois.

Moments later, with an air of obvious disgust, she rose to get a plate of food, leaving it to her husband to explain her somewhat uncharacteristic outburst. John O'Connor said his wife was upset because they wanted to retire to Arizona, and a Gore win meant they'd have to wait another four years. O'Connor, the former Republican majority leader of the Arizona State Senate and a 1981 Ronald Reagan appointee, did not want a Democrat to name her successor. Two witnesses described this extraordinary scene to NEWSWEEK. Responding through a spokesman at the high court, O'Connor had no comment.<sup>171</sup>

Although Justice O'Connor did not publicly repudiate these allegations, another version of the story has surfaced. Nina Totenberg, National Public Radios' legal correspondent, made the following allegations:

That's right. Since then, John O'Connor, Justice O'Connor's husband, has said that that's—the wrong implication was drawn, that—what he said was why she was disgusted was that the networks were calling the election before the polls had closed on the West Coast and that she thought that was wrong and that it had nothing to do with retirement and her retirement plans. Now we didn't hear that explanation for an awful long time and I'll leave it to our listeners to decide whether they think that's a plausible misunderstanding. But I think, certainly, one could make the argument now, in the wake of *Bush vs. Gore*, if you were a justice of the Supreme Court, at all worried about the status of the court, whether it should be drawn into politics, trying to keep it above the fray, the last thing you would do, likely, is retire this year and almost ensure a confirmation bat-

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171. *The Truth Behind the Pillars: The Final Act: They Cultivate an Olympian Air, But the Justices Are Quite Human—and Can Be Quite Political*, NEWSWEEK, Dec. 25, 2000, available at 2000 WL 28939787.

tle, thus making it almost a certainty that the court would once again be drawn into politics within six months of *Gore vs. Bush* [sic].<sup>172</sup>

If the *Newsweek* version of the story is true, then one can make a reasonable argument that Justice O'Connor exhibited a partiality in favor of George W. Bush, a party to the *Bush v. Gore* litigation. Therefore, one can make a reasonable argument that her subsequent participation in *Bush v. Gore* was in contravention of 28 U.S.C. § 455(a)'s mandate that a justice or other federal judge "shall disqualify himself [or herself] in any proceeding in which his [or her] impartiality might reasonably be questioned."<sup>173</sup> Similarly, her participation might have been violative of section 455(b) which provides that a justice or other federal judge "shall also disqualify himself [or herself]" if "[h]e knows that he [or she] . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."<sup>174</sup>

Regarding section 455(a), the standard for a Justice's or other federal judge's recusal requires conduct that would create an appearance of partiality in a reasonable person who knows the relevant facts, even if the Justice or judge, at the time, neither knew of nor actually used the facts in a biased manner in favor of or against a party to a case before the Justice or judge.<sup>175</sup> Because section 455(a)'s purpose is "to promote public confidence in the integrity of the judicial process," a recusal is considered from the perspective of a reasonable member of the public, and not from a Justice's or judge's perspective. In other words, a violation of section 455(a) "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew."<sup>176</sup>

Applying section 455(a)'s standards to the alleged facts in the *Newsweek* version of Justice O'Connor's comments at the election-night party, a reasonable member of the public, knowing that the outcome of the 2000 presidential election would have an impact on Justice O'Connor's decision to retire, would reasonably believe that her participation in *Bush v. Gore* created an appearance of partiality. This is because her participation might be influenced by the prospect of her having to delay retirement for four years if Al Gore were to win the election (i.e., due to the fact that she wanted a Republican president to

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172. *How Americans View the Supreme Court* (National Public Radio: Talk of the Nation broadcast, Feb. 7, 2001).

173. 28 U.S.C. § 455 (1994).

174. *Id.* § 455 (b) (1994) (emphasis added).

175. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988).

176. *Id.* at 860.

appoint her successor to the Court). Therefore, a reasonable argument can be made that, pursuant to section 455(a), Justice O'Connor should have recused herself from participation in *Bush v. Gore*.<sup>177</sup>

Similarly, if the *Newsweek* version is true, one can also make a reasonable argument that Justice O'Connor should have recused herself under section 455(b) because she knew that her alleged interest in retirement during a Republican president's administration "could be substantially affected by the outcome of" *Bush v. Gore*.<sup>178</sup> Moreover, her failure to recuse herself might affect the public perception of the Court's integrity because the public might believe that her retirement interest in the outcome of the litigation might have influenced her vote in favor of George Bush who, partly because of Justice O'Connor's vote, is the President of the United States.

If Justice O'Connor had recused herself, the *Bush v. Gore* decision would have been a 4-4 decision, and the lower court's opinion ordering a vote recount would not have been overruled.<sup>179</sup> Because she did not recuse herself, the section 455(a) and (b) issues are moot issues as they relate to the specific merits of *Bush v. Gore*. However, there is still an issue regarding the stare decisis effects and the precedential value that the Court should give to *Bush v. Gore*.<sup>180</sup> Applying the first step of the theory of statutory interpretation that this Article advocates, because of Justice O'Connor's appearance of partiality, the Court should not give *Bush v. Gore* any stare decisis effects. In other words, in a subsequent case, even on the same or similar set of facts involving Florida's voting system and a vote recount under that system, the Court should reconsider the constitutionality of the Florida Supreme Court's vote recount opinion, and any future issues regarding Florida's voting system, without being bound by either *Bush v. Gore*'s reasoning or holding. The Court's refusal to give stare decisis effects to *Bush v. Gore* would achieve the same purpose as sections 455(a) and (b)—"promote public

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177. Section 455(a) is operative whether or not a party in a lawsuit files a formal motion to recuse. *In re Doninton Investments*, 97 B.R. 112, 112 (Bankr. S.D. Fla. 1988) (addressing whether the court should recuse itself sua sponte under section 455). Therefore, a Justice or judge on her own motion should recuse herself without awaiting a formal request from one of the parties to the lawsuit. If the *Newsweek* version of the story is true, Justice O'Connor should have recused herself from the case because she knew that, if a reasonable member of the public knew that the outcome of the case would have an effect on her retirement, that reasonable member of the public would question whether she had the requisite impartiality to participate in the decision.

178. 28 U.S.C. § 455(b) (1994).

179. See generally *Carpenter v. United States*, 484 U.S. 19, 24 (1987) (evenly divided court affirmed the lower court opinion).

180. In *Bush v. Gore*, the Court limited the precedential value of the case to only the parties and the specific facts before the Court. However, the analysis of this portion of the Article indicates what the precedential value of the case should be if the Court had not limited its application.

confidence in the integrity of the judicial process."<sup>181</sup> It would be consistent with the Court's setting aside of judgments that lower-level federal courts have rendered in violation of sections 455(a) and (b).<sup>182</sup>

In sum, even when the Court has not limited their precedential value, decisions like *Bush v. Gore* should not be given stare decisis effects either when one of the Justices in the majority had a partiality in favor of one or more of the litigants or when such a Justice had some other interest—as proscribed by sections 455(a) and (b)—in the statutory interpretative outcome.

## 2. *Statutory Interpretative Outcomes Based Upon the Court's Own Political Decisions Instead of Upon Congressional Intent*

The second part of step one of the statutory interpretation theory that this Article proposes asserts that no stare decisis effects should be given to Court precedent that is based upon the Court's own political decisions instead of upon congressional intent. The Court's precedent involving the statutory interpretation of the Federal Arbitration Act falls within this category, and will comprise the bulk of the remaining portions of this Article. Primarily, the discussion concentrates upon the FAA's general applicability and upon the scope of section 2 of the FAA.

### a. *General Applicability of the FAA*

The American Bar Association's Committee on Commerce, Trade and Commercial Law (the ABA committee) drafted the FAA, with national support from trade groups and business organizations.<sup>183</sup> From 1921 through 1925, the ABA committee advocated the ABA's adoption and Congress's enactment of the FAA.<sup>184</sup> In 1925, Congress enacted the FAA;<sup>185</sup> from the FAA's sketchy legislative history, it appears that Congress's consideration and adoption of the FAA were primarily a rubber stamp of the ABA committee's efforts to pass the FAA.<sup>186</sup> Therefore, it seems only appropriate that the Court, when interpreting the FAA, take into consideration the ABA committee's statements and opinions regarding the FAA's scope and coverage,<sup>187</sup> including the

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181. *Liljeberg*, 486 U.S. at 860.

182. *See id.*

183. W. H. H. Piatt et al., *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153 (1925).

184. *See id.*

185. *See id.*

186. *See id.*

187. *See* ESKRIDGE, *supra* note 60, at 220 (citing several cases where the Burger Court relied upon information from "nonlegislators" drafters and stating that "[b]ecause much legislation is

scope of section 2 which provides:

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>188</sup>

Despite section 2's language that the FAA applies to "any contract," some rely upon the FAA's legislative history and statements from the FAA's sponsors to argue that Congress's intent is that it applies only to certain types of contracts.<sup>189</sup>

Specifically, one member of the ABA committee gave some indication that the FAA covers only arbitration agreements between *merchants* who have equal bargaining power and that it covers only *commercial* contracts and disputes, and not consumer contracts and disputes.<sup>190</sup> Mr. Julius Cohn, a member of the ABA committee that drafted the FAA, stated shortly after its passage that:

It is a remedy peculiarly suited to the disposition of the ordinary disputes *between merchants* as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions

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proposed or drafted by nonlegislators and adopted by Congress, what these nonlegislative drafters have to say about legislation is often of interest to the statutory interpreter").

188. 9 U.S.C. §§ 1-16 (1925).

189. See Cole, *supra* note 19, at 466-67 (arguing that the FAA was not intended to cover noncommercial disputes and that its purpose was to cover contracts between merchants who bargain for arbitration agreements on an equal footing and who were equally interested in preserving the parties' relationship); Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 310-13 (1999) (arguing the same point).

190. Michele M. Buse, *Contracting Employment Disputes Out of the Jury System: An Analysis of the Implementation of Binding Arbitration in the Non-Union Workplace and Proposals to Reduce the Harsh Effects of a Non-Appealable Award*, 22 PEPP. L. REV. 1485, 1519 (1995) (recounting that, as Justice Stevens noted in his *Gilmer* dissent, "the FAA was originally intended to encourage arbitration between merchants of equal bargaining power"); Sternlight, *supra* note 189, at 310-13 (citing legislative history statements by Mr. W. H. H. Piatt and Mr. Julius Cohen, and asserting that Congress's intent was that the FAA be applicable to voluntary arbitration agreements between merchants and not to "take-it-or-leave-it" arbitration agreements).

of fact which we have just mentioned. It is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.<sup>191</sup>

This statement is some indication that the supporters and drafters of the FAA envisioned arbitration agreements between merchants, and not arbitration of issues arising from consumer contracts.<sup>192</sup> Furthermore, Mr. Piatt, another member of the FAA's drafting committee, gave another indication that Congress's intent is that the FAA does not cover all types of contracts when he stated that "it is not the intention of this bill to cover insurance cases."<sup>193</sup>

Similarly, during the floor debate over the FAA, Mr. Piatt made other statements regarding the FAA not being applicable to adhesion contracts that powerful sellers force upon weaker purchasers.<sup>194</sup> During the debate of S. 4214, the initial version of the FAA that sponsors introduced in the Sixty-Seventh Congress, and which they reintroduced and Congress successfully enacted during the Sixty-Eighth Congress, the following colloquy occurred between Mr. Piatt and Senator Walsh:

Senator WALSH of Montana. This has occurred to me. I see no reason at all—I see none now; there may be some reason but I see no reason now—why, when two men voluntarily agree to submit their controversy to arbitration, they should not be com-

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191. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (emphasis added).

192. *See id.* Given the fact that merchants' arbitration agreements were the main concern, the application of the FAA to consumer contracts raises several issues. In other words, whereas two merchants with relatively equal bargaining power and dealing in an arms-length transaction might want arbitration as a dispute resolution process to maintain amicable business relationships, a consumer who does not have a pre-existing relationship with a merchant has no overriding motivation to maintain the relationship. Without a profit motive to retain the relationship, a consumer might favor a jury trial with all of its procedural protections over a fast resolution by an arbitrator who applies his or her rough-sense of justice and not necessarily established legal precedents, many of which might protect the consumer. Therefore, in forcing arbitration on consumers who have entered into adhesion arbitration contracts, the legal system is forcing consumers to give up the legal benefits flowing from the application of established legal precedents without consumers having received the same level of benefits in return. That is, whereas sellers obtain, through the application of the FAA, arbitration as a dispute resolution process that is less expensive, that limits judicial review, and that increases profits because of lower arbitrators' awards, consumers do not generally receive these benefits at the same level. That is, given that merchants and businesses are generally the ones who insist on consumers signing adhesion arbitration agreements, one can logically assume that businesses believe that they receive some type of benefit that give them an advantage over consumers.

193. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and 4214 before a Subcommittee of the Committee on the Judiciary*, 67th Cong., 4th Sess. 9-10 (1923).

194. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting) (citing legislative history to conclude that the FAA was not intended to cover "take-it-or-leave-it" contracts).

pelled to have it decided that way.

Mr. PIATT. Yes, sir.

Senator WALSH of Montana. The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily [sic] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says[:] 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Mr. PIATT. That would be the case in that kind of a case, I think; but it is not the intention of this bill to cover insurance cases.

Senator WALSH of Montana. Well, take a freight contract—a transportation contract. Here is a regular form of contract for the shipment of goods. Take a shipment of cattle, for instance. The railroad company puts up a contract having a provision for arbitration. Now, the shipper says, 'Well, I haven't any confidence in this arbitration business. I don't want to do that.' [The shipper says:] 'Very well; we can not take your stock then.'

Mr. PIATT. Do you think that would override or transcend the act of Congress with respect to what constitutes a bill of lading? Would not the bill of lading act govern that anyway?

Senator WALSH of Montana. Certainly, but the bill of lading provides what shall go in.

Mr. PIATT. Yes.

Senator WALSH of Montana. And then they have the regular bill of lading contract, but they have a further provision that any controversy arising under the contract shall be submitted to arbitration; and the fellow says[:] 'Well, I haven't any confidence in it. If I have a controversy[,] I would like to have it tried before a court, where I feel I can get justice.'

Mr. PIATT. Speaking for myself, personally, I would say I would not favor any kind of legislation that would permit the forcing [of] a man to sign that kind of a contract. I can see where that could be, right now.

Senator WALSH of Montana. You can see where they are not really voluntary contracts, in a strict sense.

Mr. PIATT. I think that ought to be protested against, because it is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods. The shipper is nearly always under a necessity.

Senator WALSH of Montana. Yes.<sup>195</sup>

The fact that Mr. Piatt, an ABA drafter and supporter of the FAA, stated that he would "not favor any kind of legislation that would permit the forcing [of] a man to sign that kind of a contract [an adhesion contract offered to one on a take-it-or-leave-it basis]<sup>196</sup> is a clear indication that the supporters and drafters of the FAA did not intend that it be applicable to forced adhesion contracts.<sup>197</sup> In addition to asserting that the intent of the FAA is that the law not be applicable to adhesion contracts, Mr. Piatt's statements reinforce Mr. Cohn's argument that Congress's intent is that the FAA apply to "contract[s] between merchants one with another, buying and selling goods," and not to adhesion contracts between those who are "nearly always under a necessity" for consumer products and services.<sup>198</sup>

Additionally, there are several statements in Senate Report Number 536, a portion of the FAA's legislative history, that shows Congress's intent that the only enforceable arbitration contracts are the ones that parties have voluntarily entered into without fear of losing a job or some other tangible benefit.<sup>199</sup>

Various reasons have been given for these ancient rules of English law [refusing specifically to enforce arbitration provisions], followed as they have been by our State and Federal courts. Among these reasons were, first, the expressed fear on the part of the courts that arbitration tribunals did not possess the means to give full or proper redress, and also the doubt they entertained as to their right to compel an unwilling party to submit his cause to such a tribunal, thus denying to him the right to submit the same to the ordinary courts of justice for hearing and determination.

. . . .  
. . . The record made under the [Arbitration Society of America] shows not only the great value of voluntary arbitrations but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been vol-

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195. *Allstar Homes, Inc. v. Waters*, 711 So. 2d 924, 931-32 (Ala. 1997) (Cook, J., concurring) (quoting Mr. Piatt's colloquy in *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and 4214 before a Subcommittee of the Committee on the Judiciary*, 67th Cong., 4th Sess. 9-10 (1923)) (emphasis omitted), *overruled by Ex parte Perry*, 744 So. 2d 859 (Ala. 1999).

196. *Id.* (emphasis omitted).

197. *See id.*

198. *See id.* (emphasis omitted).

199. *Id.* at 931-32 (Cook, J., concurring) (quoting S. REP. NO. 536, 68th Cong., 1st Sess. (1924)), *overruled by Ex parte Perry*, 744 So. 2d 859 (1999).



untarily and solemnly entered into.<sup>200</sup>

Clearly, the sponsors of the FAA sought to ensure Congress that the FAA would not be applicable to adhesion contracts that one must accept on a take-it-or-leave-it basis. The above-quoted statement, and Mr. Piatt's colloquy, sought to reduce any congressional fears that, under the FAA, a stronger party would be allowed to coerce a weaker party into involuntary arbitration. Therefore, Senate Report Number 536 emphasizes "the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been *voluntarily* and solemnly entered into."<sup>201</sup>

Some judges have relied upon the above-stated colloquy between Senator Walsh and Mr. Piatt, and the above-mentioned statements from Senate Report Number 536, to argue that Congress's intent was that the FAA not apply to adhesion arbitration agreements that consumers must accept if they want to purchase goods from a seller.<sup>202</sup> Some Supreme Court Justices have come to the same conclusion that the FAA does not apply to adhesion contracts that consumers must accept in order to purchase goods.<sup>203</sup>

One could rely upon these statements from the FAA's legislative history as evidence from which one could reasonably conclude that Congress's intent was that the FAA should apply only to arbitration agreements between merchants who have freely entered into such agreements, and that the FAA does not apply to adhesion arbitration agreements between powerful sellers and weak buyers.<sup>204</sup> However, the Supreme Court has not accepted that interpretation. Rather, the Court has used a plain meaning statutory interpretation of section 2's language to strictly enforce the FAA regardless of the type of contracts and the degree of coercion involved in the creation of arbitration agreements,<sup>205</sup>

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200. *Allstar Homes*, 711 So. 2d 931-32 (emphasis omitted).

201. *Id.* (emphasis added).

202. *Id.* at 932-33 (Cook, J., concurring) (asserting that sponsors' comments "illustrate the importance ascribed to the voluntariness of the contracting parties"), *overruled by Ex parte Perry*, 744 So. 2d 859 (1999).

203. *See Prima Paint v. Flood & Conklin Mfg. Co.*, 338 U.S. 395, 414 (1967) (Black, J., dissenting) (citing legislative history to support an argument that the FAA does not apply to adhesion contracts).

204. *See* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641 (1996). Sternlight noted the following:

When Congress passed the FAA in 1925, it intended only to require federal courts to accept arbitration agreements that had been voluntarily entered into by two parties of relatively equal bargaining power in arms' length transactions. Congress did not intend to enforce arbitration agreements that had been foisted on ignorant consumers, and it did not intend to prevent states from protecting weaker parties.

*Id.* (emphasis omitted).

205. *See infra* notes 207-08.

without being overly concerned with promoting the consumer protection policy considerations that the FAA's sponsors and supporters emphasized during their discussion of the FAA.<sup>206</sup>

The Court's textualist plain meaning interpretation of section 2 leaves open the legitimate challenge that it has progressively expanded its interpretation of the FAA's coverage to further the Court's own self-interested goal of reducing the number of cases pending in the federal courts. In other words, one can argue that the Court—especially in Chief Justice Burger's majority opinion in *Southland Corp. v. Keating*,<sup>207</sup> and in the Court's opinion in *Allied-Bruce Terminix Co. v. Dobson*,<sup>208</sup>—has taken on a judicial activist role by expanding the FAA's coverage to rob states of substantive jurisdiction over arbitration agreements, thereby preventing states from enacting laws that exclude certain types of contracts from arbitration and otherwise offer needed consumer protection. The Court's statutory interpretation shows that judicial activism is not beyond the weapons of a Court bent on reducing federal courts' caseloads.

The conclusion from this part of the Article is that, when called upon to do so, the Court—which has only implicitly held that the FAA is applicable to all contracts<sup>209</sup>—should reconsider whether the FAA is applicable only to “commercial contracts” between merchants and only to voluntary non-adhesion contracts. Pursuant to step one of the proposal of statutory interpretation offered by this Article, the Court should not be bound by *stare decisis* during a reexamination of any of its former precedents regarding the scope of section 2 because such precedent is primarily based upon the Court's own political decisions in favor of arbitration to reduce courts' caseloads, and not upon congressional intent, as will be more clearly shown below.

*b. Pre-Southland Corp. v. Keating Court Precedent Showing the Court's Scrutiny of Arbitration Agreements Relating to Statutory Claims*

Although the Court had decided cases involving arbitration before its decision in *Wilko v. Swan*,<sup>210</sup> *Wilko* is one of the first cases in which the Court undertook an interpretation of the scope of section 2 of the FAA. The Court reconciled section 2 of the FAA and section 14 of the Securities Act by holding that, despite a securities purchaser's written

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206. See *infra* notes 207-08.

207. 465 U.S. 1 (1984).

208. 513 U.S. 265 (1995).

209. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1308 (2001) (rejecting arguments that section 2 “transactions” include only “commercial contracts”).

210. 346 U.S. 427 (1953).

agreement to arbitrate future disputes with a securities brokerage firm, section 2 of the FAA did not mandate enforcement of the parties' agreement to arbitrate future disputes.<sup>211</sup> The Court's conclusion was based upon the fact that the purchaser had filed a lawsuit under the Securities Act of 1933 (which prohibited fraud surrounding the purchase of securities). In resolving the conflict between section 2 of the FAA, which provides for the enforcement of arbitration agreements, and section 14 of the Securities Act, which prevents securities sellers from obtaining a purchaser's agreement or stipulation to "waive compliance with any provision" of the Securities Act,<sup>212</sup> the Court held that the Securities Act's policy outbalanced the FAA's policy.<sup>213</sup> First, the Court held that section 14 prevented the waiver of the judicial fora that the Securities Act made available to purchasers, emphasizing that the judicial fora choices were a real benefit to purchasers.<sup>214</sup> The Court noted the differences between the procedures available from a judicial forum and those available during arbitration, including the fact that the arbitrator's decision on some issues would be "without judicial instruction, . . . without explanation of their reasons and without a complete record of their proceedings," and that there would be judicial review only of a manifest disregard of the law and not when there is merely an arbitrator's misinterpretation of the law.<sup>215</sup>

Although one could argue that *Wilko* is indicative of the judiciary's historical hostility to arbitration (a conclusion that the Court subsequently adopted), a better interpretation is that *Wilko* was an attempt by the Court to enforce Congress's intent that a securities purchaser not be forced to waive the statutory rights that the Securities Act grants. Section 14's non-waiver provision provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."<sup>216</sup> Section 22(a) of the Securi-

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211. *Wilko*, 346 U.S. at 438.

212. *Id.* at 430 n.6.

213. *See id.* at 438.

214. *See id.* at 434-37. The Court stated the following:

When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.

*Id.* at 435.

215. *Wilko*, 346 U.S. at 436. The Court noted that the FAA did not have a provision that existed in the English arbitration law where the English courts could perform a "judicial determination of legal issues." *Id.* at 437.

216. Securities Act of 1933, § 14 (1933) (codified as amended at 15 U.S.C. § 77cc(a) (2000)).

ties Act, which is the judicial forum portion of the Securities Act, falls within section 14's non-waiver of "any provision of this subchapter," and it provides in part that:

[t]he district courts of the United States . . . shall have jurisdiction . . . concurrent with State and Territorial courts, . . . of all suits in equity and action at law brought to enforce any liability or duty created by this subchapter. . . . Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place.<sup>217</sup>

Pursuant to section 14's terms and conditions, a securities purchaser should not be forced to arbitrate a claim under the Securities Act because such an arbitration would constitute a waiver of section 22(a)'s right to a civil claim in state or federal court. Therefore, instead of being merely an opinion that is hostile to arbitration, *Wilko* is the Court's effort to give meaning to section 14's non-waiver provision. The Court's reasoning is instructive. First, the Court acknowledged the substance of the petitioner's argument that an arbitration agreement is violative of section 14:

Petitioner argues that § 14 . . . shows that the purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act. He contends that arbitration lacks the certainty of a suit at law under the Act to enforce his rights. He reasons that the arbitration paragraph of the margin agreement is a stipulation that waives "compliance with" the provision of the Securities Act, set out in the margin, conferring jurisdiction of suits and special powers.<sup>218</sup>

The Court accepted petitioner's argument and reasoning, stating that:

[t]he words of § 14, . . . void any "stipulation" waiving compliance with any "provision" of the Securities Act. This arrangement to arbitrate is a "stipulation," and we think the right to select the judicial forum is the kind of "provision" that cannot be waived under § 14 of the Securities Act. That conclusion is reached for the reasons set out above in the statement of petitioner's contention on this review. While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear that the Securities Act was drafted

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217. 15 U.S.C. § 77v(a) (2000).

218. *Wilko*, 346 U.S. at 432-33.

with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers. It is therefore reasonable for Congress to put buyers of securities covered by that Act on a different basis from other purchasers.<sup>219</sup>

The Court then noted the wider choices of procedures that a securities purchaser could get in a judicial forum (“wider choice of courts and venue”), and that such advantages would be lost if a securities purchaser is forced to arbitrate her claims under the Securities Act.<sup>220</sup> The Court proceeded to discuss some of the procedural differences between arbitration and a judicial forum.<sup>221</sup> The Court concluded with the following: “As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, *it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review.*”<sup>222</sup>

In sum, the Court’s discussion of the differences between a judicial forum and arbitration might have been necessary to show why the Court was allowing the policy and statutory provision of the Securities Act to trump section 2 of the FAA. That discussion provided a rationale to support a plain meaning, textualist interpretation of section 14 of the Securities Act. Section 14 clearly prevents a waiver of the Securities Act’s statutory provisions. Section 22(a)’s federal and state court jurisdiction and private right of action language is a statutory provision. As such, section 14 by its terms prohibits arbitration if it is a forced waiver of a securities purchaser’s statutory rights to a judicial forum. Moreover, no one in *Wilko* offered any legislative history or other extrinsic evidence to show that Congress intended an interpretation other than the plain meaning interpretation.<sup>223</sup>

Furthermore, because both the FAA of 1925 and the Securities Act of 1933 are federal statutes that Congress enacted, the mere fact that the Securities Act’s section 14 came later in time, and that by its terms it prevented the waiver of a judicial forum, is sufficient enough for section 14 to trump the FAA’s arbitration provisions. In other words, to the extent that *Wilko* is hostile to arbitration, the hostility stems from Congress’s inclusion in the Securities Act of a broad section 14 non-

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219. *Id.* at 434-35.

220. *See id.* at 435-36.

221. *See id.* at 436-37. Some of these differences includes arbitration’s lack of “judicial instruction on the law, lack of a written award, and limited judicial review of the arbitrator’s award without a specific judicial review of legal issue. *See id.*

222. *Wilko*, 346 U.S. at 437 (emphasis added).

223. *Id.*

waiver of a judicial forum provision, and not from a desire by the Court to disfavor arbitration.<sup>224</sup> At worst, *Wilko* shows how the Court had to struggle when trying to reconcile the FAA's arbitration enforcement provisions with the terms and conditions of a newer federal statute.

This struggle continued in *Alexander v. Gardner-Denver Co.*,<sup>225</sup> where an African-American employee alleged both that his employer discharged him in violation of the terms and conditions of a collective bargaining agreement, and that the employer was motivated by racial discrimination.<sup>226</sup> To resolve these claims, the employee's union, pursuant to the collective bargaining agreement, entered into arbitration with the employer; the arbitrator apparently considered both of the employee's claims, and held that the employer had just cause for terminating the employee.<sup>227</sup> Subsequently, the employee filed a Title VII claim in federal court, alleging racial discrimination, which the court dismissed because the arbitrator had already concluded that no discrimination had occurred.<sup>228</sup> On appeal, the Supreme Court held that the arbitrator's decision on the Title VII claim did not preclude the employee from bringing a separate lawsuit on the same claim in federal court.<sup>229</sup> Primarily, the Court held that the congressional purposes underlying Title VII mandated that a prior arbitration of a racial discrimination claim under a collective bargaining agreement should not preclude a separate adjudication of the discrimination claim in federal court.<sup>230</sup>

First, the Court recognized that Congress's intent was that employ-

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224. See *id.* at 432. As a matter of fact the Court noted that Congress's enactment of the FAA shows a "hospitable attitude of legislatures and courts toward arbitration." *Id.*

Subsequently, in *Bernhardt v. Polygraphic Co. of America*, the Court continued its criticism of the arbitration procedures when compared to those of the judiciary. See 350 U.S. 198, 203-04 (1956). The Court noted that:

the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in *Wilko v. Swann*, 346 U.S. 427, 435.

*Bernhardt*, 350 U.S. at 203. The central holding of this case is that state law controlled the litigants' arbitration agreement because the dispute and agreement did not affect interstate commerce; under the relevant state law, a party could revoke an arbitration agreement at any time before the arbitrator reached a decision. *Id.* at 201-02.

225. 415 U.S. 36 (1974).

226. *Alexander*, 415 U.S. at 42.

227. See *id.* at 42-43.

228. See *id.*

229. See *id.* at 59-60.

230. See *id.* at 59-60.

ees filing claims cognizable under Title VII have a judicial forum to resolve their disputes and that "federal courts [are] to exercise final responsibility for enforcement of Title VII."<sup>231</sup> Pursuant to congressional intent the Court held that "federal courts have been assigned plenary powers to secure compliance with Title VII,"<sup>232</sup> and that a litigant's claim under Title VII is independent of other possible claims, including a grievance under a collective bargaining agreement.<sup>233</sup> Given the importance of the litigant's private claim under Title VII, the Court held that "there can be no prospective waiver of an employee's rights under Title VII,"<sup>234</sup> even when the litigant has already submitted her claim to arbitration under a collective bargaining agreement.<sup>235</sup>

As further support for its conclusions, the Court showed how a resolution during arbitration, under a collective bargaining agreement, did not have the same protections as a resolution during a judicial forum, including the fact that an arbitrator's responsibility is to interpret the collective bargaining agreement to further the parties' intent and not

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231. *Alexander*, 415 U.S. at 44-45. The Court stated that:

final responsibility for enforcement of Title VII is vested with federal courts. The Act authorizes courts to issue injunctive relief and to order such affirmative action as may be appropriate to remedy the effects of unlawful employment practices. . . . Courts retain these broad remedial powers despite a Commission finding of no reasonable cause to believe that the Act has been violated. . . . Taken together, these provisions make plain that federal courts have been assigned plenary powers to secure compliance with Title VII.

In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII. Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. And although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII. . . . In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices.

*Id.* at 44-45 (citations omitted).

232. *Id.* at 45. In another portion of the opinion the Court stated that:

Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. . . . There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction.

*Id.* at 47 (citation omitted).

233. See *Gardner-Denver*, 415 U.S. at 48-49. The Court also held that "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Id.* at 45.

234. *Id.* at 51.

235. *Id.* at 52.

necessarily to further Title VII's policies.<sup>236</sup> Moreover, parties choose arbitrators for their expertise in applying standards and norms of the labor industry, and not for any expertise in interpreting Title VII law and relevant public policy,<sup>237</sup> which the Court believed that federal courts are better able to do because "judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts."<sup>238</sup>

Additionally, the Court relied upon several procedural and substantive differences between arbitration and court adjudication:

Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . And as this Court has recognized, '[a]rbitrators have no obligation to the court to give their reasons for an award. . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.'<sup>239</sup>

By giving weight to these procedural differences, the Court relied upon some of the same considerations that it found important in *Wilko*.<sup>240</sup>

In sum, the Court in *Gardner-Denver* concluded that the petitioner's arbitration of his Title VII claim did not preclude him from bringing a separate Title VII claim in federal court.<sup>241</sup> Instead of the Court's discussion of the differences between arbitration and federal court litigation being indicative of a judicial hostility to arbitration, the discussion is evidence of the Court's attempt to ascertain, justify, and apply Congress's intent that federal courts have plenary power in resolving Title VII claims.<sup>242</sup>

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236. *Id.* at 56-58. The gist of the Court's conclusion is that, under a collective bargaining agreement, the arbitrator is to interpret the agreement, which takes priority over any interpretation and application of Title VII.

237. *See Gardner-Denver*, 415 U.S. at 57.

238. *Id.*

239. *Id.* at 57-58 (citations omitted) (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. at 598).

240. *See Gardner-Denver*, 415 U.S. at 57-58.

241. *Id.* at 59-60. At one point the Court made the following statement: "[W]e have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.'" *Id.* at 56.

242. *See id.* at 56-60.



As for the Court's mode of statutory interpretation, one could argue that the Court's decision in *Gardner-Denver*, like that in *Wilko*, is really a plain meaning interpretation of Title VII's federal court jurisdiction provision, aided by the Court's recognition of an underlying congressional policy in favor of federal court resolution of Title VII claims.<sup>243</sup> On the other hand, one could argue that the Court's decision is an originalist decision to the extent that the Court attempted to apply the enacting congressional intent and purpose to the relevant interpretative issue. Because the procedural differences between the two fora are real differences involving limited discovery and judicial review, the Court properly used the differences to support its interpretative conclusion that Congress's intent is that a litigant's right to a judicial forum trumps an arbitration agreement under the FAA.

However, in subsequent cases the Court has been less critical of procedural and substantive differences between arbitration and court adjudication.<sup>244</sup> Now, there is a presumption that, unless a federal statute indicates otherwise, the Court will find that (despite procedural and substantive differences) arbitrators' decisions are just as good as judicial decisions, and that any inferiority that the former might have is an acceptable risk that disputants' assume when they contract for arbitration.<sup>245</sup>

For example, the Court in *Scherk v. Alberto-Culver Co.*<sup>246</sup> reached a decision that shows a preference for the supremacy of business interests over consumer protection, and a preference for arbitration over a judicial forum. At first blush, one would have expected the Court to reach the same conclusion as it had in *Wilko*. However, in *Scherk*, the Court held that the non-waiver provision in section 29(a) of the Securities Exchange Act of 1934, although similar to the non-waiver provision in section 14(a) of the Securities Act of 1933, did not mandate that agreements to arbitrate were void, as the Court held was the case under section 14 of the Securities Act and under the rationale of *Wilko*, even when arbitration would prevent a litigant from resolving a claim under the Securities Exchange Act in federal court.<sup>247</sup>

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243. *See id.*

244. *See infra* text accompanying notes 246-59.

245. *See infra* text accompanying notes 291-92. However, where an adhesion arbitration agreement is presented on a take-it-or-leave-it basis, it is hard to argue that a weaker party to an arbitration agreement should be forced to endure arbitration's procedures and substantive differences as an assumed risk.

246. 417 U.S. 506 (1974).

247. *Scherk*, 417 U.S. at 515-20. As stated above, in *Wilko* the Court held under the Securities Act that the non-waiver of a claim provision applied to an arbitration agreement because such an agreement prevented the disputant from having his statutorily created right to a choice of judicial forums to resolve his claim in either state or federal court. This was a right which the Court held was a substantive right, apparently because the procedural opportunities and protec-

The *Scherk* Court, relying upon minor distinctions between the Securities Act and the Securities Exchange Act, held that the Securities Exchange Act did not preclude arbitration. First, the Court held that, unlike the Securities Act, the Securities Exchange Act did not provide for a "special right" claim in federal court to vindicate the plaintiff's allegations, noting that section 10(b) and rule 10(b)(5) of the Securities Exchange Act, the provisions under which the *Scherk* plaintiff sued, did not specifically provide for a private cause of action because courts had to imply a cause of action under these sections.<sup>248</sup> However, this seems to be a distinction without a difference, because courts' implying of the private right of action under the Securities Exchange Act of 1934 means that the private right of action has become a part of the Securities Exchange Act, which should have put private rights of action under both Acts on the same footing.<sup>249</sup>

Second, the Court, relying upon another insignificant fact, emphasized that in *Wilko* the disputants had, under the Securities Act, a choice of bringing a lawsuit in either state or federal court and that such a right, which was a substantive right given the procedural differences between court adjudication and arbitration, would be lost if courts were to enforce the arbitration agreement.<sup>250</sup> But the Court noted that, under the Securities Exchange Act, a party had the right to bring a lawsuit only in federal court, and that the right could be prevented if a party desiring arbitration took action in a foreign jurisdiction to stay a lawsuit in federal court until arbitration was completed in the foreign jurisdiction; allegedly, this somehow establishes that enforcing an arbitration agreement under the Securities Exchange Act in *Scherk* meant that a disputant would suffer less of a loss of rights.<sup>251</sup> The Court reached this conclusion despite noting that the Securities Exchange Act's non-waiver of statutory provisions was almost identical to the Securities Act's section 14 non-waiver provision.<sup>252</sup>

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tions in the courts were deemed to be outcome determinant in resolving disputes under the 1933 Act, in light of the absence of such protection in arbitration. See *supra* text accompanying notes 218-22.

248. *Scherk*, 417 U.S. at 513.

249. At first blush, it appears that the fact that the Securities Exchange Act does not specifically speak of a private right of action is not decisive because the courts' implying of a private right of action seems to have put those laws on the same footing as the congressionally created right of action in section 12(2) of the Securities Act of 1933.

250. *Scherk*, 417 U.S. at 518.

251. *Id.*

252. See *id.* at 514. The Court asserted:

Section 29(a) of the Securities and Exchange Act of 1934, . . . provides:

'Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.' While the two sections are not identical, the variations in their wording seem irrelevant to the issue presented in this case.

Moreover, the dissenters' opinion noted that in *Wilko* the decisive consideration was the differences between the procedures in courts and the procedures in arbitration, differences that would still exist even with the Securities Exchange Act's limiting lawsuits to federal court adjudication.<sup>253</sup> It is discouraging that the Court did not at least offer some type of rejoinder to the dissenters' statement that, like in *Wilko*, enforcement of the arbitration agreement meant that the unwilling disputant would not have the same type of outcome determinant procedures that the Court found decisive in *Wilko*. However, the worst implication from the Court's opinion in *Scherk* is that the opinion is obviously an act of judicial activism in furtherance of the Court's preference for arbitration in the international context, where the Court thought that, through arbitration agreements, parties to international trade could provide for more predictability in the manner and means of resolving future disputes.<sup>254</sup>

The best explanation for the Court's decision in *Scherk* is that it was more concerned with promoting international business than it was with protecting unwilling disputants from arbitration's deficiencies.<sup>255</sup> The Court stated that:

[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."<sup>256</sup>

What makes the Court's decision problematic from a statutory interpretation standpoint is that the above-quoted statements show the Court's own political decision in favor of arbitration, but it does not speak to Congress's intent regarding this issue. Supposedly, Congress's intent is to be the cornerstone of the Court's statutory interpretation of federal statutes.<sup>257</sup> If that were the case in *Scherk*, one would think that the

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*Id.* at 514 n.7.

253. *See id.* at 532 (Douglas, J., dissenting).

254. *Scherk*, 417 U.S. at 518.

255. *Id.*

256. *Id.* at 519 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)).

257. *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (stating the statutory interpretation standard that the Court uses in general and when interpreting ERISA's preemption clause).

Court, instead of trying to find meaningless distinctions between the private rights of action and the non-waiver of statutory provisions of the Securities Exchange Act and the Securities Act, would have recognized that the federal courts' implication of a private right under the Securities Exchange Act placed the two statutes on the same footing, and that *Wilko*, which held that the securities purchaser cannot be forced to waive her private right of action under the Securities Act, should have been applicable and controlling in *Scherk*.<sup>258</sup>

In the final analysis, it appears that *Scherk* is a decision that falls neither in the originalist camp nor in the textualist camp. Rather, it is at best the Court's use of a dynamic statutory interpretation, apparently for the Court's purpose of developing the FAA jurisprudence to promote the Court's impressions regarding the benefits that arbitration could bring to the resolution of international disputes. However, one would think that Congress should have been the entity that resolved these types of public policy decisions, and that the Court's role in *Scherk* should have been that of determining whether Congress's intent in the original drafting was that the non-waiver provision of the Securities Exchange Act of 1934 should be given the same effects as the non-waiver provision of the Securities Act.<sup>259</sup>

The Court's next major case after *Scherk* appears to have been an aberration, as the Court attempted to offer some protection against the dangers posed by the arbitration of a statutory claim that Congress designed especially for the protection of certain employees. In *Barrentine v. Arkansas-Best Freight System, Inc.*, the Court reached a decision that, in some respects, is at odds with *Scherk*.<sup>260</sup> There the Court held that the Fair Labor Standards Act's (FLSA) requirements that employees be paid a minimum wage and that federal courts have jurisdiction to resolve claims stemming from a violation of the FLSA, mandated that an arbitration agreement in a collective bargaining agreement could not prevent an employee from filing a lawsuit in federal court seeking a judicial determination of a minimum wage claim.<sup>261</sup> The Court reached this conclusion despite the fact that the employee had already submitted his claim to arbitration, the arbitrator had rendered an award against the employee,<sup>262</sup> and despite an existing federal policy in favor of arbitration when a collective bargaining agreement provides for arbitration.<sup>263</sup>

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258. See *supra* text accompanying notes 248-51.

259. See *Wilko*, 346 U.S. at 438 (relying upon Congress's intent in holding that section 14 of the Securities Act prevented the enforcement of an arbitration agreement).

260. 450 U.S. 728 (1981).

261. *Barrentine*, 450 U.S. at 739-40.

262. *Id.* at 731.

263. *Id.* at 735.

The Court's decision was based upon several considerations. First, the FLSA's purpose is to protect employees' individual rights to wages, whereas the Labor Management Relation Act (LMRA) and collective bargaining agreements thereunder are designed to protect employees' collective rights.<sup>264</sup> Consistent with its decision in *Gardner-Denver Co.*, the Court recognized that there was a possibility that the union which processed the employee's wage dispute in the arbitration hearing might have taken actions designed to protect collectively all unionized employees to the detriment of the aggrieved employee's individual claim.<sup>265</sup>

Second, the Court considered several procedural deficiencies that made arbitration not the best forum for the resolution of employees' wage claims. For example, the Court thought that the arbitrator, whose expertise was in "the law of the shop, [and] not the law of the land," might not have the legal competency to resolve "the public law considerations underlying the FLSA."<sup>266</sup> And, the Court asserted that even if arbitrators were competent, the collective bargaining agreement might not allow arbitrators to decide some issues under the FLSA.<sup>267</sup> In sum, the Court concluded that "not only are arbitral procedures less protective of individual statutory rights than are judicial procedures, but arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief."<sup>268</sup>

Chief Justice Burger, who was joined in his dissenting opinion by Justice Rehnquist, asserted that there was no showing of congressional intent that an employee could not waive a judicial determination of a wage claim under the FLSA, and that such a waiver should be allowed given a congressional policy in favor of arbitration to resolve labor disputes.<sup>269</sup> Despite the dissenters' effort to explain their opposition on the grounds of congressional intent, it appears that the dissenters' primary motivation was arbitration's alleged judicial economy in resolving disputes, especially the instant employee's wage dispute, which the dissenters implied was a simple claim.<sup>270</sup> Several statements in the dissenting opinion show that the dissenters were more concerned with reducing federal courts' dockets than with any individual harm that might flow from the arbitration of the employee's wage claim. The dissenters

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264. *Id.* at 739.

265. *Id.* at 742.

266. *Barrentine*, 450 U.S. at 743 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)).

267. *Id.* at 744.

268. *Id.* at 744-45. (citations omitted). Although the Court did not specifically set out arbitration's deficiencies, it did rely upon *Gardner-Denver* which discussed these deficiencies. *Id.* at 745. These deficiencies are quoted in the text accompanying note 239.

269. *Id.* at 747 (Burger, C.J., dissenting).

270. *See id.* at 752-53 (Burger, C.J., dissenting).

stated that:

[t]he Court seems unaware that people's patience with the judicial process is wearing thin. Its holding runs counter to every study and every exhortation of the Judiciary, the Executive, and the Congress urging the establishment of reasonable mechanisms to keep matters of this kind out of the courts. The Federal Government, as I noted earlier, has spent millions of dollars in pilot programs experimenting in extrajudicial procedures for simpler mechanisms to resolve disputes. Approving an extrajudicial resolution procedure "is not a question of first-class or second-class . . . means. It is a matter of tailoring the means to the problem that is involved." *This Court ought not be oblivious to desperately needed changes to keep the federal courts from being inundated with disputes of a kind that can be handled more swiftly and more cheaply by other methods.*<sup>271</sup>

The dissenters cited various reports, studies, and statistics that allegedly showed the propensities of arbitration and other alternative dispute resolution processes to resolve an increasing number of filed lawsuits and appeals more efficiently.<sup>272</sup> It is also significant that Chief Justice Burger had written a journal article extolling the benefits of alternative dispute resolution processes in reducing the judicial caseload and, in his opinion, in creating a more user-friendly method of resolving civil disputes.<sup>273</sup> Furthermore, the fact that Justice Rehnquist joined in the dissent may be proof that judicial economy arguments in favor of arbitration (and not consumer protection motivations nor Congress's intent) might be the predominate reason why the Supreme Court has taken a pro-arbitration position under Chief Justice Rehnquist's reign.<sup>274</sup>

After the Court's decision in *Barrentine*, one can reasonably think that Chief Justice Burger's argument, that arbitration should be used for the purpose of reducing courts' caseloads, has become the motivating rationale supporting the Court's majority position in subsequent cases, and that the Court is no longer interested in applying the enacting Con-

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271. *Barrentine*, 450 U.S. at 752-53 (citations omitted) (citing THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE *passim* (West Pub. Co. 1979); American Bar Ass'n, *Report on the National Conference on Minor Disputes Resolution passim* (1978); *Resolution of Minor Disputes: Joint Hearings before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, and Subcomm. on Consumer Protection and Finance, House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess., 28* (1979) (testimony of Assistant Attorney General Meador)) (emphasis added).

272. *Id.* at 748-49, 752-53.

273. See generally Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

274. However, Chief Justice Rehnquist has subsequently dissented from the Court's opinions when he believed that arbitration was not mandated. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 30 (1983) (disagreeing with a majority opinion in favor of arbitration).

gress's intent to resolve issues surrounding the FAA's scope.<sup>275</sup> For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>276</sup> the Court continued its march towards complete enforcement of its judicial economy arguments in favor of arbitration and its preference for the arbitration of international disputes. In *Mitsubishi Motors Corp.*, Mitsubishi sought enforcement of an arbitration agreement with Soler, desiring the arbitration of disputes arising out of the parties' distribution and sales agreement, under which Soler agreed to sell Mitsubishi cars in Puerto Rico.<sup>277</sup> The Court held that an arbitration agreement in the contract between the parties was broad enough to cover the arbitration of a counterclaim by Soler alleging that Mitsubishi, in enforcing the distribution agreement, violated the Sherman antitrust laws.<sup>278</sup>

Clearly, the Court was primarily interested in promoting its own views regarding arbitration's benefits. First, the Court praised section 2 of the FAA as establishing "[t]he 'liberal federal policy favoring arbitration agreements,'" and stated that the FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate."<sup>279</sup> Regarding this body of federal substantive law, the Court noted the following:

And that body of law counsels that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.<sup>280</sup>

However, there is nothing in either the FAA's statutory language or its legislative history that states that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitrations." Nor do these sources establish that there is a "liberal federal policy favoring arbitration agreements." Rather, it is reasonably clear that Congress, in enacting the FAA, did not intend to

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275. Cf. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("Yet, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."). One can reasonably argue that instead of the Supreme Court Justices' predilection for judicial economy, congressional intent should be the decisive factor in interpreting the FAA.

276. 473 U.S. 614 (1985).

277. *Mitsubishi*, 473 U.S. at 618-19.

278. *Id.* at 640.

279. *Id.* at 625 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).

280. *Id.* at 626 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25).

establish a federal policy that arbitration agreements should be promoted over normal court adjudication.<sup>281</sup> Section 2 only provides for the enforcement of arbitration agreements into which parties have freely entered.<sup>282</sup> There is no indication that parties should either be encouraged or forced into arbitration agreements, or that the Court should construe ambiguous arbitration agreements in favor of arbitration to carry out some alleged federal policy in favor of arbitration.<sup>283</sup> It is also clear that, in the execution of a non-existent and alleged congressional policy in favor of arbitration, the Court has taken on the role of a judicial lawmaker in the arbitration arena and has interpreted section 2 in such a manner as to further the Court's own views regarding arbitration's role in resolving disputes.

Therefore, in *Mitsubishi*, the Court held that there is no federal policy against the arbitration of all federal statutory claims, and that the exclusion of statutory claims from arbitration should be judged on a case-by-case basis.<sup>284</sup> But, instead of reviewing the Sherman Act's language and legislative history to see whether that statute contained any provisions showing a congressional intent that there should be no arbitration of a Sherman Act claim, the Court simply relied upon *Scherk* (where the Court had upheld the arbitration of international disputes) and other precedents (where the Court upheld "freely negotiated choice-of-forum clauses") to allow arbitration.<sup>285</sup> As in *Scherk*, the Court's thinking in *Mitsubishi* was that international businessmen needed arbitration to bring predictability into their dispute resolution processes.<sup>286</sup>

Although the Court emphasized that Congress had amended the FAA to allow the enforcement of international arbitration agreements, the Court should have further recognized that the amendment did not mandate the arbitration of all international disputes involving violations of federal statutes such as the Sherman Act. Also, because the FAA's amendment provides for the non-enforcement of international arbitration agreements that are against either the law or public policy, the Court should have examined the Sherman Act and its various statutory provisions, as well as relevant legislative history, to see whether these sources disclosed a congressional intent against the arbitration of Sherman Act claims.<sup>287</sup>

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281. See *infra* note 458 accompanying text.

282. H.R. REP. NO. 68-96 (1925).

283. See *id.*

284. See *Mitsubishi*, 473 U.S. at 627.

285. *Id.* at 631.

286. See *id.*

287. See *id.* at 658-60 (Stevens, J., dissenting) (discussing international arbitration amendment provisions providing for non-enforcement of international arbitration agreements that are



However, the closest the Court comes to such an analysis is its rejection of the lower-court's use of *American Safety Equipment Corp. v. J.P. Maguire & Co.*,<sup>288</sup> a Second Circuit Court of Appeals decision holding that antitrust claims are not subject to arbitration.<sup>289</sup> The Court's rejection of *American Safety's* holding, which primarily relied upon arbitration's procedural deficiencies to hold that arbitration is unsuitable for the arbitration of antitrust claims,<sup>290</sup> represents the Court's rejection of arguments that arbitration is an inferior forum for the resolution of statutory claims unless there is a specific showing of a congressional preference for a judicial forum instead of an arbitral forum.<sup>291</sup>

The Court reasoned that any procedural advantages the parties gave up by choosing an arbitral forum instead of a judicial forum was a conscious decision by the parties to instead accept arbitration's advantages.<sup>292</sup> The Court believed that the antitrust statute's objectives, including its remedial and deterrence goals, would be vindicated in arbitration as long as the arbitrator resolves a party's antitrust claim.<sup>293</sup> At minimum, it appears that the Court, like in *Scherk*, was substantially influenced by its desire to promote international trade through its pro-arbitration decision in *Mitsubishi*<sup>294</sup> instead of a desire to discover and enforce Congress's intent regarding the arbitration of antitrust claims. The Court explicitly stated the following:

As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," . . . and also their customary and understand-

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against either a country's public policy or its laws).

288. 391 F.2d 821 (2d Cir. 1968).

289. *Mitsubishi*, 473 U.S. at 628-29.

290. *See id.*

291. *See id.* at 631-38.

292. *See id.* at 633. The Court stated:

Moreover, it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.

*Id.* at 633.

293. *Mitsubishi*, 473 U.S. at 637.

294. *Id.* at 638.

able unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.<sup>295</sup>

However, the dissenters, appearing more willing to ascertain and apply Congress's intent, would not have enforced the arbitration of the Sherman antitrust claim, given the strong pro-competition policies underlying the antitrust laws, prior cases that exempt statutory claims from arbitration agreements,<sup>296</sup> and the lack of procedural protections in arbitration. In the dissenters' opinion, the lack of procedural protections made arbitration an inadequate forum for the resolution of antitrust statutory claims and the public policies implicit therein.<sup>297</sup>

*Shearson/American Express, Inc. v. McMahon*<sup>298</sup> is the Court's next case interpreting the FAA's coverage of statutory claims. The Court was faced with a consumer contract for the sale of securities, wherein the agreement between the purchaser and the seller contained an arbitration agreement providing for the arbitration of "any controversy relating to" the purchaser's account with the seller.<sup>299</sup> Alleging that one of the seller's employees had fraudulently engaged in excessive trading of the purchaser's stocks and in not disclosing certain information, the purchaser filed a lawsuit in a federal district court, alleging a section 10(b) claim, a Rule 10(b)(5) claim, and a civil RICO claim.<sup>300</sup> The

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295. *Id.* at 638-39 (citations omitted). The Court also relied upon *Scherk's* statement that, in international trade, the parties' agreement for arbitration provides more predictability in resolving international disputes. *Id.* at 630-31.

296. *See id.* at 651-54.

297. *See Mitsubishi*, 473 U.S. at 656-57. The dissenters stated:

This Court would be well advised to endorse the collective wisdom of the distinguished judges of the Courts of Appeals who have unanimously concluded that the statutory remedies fashioned by Congress for the enforcement of the antitrust laws render an agreement to arbitrate antitrust disputes unenforceable. Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207, and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually unreviewable. Despotism of this kind is fine for parties who are willing to agree in advance to settle for a best approximation of the correct result in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets. Instead of "muffling a grievance in the cloakroom of arbitration," the public interest in free competitive markets would be better served by having the issues resolved "in the light of impartial public court adjudication."

*Id.*

298. 482 U.S. 220 (1987).

299. *McMahon*, 482 U.S. at 223.

300. *See id.*

seller filed procedures under the FAA to stay the federal lawsuit and to compel arbitration pursuant to the parties' agreement.<sup>301</sup> At the Supreme Court level, Justice O'Connor, writing for the majority, held that pursuant to the parties' arbitration agreement, the purchaser must arbitrate all of his claims.<sup>302</sup>

First, the Court again noted "a federal policy favoring arbitration," necessitating that the Court "rigorously enforce agreements to arbitrate."<sup>303</sup> However, as stated above, the Court's assertion of a federal policy favoring arbitration is a misstatement of the federal policy. Instead of a policy "favoring arbitration," the congressional policy is one that "favors the enforcement of parties' agreements to arbitrate."<sup>304</sup> The Court's alleged preference for arbitration controlled the Court's interpretation of the arbitrability of the parties' dispute in *McMahon*.

Second, the Court noted that:

"we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" should inhibit enforcement of the Act "in controversies based on statutes." . . . Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that "would provide grounds 'for the revocation of any contract,'" . . . the Arbitration Act "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."<sup>305</sup>

Therefore, pursuant to the Court's reasoning, a sufficiently broad arbitration agreement can cover federal statutory claims, and any other claims, whether contractual, tortious, or statutory. However, other than citing *Mitsubishi* (which enforced an arbitration agreement, but did not clearly establish that Congress and the nation were "well past the time [of] suspicion of the desirability of arbitration and of the competence of

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301. *See id.*

302. *See id.* at 238.

303. *Id.* at 226. (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

304. *McMahon*, 482 U.S. at 226. *See supra* text accompanying notes 279-83. *See also infra* text accompanying note 457. The difference is more than semantic. Rather, it appears that the FAA's purpose is to enforce arbitration agreements that parties have freely signed, but not to encourage parties to enter into arbitration agreements. In other words, contrary to the Court's assertion of a federal policy "favoring arbitration," the FAA does not, in the first instance, express a preference for arbitration over judicial determination. That is to say that in enacting the FAA, Congress was neutral on whether parties should or should not choose arbitration to resolve their disputes. *See H.R. REP. NO. 68-96* (1925). However, in misconstruing Congress's preference for arbitration, the Court has created a federal substantive common law principal that courts should construe ambiguity regarding arbitration in favor of arbitration. One is left believing that it is the Court that has a preference for arbitration and not Congress, at least at the time of the FAA's enactment.

305. *McMahon*, 482 U.S. at 226 (citations omitted).

arbitral tribunals”), the Court did not support its conclusion that circumstances have changed such that there should no longer be concern regarding the “desirability of arbitration and of the competence of arbitral tribunals.”<sup>306</sup> The Court did not cite any statistics, studies, or reports showing that awards from arbitrators are substantially the equivalent in justice as are decisions from judicial determinations.<sup>307</sup>

Third, to support its decision in favor of arbitration, the Court distinguished *Wilko*.<sup>308</sup> Although the Court did not specifically overrule *Wilko*, it severely limited its application and usefulness. The Court held that section 29(a) of the Security Exchange Act (which, like section 14(a) of the Securities Act, has an anti-waiver provision) does not mandate that one cannot accept arbitration in lieu of a judicial resolution of a dispute.<sup>309</sup> The Court reached this conclusion by noting that the Securities Exchange Act’s waiver provision prevents only “waiver of the substantive obligations imposed by the Exchange Act,” and not the waiver of section 27, which is the statute’s grant of federal court jurisdiction over claims alleging violations of the statute.<sup>310</sup> Because *Wilko* had found no waiver of a federal forum, in interpreting a very similar waiver provision under section 14(a) of the Securities Act, the Court had to distinguish *Wilko*. It did so by limiting *Wilko* to be authority that the anti-waiver provision in the Securities Act prevents the enforcement of an arbitration agreement only when there is evidence that the arbitration procedures are “inadequate as a means of enforcing the [substantive] provisions of the Securities Act, advantageous to the buyer. In *Wilko*, the Court had found that arbitration was inadequate because it lacked certain procedural protections that one could obtain through a

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306. *Id.* (quoting *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985)).

307. *Id.*

308. *Id.* at 226-27. The Court’s test for ascertaining whether Congress intended to exclude the arbitration of a statutory claims is as follows:

The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act’s mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent “will be deducible from [the statute’s] text or legislative history,” *ibid.*, or from an inherent conflict between arbitration and the statute’s underlying purposes.

To defeat application of the Arbitration Act in this case, therefore, the McMahaons must demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under RICO and the Exchange Act, an intention discernible from the text, history, or purposes of the statute. We examine the McMahaons’ arguments regarding the Exchange Act and RICO in turn.

*Id.*

309. *McMahon*, 482 U.S. at 231-32.

310. *Id.* at 228.

judicial determination.<sup>311</sup> The Court's limitation of *Wilko* was tantamount to an implicit overruling because the Court proceeded to state that it no longer recognized arbitration as having any deficiencies that would prevent the arbitration of Securities Act claims.<sup>312</sup> However, despite the *McMahon* Court's favorable view towards arbitration's procedures, in none of the cases that the Court cited to support its conclusion that there should no longer be a suspicion of arbitration's ability to resolve disputes, does the Court provide any empirical evidence to support its conclusion that arbitration's limited procedures do not compromise the quality of the substantive protection that the Securities Exchange Act provides.<sup>313</sup> It is not persuasive that the Court would simply point to its prior decisions, which only show the Court's evolving support for arbitration without any empirical evidence, to question *Wilko*'s suspicion of arbitration.

Fourth, it appears that the Securities Exchange Commission's (SEC) regulatory authority (whether exercised or not) to govern arbitration may have been very important, if not decisive, to the Court's decision to enforce arbitration of Securities Exchange Act claims.<sup>314</sup> However, as the dissenters observed, there was no proof that the SEC had been responsible in carrying out its authority, or that it would do so in the future.<sup>315</sup>

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311. *Wilko v. Swan*, 346 U.S. 427, 435-36 (1953).

312. *McMahon*, 482 U.S. at 232. The Court stated that:

[i]t is difficult to reconcile *Wilko*'s mistrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act. . . .

Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. . . . Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.

*Id.* at 231-32 (internal citations omitted).

313. *See id.* These limited procedures include the rule that arbitrators' decisions are not reviewable because of a misinterpretation of the law, that there is limited discovery and other limited procedures, and that there is very limited judicial review from arbitrators' awards. *Id.* at 231.

314. *See id.* at 238. The Court stated the following:

We conclude, therefore, that Congress did not intend for § 29(a) to bar enforcement of all predispute arbitration agreements. In this case, where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, enforcement does not effect a waiver of "compliance with any provision" of the Exchange Act under § 29(a). Accordingly, we hold the *McMahons'* agreements to arbitrate Exchange Act claims "enforce[able] . . . in accord with the explicit provisions of the Arbitration Act."

*McMahon*, 482 U.S. at 238.

315. *Id.* at 261-66 (Blackmun, J., dissenting).

Additionally, the Court concluded that the purchaser's civil RICO claim was subject to arbitration because the RICO statute and its legislative history did not show a congressional intent to prevent the arbitration of such claims.<sup>316</sup> The Court found that the parties' substantive rights could be resolved during arbitration; that the private attorney general function of the statute would not be harmed by arbitration; and that there was no conflict between the enforcement of the FAA and the enforcement of the RICO statute, including civil claims filed under the RICO statute.<sup>317</sup>

One telling sign of the Court's attitude towards arbitration agreements is its conclusion that "having made the bargain to arbitrate,' [the purchasers] will be held to their bargain."<sup>318</sup> The Court's decision was pro-arbitration and it conclusively established that broad arbitration agreements cover federal statutory claims unless the statute's language or legislative history specifically excludes statutory claims from arbitration. The mere fact that a federal statute has a provision that grants federal court jurisdiction is not sufficient to show a congressional intent against arbitration.<sup>319</sup> At best, it appears that a statute needs an anti-waiver provision that, unlike section 14 of the Securities Act, specifically states that a party cannot waive (or be forced to waive) her right to federal court or other judicial forum, or otherwise be forced to accept arbitration.<sup>320</sup> *McMahon* also established that the Court no longer recognizes arbitration's procedural deficiencies as warranting non-enforcement of arbitration agreements. Rather, the Court will hold parties to their arbitration agreements even if they are contained in adhesion contracts.

Justice Blackmun's dissenting opinion criticized the majority on several grounds. First, Justice Blackmun reasoned that *Wilko's* anti-waiver reasoning was applicable to the 10(b) claim under the Securities Exchange Act of 1934,<sup>321</sup> supporting his conclusion by referring to Congress's 1975 amendment of the Securities Exchange Act which shows that Congress intended that *Wilko's* non-judicial waiver be extended to claims under the Securities Exchange Act.<sup>322</sup> Justice Blackmun

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316. *Id.* at 242.

317. *Id.* at 238-42.

318. *Id.* at 242. However, the Court did not properly consider that there might have been unequal bargaining power, and that the agreement might have been part of a non-negotiable adhesion contract. The only assertion of the Court that goes to that issue is its reference that an arbitration agreement might not be enforced if there is "a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds "for the revocation of any contract."'" *McMahon*, 482 U.S. at 226.

319. *Id.* at 238.

320. *See id.*

321. *Id.* at 243-46 (Blackmun, J., dissenting).

322. *Id.* at 246-49. Justice Blackmun emphasized that all federal circuit courts of appeal had

specifically pointed out that the Court had previously interpreted *Wilko* as a decision establishing that Congress intended in the Securities Act to exempt claims under the statute from arbitration by providing for a judicial forum.<sup>323</sup> He stated that the Court now attempted to limit *Wilko* as being a decision limited to a situation where the Court did not enforce an arbitration agreement because, at that time, the Court was critical of arbitration's procedures and limited judicial review.<sup>324</sup> But, Justice Blackmun reasoned that even if *Wilko* is limited to a criticism of arbitration's procedures, the majority did not show any evidence that a passing of time resolved concerns over the adequacy of arbitration's procedures, as the arbitrator's decision is still not required to be in writing which would make it difficult to review the decision; and, there still is limited judicial review of the arbitrator's decision (only for fraud, partiality, "gross misconduct," a failure to reach a final decision, and a "manifest disregard" of the law).<sup>325</sup>

Having been frustrated by its decision in *Wilko*, and in light of its friendlier attitude towards the arbitration of statutory claims in *Mitsubishi* and in *McMahon*, the Court in *Rodriguez De Quijas v. Shear-*

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extended *Wilko* to the 1934 Act before the Court raised questions about its applicability in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). *McMahon*, 482 U.S. at 248-49.

323. *Id.* at 250-51. In other words, Justice Blackmun attempted to apply the Court's standard jurisprudence under the FAA that, if a federal statute's language, legislative history, or legislative scheme shows an intent that Congress intended that claims under the statute be resolved in a judicial forum, then parties cannot enforce an arbitration agreement to arbitrate such a claim.

324. *Id.* at 254.

325. *Id.* at 257-58. In noting that there had been no substantial changes to arbitration's procedures, Justice Blackmun stated the following:

As at the time of *Wilko*, preparation of a record of arbitration proceedings is not invariably required today. Moreover, arbitrators are not bound by precedent and are actually discouraged by their associations from giving reasons for a decision. Judicial review is still substantially limited to the four grounds listed in § 10 of the Arbitration Act and to the concept of "manifest disregard" of the law. . . .

The Court's "mistrust" of arbitration may have given way recently to an acceptance of this process, not only because of the improvements in arbitration, but also because of the Court's present assumption that the distinctive features of arbitration, its more quick and economical resolution of claims, do not render it inherently inadequate for the resolution of statutory claims. . . . Such reasoning, however, should prevail only in the absence of the congressional policy that places the statutory claimant in a special position with respect to possible violators of his statutory rights. As even the most ardent supporter of arbitration would recognize, the arbitral process at best places the investor on an equal footing with the securities-industry personnel against whom the claims are brought.

Furthermore, there remains the danger that, at worst, compelling an investor to arbitrate securities claims puts him in a forum controlled by the securities industry. This result directly contradicts the goal of both securities Acts to free the investor from the control of the market professional. The Uniform Code provides some safeguards but despite them, and indeed because of the background of the arbitrators, the investor has the impression, frequently justified, that his claims are being judged by a forum composed of individuals sympathetic to the securities industry and not drawn from the public.

*Id.* at 259-60 (citations omitted) (emphasis omitted).

*son/American Express, Inc.*<sup>326</sup> overruled *Wilko*. To support its decision, the Court gave *Wilko* a very restrictive interpretation, primarily asserting that the Court's decision in *Wilko* was based upon the Court's impression that "arbitration lacks the certainty of a suit at law under the Act to enforce [the buyer's] rights," and upon the Court's conclusion that "the Securities Act was intended to protect buyers of securities, who often do not deal at arm's length and on equal terms with sellers, by offering them 'a wider choice of courts and venue' than is enjoyed by participants in other business transactions, [thereby] making 'the right to select the judicial forum' a particularly valuable feature of the Securities Act."<sup>327</sup> The Court held that these two rationales were not sufficient to support a continuation of *Wilko*'s holding that courts could not enforce an arbitration agreement if a securities purchaser wanted a judicial determination of her Securities Act claim.<sup>328</sup> The Court labeled *Wilko* as being infected by "the old judicial hostility to arbitration," and noted the erosion of such a view.<sup>329</sup> The Court noted its shift from the alleged judicial hostility view to a view that "arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."<sup>330</sup>

Having concluded that any disfavoring of arbitration's procedures is outdated, the Court proceeded to hold that a securities purchaser's "right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions."<sup>331</sup> In other words, the Court held that the Securities Act sections regarding federal court jurisdiction are not so important that they cannot be waived.<sup>332</sup> In doing so, the Court made a distinction between the Securities Act's substantive provisions and its procedural provisions involving a federal court's "broad venue," "nationwide service of process," "amount-in-controversy requirement," and "concurrent jurisdiction" with state courts.<sup>333</sup> The Court concluded that section 14 of the Act did not pre-

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326. 490 U.S. 477 (1989).

327. *Rodriguez*, 490 U.S. at 480.

328. *Id.* at 480.

329. *Id.* at 480-81 (quoting *Kulukudis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) and citing *McMahon*, 482 U.S. at 220; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 566, 616 (1974)).

330. *Id.* at 481 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Court stated that "[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id.*

331. *Rodriguez*, 490 U.S. at 481.

332. *Id.*

333. *Id.* at 482.



vent the waiver of these federal court procedural protections because a plaintiff could bring a state court proceeding where the procedures might not be available.<sup>334</sup> Also, the Court held that the statutes at issue in *McMahon* and in *Mitsubishi* had similar procedures, but the Court held that such procedures did not prevent enforcement of the arbitration agreements at issue in those cases.<sup>335</sup>

Interestingly, the Court in part tried to justify its overruling of *Wilko* by citing *Scherk's* observations that the Securities Exchange Act provided only for federal court jurisdiction, while the Securities Act provided for both state court and federal court jurisdiction.<sup>336</sup> Now, in *Rodriguez*, the Court implied that such differences in statutory provisions did not warrant a different treatment of the anti-waiver provisions in both statutes, apparently because the Court wanted to enforce the arbitration agreement as it had done in *Scherk*. The Court reasoned that even if there was a difference, an arbitration agreement is like a forum selection clause that, like the Securities Act's concurrent jurisdiction provision, provides more choice in the fora available for the resolution of a securities purchaser's claims.<sup>337</sup> However, the Court, which was supposed to be trying to ascertain congressional intent on the waiver of jurisdiction issue, did not cite either a statutory provision or legislative history to support an assertion that Congress would have wanted the Court to imply arbitration into either the Securities Act's remedial procedures or into its concurrent jurisdiction procedures.<sup>338</sup>

In conclusion, the Court overruled *Wilko's* holding against arbitration in the securities industry to make the Court's securities industry precedents consistent with *McMahon*, which ruled in favor of arbitration. The Court was influenced by a desire to make its construction of the Securities Act uniform with its construction of the Securities Exchange Act in *Scherk*, asserting that the Acts "should be construed harmoniously because they constitute interrelated components of the federal regulatory scheme governing transactions in securities."<sup>339</sup>

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334. *Id.*

335. *Id.*

336. *Rodriguez*, 490 U.S. at 482-83.

337. *Id.* The Court also relied upon *McMahon's* rejection of "the *Wilko* Court's aversion to arbitration as a forum for resolving disputes over securities transactions, especially in light of the relatively recent expansion of the Securities and Exchange Commission's authority to oversee and to regulate those arbitration procedures." *Id.* at 483.

338. *See id.* at 482-83. Additionally, the Court asserted that the party opposing an arbitration agreement has the burden of showing that Congress, in a specific statute (like the Securities Act) intended to preclude arbitration of a statutory claim. *Id.* at 483. The Court also asserted that a party wanting to escape an arbitration agreement could do so if it established a "well-supported claim[] that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Rodriguez*, 490 U.S. at 483-84 (citations omitted).

339. *Id.* at 484-85 (internal quotations omitted).

The dissenting opinion by Justice Stevens made the following statement regarding the role of stare decisis when interpreting statutes:

But when our earlier opinion gives a statutory provision concrete meaning, which Congress elects not to amend during the ensuing 3 1/2 decades, our duty to respect Congress's work product is strikingly similar to the duty of other federal courts to respect our work product.

In the final analysis, a Justice's vote in a case like this depends more on his or her views about the respective lawmaking responsibilities of Congress and this Court than on conflicting policy interests. Judges who have confidence in their own ability to fashion public policy are less hesitant to change the law than those of us who are inclined to give wide latitude to the views of the voters' representatives on nonconstitutional matters. As I pointed out years ago, there are valid policy and textual arguments on both sides regarding the interrelation of federal securities and arbitration Acts. None of these arguments, however, carries sufficient weight to tip the balance between judicial and legislative authority and overturn an interpretation of an Act of Congress that has been settled for many years.<sup>340</sup>

In sum, the above discussion in this part of the Article shows how the Court has manipulated its interpretation of the FAA to carry out its own agenda to further the use of arbitration to reduce courts' caseloads, and otherwise to achieve the alleged judicial economy that the Court believes flows from the use of arbitration. Whereas *Wilko*, *Gardner-Denver*, and *Barrentine* are legitimate attempts by the Court to apply Congress's intent regarding one's ability to waive a judicial forum for claims under the Securities Act, Title VII, and the FLSA, respectively, the Court's current judicial philosophy is in favor of a broad application of arbitration agreements to statutory claims under federal statutes. This is shown by the Court's decisions in *Mitsubishi*, *McMahon* and *Rodriguez*, which overruled *Wilko* and signaled that the Court has relinquished all concerns it might have once had about the suitability of arbitration and its very limited procedures for the resolution of federal statutory claims and the public policy inherent in such claims.

Clearly, the Court's promotion of arbitration in its statutory interpretation is for the purpose of furthering its own public policy decisions regarding the appropriate use of arbitration, in lieu of any congressional intent that might be contrary to its agenda. As such, an application of step one of this Article's statutory interpretation proposal means that the Court should not apply the stare decisis doctrine to *Mitsubishi*,

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340. *Id.* at 486-87 (Stevens, J., dissenting) (citations omitted).

*McMahon*, and *Rodriguez*. Rather, it should freely reexamine the rationale and holding of these cases. Further, as will be argued below,<sup>341</sup> lower-level courts should strictly construe these decisions by creating necessary exceptions to them for the purpose of preventing a broad application of their holdings.<sup>342</sup>

c. *The Court's Non-Statutory Claims Precedents Before Southland Corp. v. Keating*

The same conclusion regarding the non-stare decisis status of many of the Court's precedents interpreting statutory claims is applicable to non-statutory claims because the Court's precedents in the non-statutory claim area follow the same pattern as in the statutory claim area, as discussed above.<sup>343</sup> The Court has gone from a narrow interpretation of section 2 of the FAA, with an exacting review of arbitration's procedural differences, to a broad interpretation of section 2 that disregards arbitration's procedural differences. For example, in *Bernhardt v. Polygraphic Co. of America*,<sup>344</sup> an earlier case interpreting the essential meaning of section 2, the Court concluded that section 2 was not applicable because the employment contract at issue in the case did not involve either a "maritime transaction" or a contract "evidenc[ing] 'a transaction involving commerce,'"<sup>345</sup> the two preconditions, one of which must exist before a court will enforce an arbitration agreement under the FAA.<sup>346</sup> However, given that the lawsuit fell within the federal district court's diversity jurisdiction, the Court considered whether the lower court could enforce the parties' arbitration agreement (a decision that hinged upon whether the arbitration agreement involved procedural or substantive law given the agreement's impact upon state substantive law, and upon the outcome of the parties' lawsuit).<sup>347</sup> Because of the procedural differences between arbitration and normal court adjudication, the Court held that the enforcement of the arbitration agreement was a matter of substantive law:

If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the court-house where suit is brought. For the remedy by arbitra-

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341. See *infra* notes 511-28 and accompanying text.

342. See *infra* notes 511-28 and accompanying text.

343. See *supra* text accompanying notes 210-341.

344. 350 U.S. 198 (1955).

345. *Bernhardt*, 350 U.S. at 200-01.

346. *Id.* at 201. The court further held that section 3 of the FAA, which allows federal courts to stay judicial proceeding until the completion of arbitration, is applicable only when section 2 and one of its two preconditions are applicable. *Id.* at 201-02.

347. *Id.* at 202-05.

tion, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and by Ch. 1, Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial . . .<sup>348</sup>

Being a matter of substantive law, the Court held that the federal district court could not enforce the parties' arbitration agreement because the relevant state substantive law, which was applicable for diversity purposes, mandated that the parties could revoke an arbitration agreement at anytime before the arbitrator rendered an award.<sup>349</sup>

In emphasizing the differences between an arbitrator's award and a judicial determination, the Court's decision in *Bernhardt* appropriately recognized that litigants do give up certain attributes of a judicial determination that may have a real impact on the outcomes of their disputes. However, the dissenting opinion in *Bernhardt* shows early signs of some of the Justices' hesitancy to recognize that the differences in the two types of proceedings are important enough to bar the enforcement of an arbitration agreement.<sup>350</sup>

Approximately one year later, in *Textile Workers Union of America v. Lincoln Mills of Alabama*,<sup>351</sup> the Court concluded that federal courts have the authority, as a part of their obligation under the Labor Management Relations Act (LMRA) to make federal common law, to enforce an arbitration agreement between a union and an employer.<sup>352</sup> The

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348. *Id.* at 203. Justice Frankfurter's concurring opinion also recognized that the differences between an arbitrator's award and the outcome of an ordinary judicial determination were sufficient enough to hold that issues involving the applicability of the arbitration agreement were substantive and not procedural. *Bernhardt*, 350 U.S. at 207-08 (Frankfurter, J., concurring) (asserting that the differences between the two proceedings "go to the merits of the outcome" and citing the specific differences between the arbitrator's award and the outcome of a judicial determination).

349. *Id.* at 204-05.

350. *See id.* at 212-13 (Burton, J., dissenting) (asserting that the proceedings of the arbitration agreement were "a permissible 'form of trial.'").

351. 353 U.S. 448 (1957). For a companion case, see *Goodall-Sanford, Inc. v. United Textile Workers of Am., A.F.L. Local 1802*, 353 U.S. 550 (1957) (applying the same law and holding that *Textile Workers Union of America* mandated that a federal court had the authority to enforce the parties' arbitration agreement). *See also* *General Elec. Co. v. Local 205, United Elec., Radio and Mach. Workers of Am.*, 353 U.S. 547 (1957) (applying the same law).

352. *Textile Workers*, 353 U.S. at 451-55.

Court's decision was based upon the LMRA's legislative history that the Court interpreted as recognizing that the parties' agreement to arbitrate labor disputes under a collective bargaining agreement was a quid pro quo for the union's foregoing its right to strike.<sup>353</sup> In other words, the Court recognized and accepted a congressional policy in favor of arbitration in the labor field as a means of minimizing strikes.

It is not unreasonable to believe that a case like *Textile Workers Union of America* could have influenced the Court away from its initial hesitancy against arbitration as reflected in *Wilko* and in *Bernhardt*, especially in light of legislative history showing Congress's acceptance of arbitration as a means of controlling labor strikes and other employer-employee strifes.<sup>354</sup> The Court may have relied upon a congressional acceptance of arbitration in the labor industry to support its belief, in subsequent cases not involving labor, that there is a congressional policy in favor of arbitration.

Ten years later—from the initial hesitancy against arbitration in *Bernhardt* to the *Textile Workers Union's* reference to Congress's acceptance of arbitration in the labor field—the Court, through an “evolutionary” statutory interpretation, gave section 2 of the FAA a broad interpretation that greatly expanded the FAA's coverage and extended the statute beyond original congressional intent, thereby limiting states' abilities to protect their citizens. In *Prima Paint Corp. v. Flood & Conklin MFG. Co.*,<sup>355</sup> the Court held that the parties' agreement to arbitrate “[a]ny controversy or claim arising out of or relating to” contracts involving the sale of a paint business fell within section 2's scope because the contract's circumstances made the contract one “evidencing a transaction in interstate commerce.”<sup>356</sup> Given the applicability of section 2, the Court resolved the major issue of the case: “[W]hether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators.”<sup>357</sup>

Relying upon the language of section 4 of the FAA,<sup>358</sup> the Court held that “the federal court is instructed [by section 4] to order arbitration to proceed once it is satisfied that the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.”<sup>359</sup> Therefore, federal district courts have the authority to resolve only issues involving fraud in the inducement of the arbitration

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353. *See id.* at 455.

354. *See id.* at 453-54.

355. 388 U.S. 395 (1967).

356. *Prima Paint Corp.*, 388 U.S. at 398, 401.

357. *Id.* at 402.

358. *See id.* at 403.

359. *Id.* (internal quotations omitted).

agreement itself; and, federal courts should, pursuant to section 3, stay lawsuits or other proceedings until an arbitrator has resolved allegations regarding fraud in the inducement of the contract in general.<sup>360</sup> As such, the Court affirmed the federal district court's decision referring the petitioner's claim to an arbitrator because the claim alleged only that the opposing party had fraudulently induced the acceptance of the contract in general, and not that there was a fraudulent inducement of the arbitration agreement itself.<sup>361</sup>

As to the Court's mode of statutory interpretation, the Court primarily used a plain meaning interpretation of the FAA's provisions.<sup>362</sup> But in stating that it was also honoring "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts,"<sup>363</sup> the Court also relied upon one of the FAA's underlying purposes. Therefore, it would seem that the Court should have at least exerted a little effort in rebutting the dissenting Justices' conclusion that its decision was not in compliance with some of the FAA's other purposes and legislative history statements regarding those purposes.<sup>364</sup> Instead, the Court's reliance upon only the alleged congressional purpose in favor of a "speedy" resolution of disputes leaves it open for the dissenting Justices' criticism that the majority opinion's only advantages are that it supports arbitrators in their efforts to make more money performing arbitrations<sup>365</sup> and that it supports the Court's efforts to promote arbitration.<sup>366</sup>

The dissenting Justices' criticisms of the Court's decision in *Prima Paint* starts with the dissenters' disbelief that the Court would let arbitrators decide whether the entire contract was induced by fraud, be-

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360. *Id.* at 404. When compared to *Bernhardt*, the Court's decision in *Prima Paint* made a distinction between claims involving only diversity of citizenship and claims involving interstate commerce under the Commerce Clause. Under *Bernhardt*, federal courts cannot enforce parties' arbitration agreements if the agreements do not involve either a maritime transaction or a transaction involving interstate commerce (the two preconditions of the FAA's section 2 applicability), if the relevant state law would not enforce the agreement to arbitrate. *See Bernhardt*, 350 U.S. at 202-05. However, if the arbitration agreement does meet at least one of the two preconditions, then federal courts must apply the provisions of the FAA to the parties' arbitration agreements. *See Prima Paint Corp.*, 388 U.S. at 406 ("Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power.").

361. *See id.* at 406.

362. *Id.* at 404. The Court stated that "[i]n so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts. *Id.*

363. *Id.*

364. *See generally Prima Paint Corp.*, 388 U.S. at 407-25 (Black, J., dissenting).

365. *See id.* at 416.

366. *See id.* at 422.

cause such authority creates a conflict of interest to the extent that arbitrators have an incentive to find no fraud in the inducement of the whole contract, as such a conclusion is the only one that would give the arbitrators an opportunity to address subsequent issues regarding the parties' rights and responsibilities under the contract.<sup>367</sup> Further, the dissenters were critical of arbitration's lack of significant substantive and procedural protections that would exist if there were a judicial resolution of the dispute; however, once again, the majority did not find such arguments persuasive.<sup>368</sup>

Reviewing the FAA's language and legislative history, the dissenters had other criticisms. First, they believed that Congress, in adopting section 2 of the FAA, did not intend that it apply to all contacts "which 'affect commerce'" because Congress would have used that standard phrase instead of the one that is contained in section 2.<sup>369</sup> The dissenters concluded that the "Act was to have a limited application to contracts between merchants for the interstate shipment of goods."<sup>370</sup>

Second, there was a dispute between the majority opinion and the dissenters over whether section 4 or section 3 was the controlling provision of the FAA, as they related to the issues presented. The majority relied upon section 4, which appears to limit federal courts' authority, when deciding whether to send a case to arbitration, to deciding whether "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement]"<sup>371</sup> is at issue. If the "making of the agreement" is not at issue, then section 4 seems to say that the courts should send the case to arbitration.<sup>372</sup>

Under section 3—which the dissenters found more persuasive because one of the parties was seeking a stay as provided for under section 3 and not under section 4—the dissenters made an argument that the courts, not arbitrators, should determine whether the parties' entire agreement was induced by fraud.<sup>373</sup> This was due to section 3's language providing for a stay of a judicial proceeding or lawsuit only if the issues are "referable to arbitration under an agreement in writing for such arbitration."<sup>374</sup> The dissenters' conclusion is not unreasonable given that, if the entire contract is void for fraud, then there are no issues referable to arbitration under the arbitration agreement because

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367. See *id.* at 407 (Black, J., dissenting).

368. See *id.* at 407.

369. *Prima Paint Corp.*, 388 U.S. at 410 (Black, J., dissenting).

370. *Id.* at 409.

371. See *id.* at 403.

372. See *id.* at 403-04.

373. *Id.* at 412.

374. *Prima Paint Corp.*, 388 U.S. at 412 (Black, J., dissenting) (emphasis removed).

the arbitration agreement would also be void.<sup>375</sup> In the dissenters' opinion, the only benefit of letting arbitrators decide the fraud issue regarding the entire contract is that such authority would increase the income of arbitrators who are paid according to the number of arbitrations that they perform.<sup>376</sup> Second, the dissenters thought that the majority opinion's imposition of a severability doctrine regarding the enforcement of arbitration agreements was inconsistent with the congressional purpose of placing arbitration on the same footing as other contracts. Under the severability doctrine, arbitration agreements, if not alleged to be specifically induced by fraud, were valid, and the arbitrator could arbitrate whether the entire contract was void because of fraudulent inducement. Given that other state law contracts might not apply the severability doctrine, arbitration agreements were put on a better footing than other state law contracts.<sup>377</sup> Third, the dissenters stated that one implication from the majority opinion's apparent conclusion that the FAA created federal substantive law, when the arbitration agreement involves interstate commerce, is that the FAA provisions would be obligatory on state courts when they are asked to enforce an arbitration agreement.<sup>378</sup> The dissenters believed that this would be contrary to congressional intent.<sup>379</sup>

In light of the different interpretations of the majority and dissenting opinions in *Prima Paint*, the most obvious conclusion that one can reach is that the majority applied a plain meaning interpretation to section 4 of the statute, when it probably should have interpreted section 3. The plain meaning interpretation of section 4, without a review of Congress's intent and purposes underlying the FAA, gave the Court a means of reaching a decision favorable to arbitration, regardless of

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375. *Id.* In other words, if the whole contract is void, the arbitration agreement would also be void. The dissenters relied upon other legislative history to support their conclusion that courts should determine whether the entire contract is void for fraud in the inducement. *Id.* at 407-08. First, they cited two congressionally recognized values of arbitration: the arbitrator's expertise in resolving certain matters and the speed in which arbitration might resolve disputes. *Id.* at 415. They note that neither value was served by allowing the arbitrator to decide legal issues regarding whether the entire contract was void because of fraud in the inducement. *Id.* Rather, courts have more expertise in resolving such legal issues. Furthermore, the speedy nature of arbitration could not revive a contract that was entirely void because of fraud. *See Prima Paint Corp.*, 388 U.S. at 416 (Black, J., dissenting).

376. *See id.* at 416. The dissenters attacked other portions of the Court's reasoning. First, they asserted that Congress primarily relied upon its general power to fashion procedures for federal courts (meaning that the FAA is procedural and applicable to the federal courts' proceeding) and not on Congress's Commerce Clause powers. *See id.* at 418-19. This was accepted by the majority opinion in *Prima Paint*, meaning that the FAA's provisions are substantive provisions when the arbitration agreements involve interstate commerce, which might indicate that such substantive provisions would be applicable even in state court proceeding when the arbitration agreement involved interstate commerce.

377. *See id.* at 423.

378. *Id.* at 420.

379. *Prima Paint Corp.*, 388 U.S. at 420 (Black, J., dissenting).



whether the Court's opinion was consistent with Congress's intent that the FAA's purpose is only to put arbitration agreements on an even footing with other contracts and that the FAA is procedural and not substantive.<sup>380</sup> If the Court had interpreted section 3 of the FAA, and held that courts should determine whether the contract as a whole was induced by fraud, the decision would have increased courts' caseloads, which would have been contrary to the Court's desire to do the opposite. Therefore, one can conclude that *Prima Paint* is just another case of the Court's "evolutive" interpretation in favor of a broad all-encompassing application of the FAA that serves the Court's own desires to reduce the workload in the courts even if such a desire is contrary to congressional intent and purposes.

Subsequently, in some areas of the law when the interpretation does not involve section 2's scope and its impact on state authority, the Court has been more willing to look at the purposes underlying a statute when the statute's language and scope is ambiguous, as was the case in *Prima Paint*.<sup>381</sup> For example, in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, contrary to *Prima Paint*, the Court did not employ a plain meaning statutory interpretation of the FAA.<sup>382</sup> This shows that the Court will adopt whatever theory of interpretation that is necessary to achieve a desired result. In *Commonwealth Coatings Corp.*, the Court reversed the lower court's affirmation of an arbitration award that one party to the dispute had challenged because the neutral arbitrator (of a panel of three arbitrators) had not disclosed that he had done some engineering consulting work for one of the parties to the dispute.<sup>383</sup> The relevant statutory provision under interpretation was section 10 of the FAA, which provides for a vacatur of an arbitration award when the award was "'procured by corruption, fraud, or undue means,' or '[w]here there was *evident partiality* . . . in the arbitrators.'"<sup>384</sup> The Court's analysis centered around the meaning of "evident

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380. See *supra* text accompanying note 377.

381. See *supra* text accompanying notes 355-80.

382. 393 U.S. 145 (1968).

383. See *id.* at 146. Justices Black, White, and Marshall were in the majority.

384. *Id.* at 147 (quoting section 10) (emphasis added). Section 10 provides that:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) 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.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was

partiality,"<sup>385</sup> with the Court eschewing a plain meaning interpretation of the phrase because there were no facts showing "evident partiality" because the neutral arbitrator had not acted improperly in being a part of a unanimous decision; nor did the Court, "apart from the undisclosed business relationship," have reason "to suspect him of any improper motives."<sup>386</sup>

However, to support its decision to reverse the arbitration award, the Court interpreted the whole of section 10 as expressing Congress's intent "to provide not merely for any arbitration but for an impartial one."<sup>387</sup> Therefore, the Court imposed the same avoidance of "even the appearance of bias" standard on arbitrators as is imposed on judges.<sup>388</sup> Without citing legislative history, the Court concluded that: "We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another."<sup>389</sup>

Although the Court's decision provides consumer protection by imposing the avoidance of the appearance of bias standard, the decision does not appear to be based upon congressional intent. Rather, it is based upon the Court's belief that a decision by a judge with the same type of financial relationship with one of the parties would have been questioned, and that the Court "should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."<sup>390</sup> Therefore, the decision is inconsistent with *Mitsubishi*, *McMahon*, and other cases where the Court has not relied upon the procedural differences between arbitration

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not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a re-hearing by the arbitrators.

*Id.* at 145 n.1.

385. *Id.* at 147-50.

386. *Commonwealth Coatings Corp.*, 393 U.S. at 147.

387. *Id.* (emphasis removed).

388. *See id.* at 150.

389. *Id.* The dissenters, Justices Fortas, Harlan, and Stewart, would have applied a plain meaning interpretation, and would have sustained the arbitrators' award because there was no "evident partiality" given that no one had alleged the neutral arbitrator had been biased against or in favor of the parties. Although the dissenters stated that they agreed "that failure of an arbitrator to volunteer information about business dealings with one party will [provide], prima facie, support [for] a claim of partiality or bias," *id.* at 154, they noted that the absence of any allegation of bias behavior would rebut the presumption; therefore, the end result is that the dissenters, in requiring some evidence or allegation of bias or partial behavior, gave a plain meaning interpretation of section 10 of the FAA. *Commonwealth Coatings Corp.*, 393 U.S. at 150-55 (Fortas, J., dissenting).

390. *Id.* at 149.

and court adjudication to construe section 2 of the FAA more narrowly. In other words, if arbitration's use of fewer procedural protections does not cause the Court to be overly concerned,<sup>391</sup> when the Court is using a broad interpretation of section 2 to take away states' rights to protect their citizens, arbitration's use of less than an avoidance of the appearance of bias standard should not overly concern the Court.<sup>392</sup>

In sum, the Court's non-statutory claim precedents before *Southland* show that the Court's interpretation has evolved from the initial hesitancy in *Bernhardt* to enforce arbitration agreements because of the procedural differences between arbitration and court adjudication, to the Court's broad enforcement of an arbitration agreement in *Prima Paint* without much concern about the above-referenced procedural differences. However, given the *Commonwealth Coating* Court's use of arbitration's lack of procedural protections to impose the avoidance of the appearance of bias standard on arbitrators, one would think that the Court would have at least been receptive to arguments about the differences in procedural protections to limit the scope of section 2. However, the Court was not so inclined in its leading case regarding the FAA's application to state court proceedings.

*d. Southland Corp. v. Keating and Federalism*

Chief Justice Burger, who had spoken and written on the alleged judicial economy benefits from alternative disputes resolution processes, had the opportunity in *Southland Corp. v. Keating*<sup>393</sup> to further advance his preference for arbitration. In *Southland*, the Court soundly held that section 2 of the FAA created a federal substantive right for the enforcement of arbitration agreements and that the right was enforceable in state courts as well as in federal courts.<sup>394</sup> Principally, the alleged substantive right stemmed from Congress's enactment of the FAA under its commerce powers, pursuant to which Congress has plenary authority.<sup>395</sup> Therefore, the Court concluded that the supremacy clause mandated that section 2 preempts the California Franchise Investment

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391. See *supra* text accompanying note 305.

392. See *supra* text accompanying note 305.

393. 465 U.S. 1 (1983).

394. See *id.* at 12. In part, the Court reached this decision by relying upon *Prima Paint* and Justice Black's dissenting opinion therein:

The statements of the Court in *Prima Paint* that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts. As Justice Black observed in his dissent, when Congress exercises its authority to enact substantive federal law under the Commerce Clause, it normally creates rules that are enforceable in state as well as federal courts.

*Id.* (citing *Prima Paint*, 388 U.S. at 420).

395. See *id.* at 11.

Law because it provided for enforcement of the parties' arbitration agreement, when the California law would have voided the agreement.<sup>396</sup>

The Court referenced legislative history to support its conclusions. First, it asserted that the purpose of the FAA was to "make valid and enforceable [sic] agreements for arbitration contained in contracts involving interstate commerce."<sup>397</sup> Additionally, it noted that Congress sought to prevent "the failure of state arbitration statutes to mandate enforcement of arbitration agreements."<sup>398</sup> Given these purposes, the Court asserted that the most logical conclusion was that Congress, to carry out its goal of overruling equity's hesitancy to enforce arbitration agreements, intended that section 2 apply to claims brought in both state and federal courts.<sup>399</sup> The Court reasoned that Congress would not have to rely upon its commerce powers if it had intended that the FAA apply only in federal courts, but that Congress would have to rely upon its commerce powers, as it did, to make the FAA applicable in state courts.<sup>400</sup> Also, the Court reasoned that Congress intended to place arbitration agreements on the same footing as other contracts, which, in the Court's opinion, could only be done if arbitration agreements were enforceable in both state and federal courts.<sup>401</sup>

As a critique of *Southland*, one can reasonably conclude that the Court's holding was self-interested because it has the tendency of reducing federal courts' caseloads. A contrary holding that the FAA is not applicable to state court actions, when under *Prima Paint* the FAA is applicable to diversity claims in federal court, would, according to the Court, encourage forum shopping.<sup>402</sup>

Additionally, the Court's mode of statutory interpretation leaves

396. *See id.* The gist of the Court's decision is that section 2 of the FAA, and any federal common law under section 2, are substantive rules to be applied in both state and federal courts, and that they are not procedural rules applicable only to federal courts. *See Southland Corp.*, 465 U.S. at 12-13. Several factors motivated the Court's decision. First, as noted above, the Court thought that Congress passed the FAA under its Commerce Clause powers, which meant that section 2's substantive rights were applicable in both state and federal court. *See id.* at 11-12.

397. *Id.* at 12-13 (quoting H.R. REP. NO. 68-96 at 1 (1924)) (emphasis removed).

398. *Id.* at 14.

399. *See id.* at 13.

400. *See Southland Corp.*, 465 U.S. at 14-15.

401. *See id.*

402. *See id.* at 15. The majority stated:

We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted. And since the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to federal-court jurisdiction. Such an interpretation would frustrate congressional intent to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs."

*Id.* at 15-16 (quoting H.R. REP. NO. 68-96, at 1 (1924)) (emphasis in original).

much to be desired. The Court used a plain meaning interpretation of the FAA, and made several assertions about what Congress must have meant by using its commerce powers to enact the FAA. However, the Court relied upon legislative history sparingly, and even when it used such history, it used only portions from which the Court had to draw further inferences regarding Congress's intent.<sup>403</sup> And more importantly, the Court did not cite or distinguish any of the substantial legislative history references that show that Congress did not intend that the FAA be applicable in state court proceedings.<sup>404</sup>

In a well-reasoned dissenting opinion with many citations to legislative history, Justice O'Connor, joined by Justice Rehnquist, opined that Congress intended that the FAA only apply to cases filed in federal courts because the FAA is procedural and not substantive law.<sup>405</sup>

403. *Id.* at 13. The portions used were as follows: "The Arbitration Act sought to 'overcome the rule of equity, that equity will not specifically enforce [any] arbitration agreement.'" *Southland Corp.*, 465 U.S. at 13 (citing *Hearing on S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67<sup>th</sup> Cong., 6 (1923) (Senate Hearing) (remarks of Sen. Walsh)).

The Court further stated that:

Congress also showed its awareness of the widespread unwillingness of state courts to enforce arbitration agreements, *e.g.*, Senate Hearing, *supra*, at 8, and that such courts were bound by state laws inadequately providing for "technical arbitration by which, if you agree to arbitrate under the method provided by the statute, you have an arbitration by statute[:]; but [the statutes] ha[d] nothing to do with validating the contract to arbitrate."

*Id.* at 13-14. The Court asserted that:

[u]nder the interpretation of the Arbitration Act urged by JUSTICE O'CONNOR, claims brought under the California Franchise Investment Law are not arbitrable when they are raised in state court. Yet it is clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable. The interpretation given to the Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping. We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted. And since the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to *federal*-court jurisdiction. Such an interpretation would frustrate congressional intent to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs."

*Id.* at 15-16 (internal footnotes and quotations omitted) (quoting H.R. REP. NO. 68-96, at 1 (1924)).

404. See *infra* note 405 and accompanying text.

405. *Southland Corp.*, 465 U.S. at 25. Justice O'Connor stated:

One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.

In 1925 Congress emphatically believed arbitration to be a matter of "procedure." At hearings on the Act, congressional Subcommittees were told: "The theory on which you do this is that you have the right to tell the Federal courts how to proceed." The House Report on the FAA stated: "Whether an agreement for arbitration shall be enforced or not is a question of procedure. . . ." On the floor of

the House Congressman Graham assured his fellow Members that the FAA "does not involve any new principle of law except to provide a simple method . . . in order to give enforcement. . . . It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts."

*Id.* Citing another portion of the legislative history, Justice O'Connor stated that:

A month after the Act was signed into law the American Bar Association Committee that had drafted and pressed for passage of the federal legislation wrote:

"The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. . . . A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. . . . [W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought. That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts."

Since *Bernhardt*, a right to arbitration has been characterized as "substantive," and that holding is not challenged here. But Congress in 1925 did not characterize the FAA as this Court did in 1956. Congress *believed* that the FAA established nothing more than a rule of procedure, a rule therefore applicable only in the federal courts.

If characterizing the FAA as procedural was not enough, the draftsmen of the Act, the House Report, and the early commentators all flatly stated that the Act was intended to affect only federal-court proceedings. Mr. Cohen, the American Bar Association member who drafted the bill, assured two congressional Subcommittees in joint hearings:

"Nor can it be said that the Congress of the United States, *directing its own courts* . . . , would infringe upon the provinces or prerogatives of the States. . . . [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced. . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement."

The House Report on the FAA unambiguously stated: "Before [arbitration] contracts could be enforced in the Federal courts . . . this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States."

Yet another indication that Congress did not intend the FAA to govern state-court proceedings is found in the powers Congress relied on in passing the Act. The FAA might have been grounded on Congress' powers to regulate interstate and maritime affairs, since the Act extends only to contracts in those areas. There are, indeed, references in the legislative history to the corresponding federal powers. More numerous, however, are the references to Congress' *pre-Erie* power to prescribe "general law" applicable in all federal courts. At the congressional hearings, for example: "Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts." And in the House Report:

"The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. . . ."

*Id.* at 26-28. (footnotes and internal citations omitted). Justice O'Connor concluded that:

The foregoing cannot be dismissed as "ambiguities" in the legislative history. It is accurate to say that the entire history contains only one ambiguity, and that appears in the single sentence of the House Report cited by the Court *ante*, at 12-13. That ambiguity, however, is definitively resolved elsewhere in the same House Report, see *supra*, at 27, and throughout the rest of the legislative history.

*Id.* at 29.

Justice O'Connor concluded that, even if Congress had intended section 2 of the FAA to be a new federal substantive right, states should still be allowed to use their own procedures when evaluating arbitration agreements.<sup>406</sup>

In the final analysis, it appears that many, if not a majority, of the Justices agreed with Justice O'Connor that the Court wrongly decided *Southland*. In this Author's opinion, at least three extrinsic sources substantiate Justice O'Connor's conclusion. One source is House of Representatives Report No. 96, the official report of the House Committee on the Judiciary, which had jurisdiction over the FAA during its debate in Congress. First, Report Number 96 clearly states that "[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made."<sup>407</sup> A deconstruction of this statement is instructive. The statement provides that the enforcement of an arbitration agreement is not to be determined by the "substantive law" of "the forum in which the contract is made." What this means is that when parties enter into an arbitration agreement in the United States, the enforcement of that agreement is not necessarily determined by either section 2 of the FAA (which Report No. 96 labels as being procedural) or by any relevant United States substantive law. Instead, the enforcement of the agreement is to be determined by "the law court in which the proceeding is brought."<sup>408</sup> This means that if a lawsuit is filed in state court, the state court should apply its own procedural law when determining whether to enforce an arbitration agreement.<sup>409</sup> On the other hand, when a lawsuit is filed in federal court, the federal court will use section 2 of the FAA and other FAA procedures when deciding whether to enforce arbitration agreements.

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406. *Id.* at 31-32. Justice O'Connor stated that:

Before we undertake to read a set of complex and mandatory procedures into § 2's brief and general language, we should at a minimum allow state courts and legislatures a chance to develop their own methods for enforcing the new federal rights. Some might choose to award compensatory or punitive damages for the violation of an arbitration agreement; some might award litigation costs to the party who remained willing to arbitrate; some might affirm the "validity and enforceability" of arbitration agreements in other ways. Any of these approaches could vindicate § 2 rights in a manner fully consonant with the language and background of that provision.

*Southland Corp.* 469 U.S. at 31-32. The gist of her assertions is that state procedures should be used in state courts, as long as such procedures do not provide for the non enforcement of valid arbitration agreements. *See id.* at 33.

407. H.R. REP. NO. 68-96, at 1 (1925).

408. *See id.* at 1.

409. Because many states have arbitration statutes that establish rules governing the enforcement of arbitration agreements and the procedures that state courts should apply, state courts will generally utilize these state laws when determining whether to enforce arbitration agreements.

Second, the fact that the FAA is procedural is shown by another portion of Report Number 96: "Before such contracts [arbitration contracts] could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States."<sup>410</sup> The statement has two references to federal court proceedings, "enforced in Federal courts" and "enforced by the courts of the United States." However, there is no reference regarding the FAA's being enforceable in state courts. The best interpretation of the above statement is that Congress recognized that the FAA procedures were needed to ensure that there were uniform procedures regarding the enforcement of arbitration agreements in federal courts.<sup>411</sup> But, the FAA was not "essential" in state courts because states like New York, and a few other states, already had arbitration statutes making arbitration agreements enforceable in state courts. Moreover, at the time of the passage of the FAA, the ABA, in conjunction with the National Conference of Commissioners of State Laws, was drafting and promoting a model uniform state law that would regulate arbitrations in state courts.<sup>412</sup> In any event, given Report Number 96's statements that the FAA is a procedure for federal courts, it is irrelevant whether or not state statutory or common law procedures would allow the enforcement of arbitration agreements in state courts. Congress, pursuant to Report No 96, implicitly, if not expressly, left state arbitration enforcement issues to the discretion of the states.

Third, the fact that Report Number 96 provides that "[t]he remedy is founded also upon the Federal control over interstate commerce and over admiralty"<sup>413</sup> is not decisive. The best interpretation that would reconcile Congress's statement in Report Number 96 that the FAA is procedural, not substantive, law and Congress's statement regarding the applicability of its commerce powers is that, although partially relying upon its commerce powers, Congress limited the use of its commerce powers such that it intended only that the FAA be deemed a procedural law applicable only in federal courts.<sup>414</sup> Any other interpretation would render certain portions of Report Number 96 nugatory, which would be contrary to the Court's normal practice of giving meaning to all of the terms and provisions of an entire document.<sup>415</sup>

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410. H.R. REP. NO. 68-96, at 1 (1925).

411. *See id.*

412. Piatt, *supra* note 183, at 156.

413. H.R. REP. NO. 68-96, at 2 (1925). The Report states that "[t]he control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce." *Id.* at 1.

414. *See id.*

415. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (stating that a provision in a statute should be interpreted such that it does not make other provisions nugatory).



Fourth, another statement from Report Number 96 is important. After discussing the source of the judicial hostility to arbitration, the report states the following: "The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement."<sup>416</sup> Clearly, one can reasonably assume that Congress knew in 1925 that, in addition to the existence of federal courts, there were also state courts. Furthermore, if Congress had intended that the FAA be applicable in state courts it would have said that the FAA "provides a procedure in the Federal courts and in the state courts for their enforcement."<sup>417</sup> However, Congress did not make such a statement because it never intended that the FAA be applicable in state courts. Furthermore, given that neither Report Number 96, the FAA's statutory language, nor any other portions of the FAA's legislative history mentioned anything about the FAA being applicable to state court proceedings, one can also clearly conclude that the only reason why the *Southland* majority relied upon Report Number 96's single reference to Congress's Commerce Clause powers is that the Court embraced the Commerce Clause reference as a means of supporting its political decision to promote a broad use of arbitration to reduce federal courts' caseloads.

Fifth, another reference in Report Number 96 shows that Congress intended that the FAA apply only to federal courts: "The proceeding will be commenced practically as any action is now commenced in the Federal courts."<sup>418</sup> Again, if Congress had intended that the FAA apply to state courts it would have made reference in the above quote to the commencement of actions in both the federal and state courts.

Therefore, a fair reading of Report Number 96 suggests that Congress intended that the FAA apply only in federal courts. As stated by Justice O'Connor in her dissenting opinion in *Southland*, Justice Burger's reliance upon only the report's statement regarding the Commerce Clause is not persuasive, especially given that the majority opinion ignores the many references in Report Number 96 to the fact that Congress intended the FAA to apply only in federal courts.

The second extrinsic source is an ABA Journal article by the ABA committee that drafted the FAA [hereinafter "ABA article"].<sup>419</sup> First, the ABA article is relevant because, in Report Number 96, Congress clearly indicated that the ABA committee was influential in the passage of the FAA, stating the following: "[The FAA] was drafted by a committee of the American Bar Association and is sponsored by that asso-

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416. H.R. REP. NO. 68-96, at 2 (1925).

417. *See id.*

418. *Id.* at 2.

419. Piatt, *supra* note 183.

ciation."<sup>420</sup> Therefore, it is only reasonable that the Court should at least acknowledge the ABA committee's opinions and beliefs about the FAA's application to state court proceedings. The article entitled *The United States Arbitration Law and Its Application*, was published in 1925, the same year that Congress enacted the FAA.<sup>421</sup> The ABA article makes several references to Congress's intent that the FAA be a procedural law applicable only in federal courts. First, the article provides that:

the Federal courts are given jurisdiction to enforce agreements for arbitration . . . and a procedure is established by which such enforcement can be had summarily. The jurisdiction exists in those cases in which, under the Judicial Code, the Federal courts would normally have jurisdiction of the controversy between the parties.<sup>422</sup>

Second, the ABA article states that "any suit commenced in a Federal court upon an issue referable to arbitration may be stayed until arbitration is had."<sup>423</sup> Third, the article asserts that "[t]he proceeding is commenced by a petition to the Federal court which, except for the agreement, would have jurisdiction of the subject matter of the controversy."<sup>424</sup>

The ABA article also addresses the sources of authority that Congress relied upon in enacting the FAA:

It does not seem that the law depends for its validity solely on the exercise of the interstate commerce and admiralty powers of Congress. *The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts.* So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power. This principle is so evident and so firmly established that it cannot be seriously disputed.<sup>425</sup>

Fifth, the article specifically states that Congress's intent was not to prevent states and state courts from regulating the validity and the enforcement of arbitration agreements:

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420. H.R. REP NO. 68-96, at 1 (1925).

421. Piatt, *supra* note 183.

422. *See id.* at 154.

423. *Id.*

424. *Id.*

425. *Id.* (emphasis added).

A federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made. But whether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought.

That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts.<sup>426</sup>

The ABA article concluded with the following:

So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States. It seems probable, however, that Congress has ample power to declare that all arbitration agreements connected with interstate commerce or admiralty transactions shall be recognized as valid and enforceable [sic] even by the State courts. In both cases the Federal power is supreme. Congress may act at its will, and having acted, no law or regulation of a State inconsistent with the congressional act can be given any force or effect even in the courts of the State itself. They are as much bound to carry out the provisions of such a Federal statute as though it was an act of their own legislature. This rule is so well settled that it is no longer subject to question or discussion. It has been enforced in innumerable instances.

Even if, however, it should be held that Congress has no power to declare generally that in all contracts relating to inter-

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426. Piatt, *supra* note 183, at 153-55. The article continued with the following:

The rule is succinctly stated in the *Meacham* case, *supra*; "An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum."

Neither is it true that such a statute, when it declares arbitration agreements to be valid, declares their existence as a matter of substantive law. The courts have always recognized that such agreements have existed but have refused to enforce them. It was often said loosely that arbitration agreements were void, even under the common-law rule. This statement was not accurate. While the courts refused to enforce arbitration agreements specifically, they recognized their existence because they gave another remedy. From the earliest times it was held that for a breach of arbitration agreement the aggrieved party was entitled to damages.

In no proper sense, therefore, was the arbitration agreement void. It was valid in the same sense that most contracts are valid, i.e., while specific performance would not be given, a remedy for a breach existed in the right to recover damages.

*Id.* at 155 (citation omitted).

state commerce arbitration agreements shall be valid, the present statute is not materially affected. The primary purpose of the statute is to make enforceable [sic] in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.<sup>427</sup>

From the above quotes and other references from the article, the best interpretation of the opinion of the ABA committee that drafted and sponsored the FAA, is that Congress intended the FAA to apply only in federal courts because Congress intended that the statute be a procedural law.

The ABA committee's article indicates that one source of the authority underlying the FAA might be Congress's commerce powers, and that pursuant thereto Congress had the authority to make arbitration agreements enforceable in state courts as well as in federal courts. However, there is no indication in either the FAA's legislative history or in the ABA committee's article that Congress intended the FAA to cover arbitration agreements to the full extent of Congress's Commerce Clause powers. Rather, the ABA committee's article shows that, regardless of the applicability of Congress's commerce powers, "[t]he primary purpose of the statute is to make enforceable [sic] in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."<sup>428</sup> It would seem that if Congress had wanted to make the FAA applicable in state courts, it would have specifically stated so in either the FAA's statutory language or in its legislative history. It would also seem that the FAA's sponsors would have stated such a congressional intent in the ABA article, especially given that the applicability of the FAA to state court proceedings has a substantial impact on federalism and states' abilities to regulate their citizens' contracts and legal disputes.

Additionally, it is significant that the ABA article also indicates that at or near the time of the FAA's enactment, the ABA—in conjunction with the National Conference of Commissioners on Uniform State Laws—was drafting a model state statute on arbitration. The model law made enforceable only arbitration agreements involving existing disputes and not agreements involving future disputes, as provided for under the FAA.<sup>429</sup> Therefore, the model state law that the ABA was

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427. *Id.*

428. *Id.*

429. *See id.* at 156. The ABA article addresses the differences between the model state law and the FAA:

And why should merchants whose claims being under \$3,000 must apply to state

considering at or near the time that the ABA committee drafted and sponsored the FAA, and at the time that Congress enacted the FAA, had a different scope than the FAA. This is an indication that the ABA, and the ABA's committee sponsors of the FAA, did not intend it to apply in state court proceedings. If they had such an intent there would have been no real reason to have a model state law, with a different scope, to control proceedings in state court.<sup>430</sup>

The third extrinsic source of information on Congress's intent regarding the FAA is a law review article by Julius Henry Cohen and Kenneth Dayton.<sup>431</sup> Cohen was a member of the ABA committee that drafted the FAA, and the law review article supports the above-referenced conclusion from the ABA article that Congress intended that the FAA be a procedural law applicable only in federal courts.<sup>432</sup>

In conclusion, although the ABA committee's article and the law review article by Cohen, one of the ABA committee's sponsors, are not legislative history materials, the Court occasionally has accepted such statements from the sponsors of federal statutes as an aid in determining the congressional intent underlying a statute.<sup>433</sup> Given the paucity of other legislative history materials on this important issue of the applicability of the FAA to state court proceedings, the Court should accept the ABA article and Cohen's law review article and use them to reexamine its *Southland* decision which erroneously holds that the FAA is applicable to state court proceedings. These extrinsic sources, the legislative history stated in Report Number 96, and Justice O'Connor's well-reasoned dissenting opinion in *Southland*, with its many references to legislative history, indicate that the Court's judicial activism in *Southland* is violative of one's legitimate expectation of how a Supreme

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courts for relief, meet a situation where, if the claim is against a non-resident and involves interstate commerce, the contract for arbitration is *valid*; but, though it be \$10,000, if it be against a fellow resident or involve only intrastate commerce, it is invalid and revocable? It is precisely such situations which require uniformity.

Piatt, *supra* note 183, at 156.

430. *Id.* at 156.

431. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926).

432. *See id.* at 277-78. Cohen and Dayton noted the following:

So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States. . . . Even if, however, it should be held that Congress has no power to declare generally that in all contracts relating to interstate commerce arbitration agreements shall be valid, and enforceable even by the state courts, the present statute is not materially affected. The primary purpose of the statute is to make enforceable in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.

*Id.*

433. *See* ESKRIDGE, *supra* note 60, at 220 (citing Justice Burger's use of statements from "nonlegislator" drafters to interpret statutes).

Court allegedly bound by the "rule of law" should conduct itself in a nation of laws and not of men.

*e. Post-Southland Corp. v. Keating Precedents*

In post-*Southland* cases, it seems that the Court's primary mode of statutory interpretation is originalism. However, the Court will not enforce Congress's original intent that the FAA should not be applied in state court proceedings because the FAA is a procedural law and not a substantive law. Beyond that fundamental issue, the Court is more willing to attempt an enforcement of the congressional purposes underlying the FAA.

*Perry v. Thomas*<sup>434</sup> is an example of the Court's unwillingness to reconsider the fundamental question of section 2's application to state court proceedings. The Court continued its enforcement of arbitration agreements in the consumer contract arena, holding that section 2 of the FAA preempted a state lawsuit, filed by the ex-employee of a securities firm, which alleged breach of contract and other state law theories.<sup>435</sup> The employee had signed, as a part of his job application process, a registration form for the securities industry in which he agreed to arbitrate disputes and controversies that he might have with his employer.<sup>436</sup> Having registered for the New York Stock Exchange, the employee was also subject to its rules, which required arbitration of controversies and disputes between securities firms and their employees.<sup>437</sup> The employee tried to escape arbitration by relying upon a California law that mandated a judicial resolution of an employee's claim for wages, including the denied commissions that formed the basis of the employee's state lawsuit.<sup>438</sup> Pursuant to the Supremacy Clause, the Court enforced the arbitration agreement by holding that section 2 of the FAA (which states that arbitration agreements "in contracts evidencing a transaction involving commerce" are binding and irrevocable) preempted the employee's state lawsuit.<sup>439</sup>

The Court reemphasized that Congress enacted the FAA pursuant to its Commerce Clause powers and, therefore, the FAA's provisions and federal substantive common law created thereunder are obligatory in both state courts and in federal courts.<sup>440</sup> The Court also stated that section 2 of the FAA "is a congressional declaration of a liberal federal

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434. 482 U.S. 483 (1987).

435. *Perry*, 482 U.S. at 490-91.

436. *Id.* at 485.

437. *Id.*

438. *Id.* at 486.

439. *Id.* at 491.

440. *See Perry*, 482 U.S. at 489.

policy favoring arbitration agreements,"<sup>441</sup> that the FAA "embodies Congress's intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause,"<sup>442</sup> and that "these agreements must be 'rigorously enforce[d].'"<sup>443</sup>

However, Justice Stevens' dissenting opinion makes clear that the Court's interpretation of the FAA is improper judicial lawmaking: "It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend."<sup>444</sup> Justice Stevens' main objection was that the Court was interpreting the FAA to "preempt state-created rights" and that he believed that states should have the authority to "except certain categories of disputes from arbitration" unless Congress clearly decides that states should not have such authority.<sup>445</sup> Justice O'Connor's dissent, consistent with her dissent in *Southland*, reemphasized that Congress did not intend that the FAA apply in state courts because the FAA is procedural and not substantive.<sup>446</sup> Therefore, Justice O'Connor asserted that the Court's decisions in both *Southland* and *Perry* were "unfaithful to congressional intent."<sup>447</sup>

*Volt Information Sciences, Inc. v. Board of Trustees* is an example where, beyond the fundamental question, the Court attempts to enforce the underlying congressional purposes and to clarify the scope of the congressional and federal policies that underlie section 2 of the FAA.<sup>448</sup> At issue was a contract that contained both an arbitration agreement, requiring the arbitration of "all disputes between the parties 'arising out of or relating to this contract or the breach thereof,'" and a "choice-of-

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441. *Id.*

442. *Id.* at 490.

443. *Id.* It is significant to note that the Court, through Justice Marshall the author of the opinion, emphasized that section 2 of the FAA evidences a federal policy in favor of "arbitration agreements," and not in favor of arbitration. This distinction is more than semantic. A federal policy in favor of "arbitration agreements" ostensibly expresses no preference on whether or not one should enter into an arbitration agreement, whereas a federal policy in favor of arbitration shows a preference that disputes should be arbitrated instead of litigated. Despite Justice Marshall's statements regarding the alleged congressional policy as being in favor of the enforcement of "arbitration agreements," it appears that the Court's decisions in *Southland Corp.*, in *McMahon*, and in other post-*Wilko* opinions, show the Court's preference for arbitration over judicial resolutions. See *supra* text accompanying notes 303-06.

444. *Perry*, 482 U.S. at 493 (Stevens, J., dissenting).

445. *Id.* at 493-94.

446. *Id.* at 494 (O'Connor, J., dissenting).

447. *Id.* Justice O'Connor would have held that the FAA did not preempt the California state labor law given her belief that the FAA is applicable only in federal court as a procedural law, and not in state court as a substantive rule that would have necessitated the preemption of the state labor law and the employee's suit under that law. See *id.* at 494-95. Furthermore, even if the FAA was applicable in state court, Justice O'Connor would have allowed a state statute to exempt certain claims from arbitration as a matter of state policy, as Congress can do as a matter of federal policy, which is currently recognized by the Court. See *Perry*, 482 U.S. at 494-95.

448. 489 U.S. 468 (1989).

law clause” that provided that “[t]he Contract shall be governed by the law of the place where the Project is located.”<sup>449</sup> California, which was the place, had a law allowing “a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where ‘there is a possibility of conflicting rulings on a common issue of law or fact.’”<sup>450</sup> Volt was supposed to perform certain work for the Board of Trustees, but a dispute arose between the two.<sup>451</sup> The Board filed a state lawsuit against Volt for breach of contract and for other alleged state law violations.<sup>452</sup> Volt, relying upon the arbitration agreement, filed a motion to compel arbitration.<sup>453</sup>

The central issue was whether section 2 of the FAA mandated the arbitration of the parties’ dispute, and whether section 2 preempted the California statutory provision allowing the staying of arbitration.<sup>454</sup> The Court held that section 2 did not preempt the California law.<sup>455</sup> First, non-preemption of the California law was consistent with section 2’s congressional purposes—“to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate” and to “place such agreements ‘upon the same footing as other contracts.’”<sup>456</sup> Second, accepting the lower court’s conclusion that the parties’ choice-of-law provisions incorporated the California provision staying arbitration, the Court reemphasized that the FAA’s “federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate,” and not a federal policy that seeks to elevate the use of arbitration over the judiciary as a method of resolving disputes.<sup>457</sup>

Therefore, the Court did not find a conflict between section 2 and the California law staying arbitration because the parties had agreed to such procedures, and their agreement did not contravene section 2’s policy mandating enforcement of the terms of the parties’ specific agreement to arbitrate.<sup>458</sup>

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449. *Volt Information Sciences*, 489 U.S. at 470.

450. *Id.* at 471.

451. *See id.* at 470-71.

452. *Id.*

453. *Id.* at 470.

454. *Volt Information Sciences*, 489 U.S. at 470-74.

455. *Id.* at 477.

456. *Id.* at 474 (citations omitted).

457. *Id.* at 476. In other words, the congressional purpose underlying section 2 is that the parties’ consensual arbitration agreements should be enforced as written, but that in the absence of such arbitration agreement there is no federal policy that would force parties to arbitrate their disputes instead of litigating them in a regular judicial forum. *See id.*

458. *Volt Information Sciences*, 489 U.S. at 477-78. The Court stated that:

The FAA was designed “to overrule the judiciary’s long-standing refusal to enforce agreements to arbitrate,” and to place such agreements “‘upon the same footing as other contracts.’” While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage “was motivated, first and



The importance of *Volt* is that it reaffirmed that parties control their arbitration agreements. Also, the Court established that the federal policy that underlies section 2 of the FAA is a policy that simply mandates the enforcement of the parties' agreements as written, and not some type of policy showing a congressional preference for arbitration over court adjudication. In other words, given this recognition of a federal policy only in favor of the enforcement of consensual arbitration agreements, one can only wonder how the Court could have reached its decision in *Scherk* (causing an apparent conflict with its decision in *Wilko*), imposing its own policy or belief that arbitration is better for the resolution of international disputes.<sup>459</sup>

Similarly, it appears that in the entire consumer contract arbitration area, the Court has forgotten that the primary focus of the FAA is only the enforcement of the parties' consensual arbitration agreements. Instead, the Court, through its creation of a liberal federal substantive law of arbitration, has established a regime of statutory interpretation that promotes alleged judicial economy through arbitration even when it is evident that most consumer arbitration agreements are adhesion contracts devoid of consumers' free will.<sup>460</sup> As the federal policy is one only for the enforcement of consensual arbitration agreements, there is no basis for the Court's liberal construction of ambiguity in arbitration

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foremost, by a congressional desire to enforce agreements into which parties had entered." Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. . . .

In recognition of Congress's principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA preempts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have 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 if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

*Id.* at 478-79 (internal citations omitted).

459. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518 (1974).

460. See generally Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191 (2001) (discussing the prevalence of adhesion arbitration agreements in consumer contracts).

agreements in favor of arbitration. Rather, under normal doctrines of contract interpretation, ambiguities should be construed against the drafters of written arbitration agreements, which would normally be a construction against arbitration.<sup>461</sup>

In any event, the Court should consistently follow the federal policy in favor of real consensual arbitration agreements and not its own preference for arbitration over court adjudication. Therefore, it should be more willing to reconsider the *Southland* decision which was erroneously decided in favor of arbitration pursuant to the Court's own political agenda. Instead, the Court still hides behind its stare decisis doctrine, as shown by the next case.

In *Allied-Bruce Terminix Co. v. Dobson*, the Court, having wedded itself to an expansive interpretation of section 2—one that is against Congress's true intent and purpose—refused to reconsider *Southland's* holding.<sup>462</sup> The Court primarily interpreted section 2's "involving commerce" language and its "*evidencing a transaction involving commerce*" language.<sup>463</sup> Certain purchasers of a home filed a lawsuit in Alabama state court against their sellers and against Allied-Bruce, and its parent company Terminix, alleging termite damage to the home.<sup>464</sup> The sellers cross-claimed against Allied-Bruce and Terminix alleging that they had breached a contract with the sellers to guard against termites and to repair any damages caused thereby.<sup>465</sup> Allied-Bruce and Terminix sought to compel arbitration under section 2 of the FAA.<sup>466</sup> Eventually, an appeal was filed with the Alabama Supreme Court, challenging a lower court's denial of the stay of the state lawsuit so that arbitration could take place.<sup>467</sup> The Alabama Supreme Court affirmed the denial of stay, reasoning that the dispute was not within section 2's scope, on the grounds that it did not "involve commerce" and because an interstate commerce transaction was not within the contemplation of the parties at the time that they entered into the termite service contract.<sup>468</sup> The Alabama Supreme Court justified its denial of a stay by relying upon an Alabama statute that voided an arbitration agreement

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461. Cf. *Gray v. American Express Co.*, 743 F.2d 10, 18 (D.C. Cir. 1984) ("This rule blends two independent canons of construction: first, that a contract is interpreted against its drafter and second, that a contract of adhesion should be strictly construed."). See also RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

462. 513 U.S. 265 (1995).

463. *Allied-Bruce*, 513 U.S. at 273, 277.

464. *Id.* at 269.

465. *Id.*

466. *Id.*

467. *Id.* at 269.

468. *Allied-Bruce*, 513 U.S. at 269.

covering future disputes.<sup>469</sup>

On a writ of certiorari, the Supreme Court held that the dispute did fall within section 2's scope, because "involving commerce" means the same thing as "affecting commerce," which means Congress intended that section 2 extend to the limits of Congress's commerce powers.<sup>470</sup> The Court also held that "*evidencing a transaction* involving commerce" means "commerce in fact;" that is, section 2 is applicable if the parties' contract "in fact" involved a transaction in commerce.<sup>471</sup> Therefore, as Allied-Bruce used supplies and equipment that had been shipped in interstate commerce, the contract between it and the home sellers in fact involved a transaction affecting interstate commerce.<sup>472</sup> The Court also held that section 2 was applicable to the parties arbitration agreement, and on remand, the state court would have to stay the state lawsuit until after arbitration.<sup>473</sup>

The importance of *Allied-Bruce* is its comments regarding the congressional intent underlying section 2. Justice Breyer, the author of the opinion, glossed over the respondent home sellers' arguments and the amici briefs of twenty state attorney generals that asked the Court to overrule *Southland's* holding that section 2 is substantive law and that it is applicable in both federal and state court proceedings.<sup>474</sup> Instead of reexamining *Southland's* legal underpinning, Justice Breyer, and those Justices who joined his opinion,<sup>475</sup> offered stare decisis as the reason for not overruling *Southland*; however, they did not deny that *Southland* was wrongly decided.<sup>476</sup> Additionally, Justice O'Connor, who has been one of the most adamant opponents of *Southland's* holding, "wimped

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469. *Id.*

470. *Id.* at 273-74.

471. *Id.* at 277-79.

472. *Id.* at 282.

473. *Allied-Bruce*, 513 U.S. at 282.

474. *Id.* at 270-72.

475. *Id.* at 267. The Justices who joined Justice Breyer's opinion were Chief Justice Rehnquist, and Justices Stevens, O'Connor, Kennedy, Souter and Ginsburg.

476. *Id.* at 270-72. Justice Breyer stated:

We have set forth this background because respondents, supported by 20 state attorneys general, now ask us to overrule *Southland* and thereby to permit Alabama to apply its antiarbitration statute in this case irrespective of the proper interpretation of § 2. The *Southland* Court, however, recognized that the pre-emption issue was a difficult one, and it considered the basic arguments that respondents and amici now raise (even though those issues were not thoroughly briefed at the time). Nothing significant has changed in the 10 years subsequent to *Southland*; no later cases have eroded *Southland's* authority; and no unforeseen practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying upon *Southland* as authority. Further, Congress, both before and after *Southland*, has enacted legislation extending, not retracting, the scope of arbitration. . . . For these reasons, we find it inappropriate to reconsider what is by now well-established law.

*Id.* at 272.

out" by stating that she "acquiesc[ed] in today's judgment. Though wrong, *Southland* has not proved unworkable, and, as always, 'Congress remains free to alter what we have done.'"<sup>477</sup> Furthermore, Justice O'Connor affirmatively stated what many no doubt believe. Namely, that the Court has engaged in its own brand of judicial law-making when interpreting the FAA: "Yet, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."<sup>478</sup>

Furthermore, Justice Scalia's and Justice Thomas' dissents argued that *Southland* was wrongly decided, as Congress did not intend that section 2 apply to lawsuits filed in state courts, thereby supporting Justice O'Connor's conclusion that the FAA is procedural and not substantive law.<sup>479</sup> Therefore, it appears that at least four of the Justices believe that section 2 should not apply in state court proceedings; but only two would overrule *Southland* and thereby enforce Congress's real intent regarding the FAA's application.<sup>480</sup>

The worst implication of *Allied-Bruce* and *Southland* is that states cannot void arbitration agreements covering either future disputes, consumer contracts, or employment contracts. Therefore, states cannot give consumers the level of protection that their public policies might warrant.<sup>481</sup> This is clearly shown by the Court's next-term decision in

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477. *Allied-Bruce*, 513 U.S. at 284 (O'Connor, J., concurring).

478. *Id.* at 283 (O'Connor, J., concurring). Justice O'Connor quoted Justice Stevens in *Perry v. Thomas*, 482 U.S. 483, 493 (1987), as follows: "It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend." *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring).

479. In a very persuasive opinion, with citations to legislative history and to the FAA's statutory provisions, Justice Thomas argued that section 2 was not applicable in state courts because it was meant to be a procedural law; other FAA provisions (sections 3, 4, 7, 9, and 13) are applicable only in federal courts; Congress's use of its commerce powers is more indicative of its expression that the FAA should be applicable to areas in which there is a federal interest (maritime contracts and those involving interstate commerce) instead of the FAA applying to all contracts; even if section 2 is applicable in state courts, state courts do not have to specifically enforce arbitration agreements, but can award damages as a remedy because to hold otherwise would make section 3 (a court's power to stay litigation until the end of arbitration) superfluous; the fact that the court has reserved judgment on whether sections 3 and 4 are applicable in state court is further evidence that they do not have to specifically enforce arbitration, even if section 2 were applicable to state court proceedings; and that *stare decisis* should not prevent an overruling of *Southland*, because there is no conclusive showing that the harm from an overruling would outweigh the federalism benefits flowing from states being able to make and enforce their own arbitration laws. *See id.* at 285-97 (Thomas, J., dissenting).

480. The two Justices who are more likely to overrule *Southland* appear to be Justices Scalia and Thomas. Justices Stevens and O'Connor appear to be wedded to *stare decisis* and are less inclined to overrule *Southland*. This is the gist of the Justices' different opinions in *Allied-Bruce*. *See generally id.* at 265-97.

481. Under *Southland's* holding, section 2 of the FAA would preempt state consumer protection laws that exempt consumer contracts, executory contracts, and employment contracts from arbitration agreements. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

*Doctor's Associates, Inc. v. Casarotto*,<sup>482</sup> where the Court held that section 2 of the FAA preempted a Montana notice statute mandating that arbitration agreements "shall be typed in underlined capital letters on the first page of the contract."<sup>483</sup> Relying on *Southland*, the Court restated that section 2 is applicable to lawsuits filed in state courts.<sup>484</sup> Additionally, citing *Perry* and *Allied-Bruce*, the Court held that section 2 preempted the Montana statute, because it singled out arbitration agreements for a notice requirement that was not applicable generally to all contracts, thereby causing the statute to be inconsistent with section 2's policy that arbitration agreements be put on an equal footing with other contracts.<sup>485</sup> Justice Thomas was the only dissenter, relying upon his last-term dissent in *Allied-Bruce* that section 2 was not applicable to state court proceedings.<sup>486</sup>

As the Montana statute's apparent purpose was to protect consumers, by mandating that they be given adequate written notice of arbitration agreements, it is clear that *Southland's* holding, that section 2 is applicable in state courts, prevents states from enacting statutes to protect consumers and other persons who find themselves subject to adhesion arbitration agreements.<sup>487</sup>

Subsequently, the Court in *Green Tree Financial Corp.-Alabama v. Randolph*<sup>488</sup> continued its own policy of favoring arbitration over court adjudication.<sup>489</sup> What *Green Tree* shows is that all of the Justices have acquiesced in the Court's *Southland* misinterpretation of section 2 of

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482. 517 U.S. 681 (1996).

483. *Doctor's Assoc.*, 517 U.S. at 684.

484. *Id.*

485. *Id.* at 686-87.

486. *See id.* at 689 (Thomas, J., dissenting). Justice Ginsburg wrote the majority opinion, in which Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, Souter, and Breyer joined. Although Justices Stevens, O'Connor, and Scalia had previously stated that the Court had wrongly decided *Southland*, for stare decisis purposes, none of them dissented in *Doctors Associates, Inc.*

487. However, the Court did emphasize that states can indirectly regulate arbitration agreements through generally applicable contract doctrine:

Montana could have invalidated the arbitration clause in the franchise agreement under general, informed consent principles, counsel suggested. She asked us to regard § 27-5-114(4) as but one illustration of a cross-the-board rule: Unexpected provisions in adhesion contracts must be conspicuous. But the Montana Supreme Court announced no such sweeping rule. The court did not assert as a basis for its decision a generally applicable principle of "reasonable expectations" governing any standard form contract term. Montana's decision trains on and upholds a particular statute, one setting out a precise, arbitration-specific limitation. We review that disposition, and no other. It bears reiteration, however, that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."

*Id.* at 687-88 n.3 (alterations in original) (citations omitted).

488. 531 U.S. 79 (2000).

489. *See Green Tree*, 531 U.S. at 89-90.

the FAA; eight Justices apparently because of stare decisis, and in Justice Scalia's case, because he cannot obtain a majority of Justices willing to overrule the decision.<sup>490</sup>

The central holding of *Green Tree* is not earth shattering. First, the Court held that a district court's decision, staying a lawsuit and compelling arbitration, is a final judgment under section 16(a)(3) of the FAA.<sup>491</sup> Second, the Court held that the respondent, the purchaser of a mobile home who had entered into an arbitration agreement with petitioner (the financier of the mobile home) to resolve any dispute arising out of the financing agreement, could not avoid arbitration by alleging that the arbitration agreement, which did not allocate the costs of the arbitration, denied her the right to pursue her Truth-in-Lending Act ("TILA") violation claim, ostensibly because the costs of the arbitrator's fee and other expenses could possibly be more than the permissible award for a TILA violation.<sup>492</sup> Although the Court did not conclusively hold that the costs of an arbitration proceeding could never void an arbitration agreement, it placed the burden on the respondent of proving that the costs were so prohibitive that they were tantamount to a denial of respondent's substantive rights under the TILA statute.<sup>493</sup> And, because the respondent had not offered sufficient evidence to show that the arbitration costs were prohibitive, the Court held that the arbitration agreement was enforceable.<sup>494</sup> In opposition, the primary focus of Justice Ginsburg's dissenting opinion was that the burden of proof should have been placed on the petitioner, a business that was an arbitration repeat-player, with more knowledge regarding the costs of arbitration proceedings.<sup>495</sup>

To the extent that a consumer purchaser is less likely to meet the burden of proving that the arbitration costs are prohibitive, *Green Tree* is a pro-arbitration decision. The Court's ever-increasing effort to broadly construe the FAA for the purpose of promoting the Court's—and not Congress's—preference for arbitration is shown by its statement in *Green Tree* that the FAA has a "liberal federal policy favoring arbitration agreements."<sup>496</sup>

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490. See generally *Green Tree*, 531 U.S. 79. In *Green Tree*, none of the Justices stated that *Southland* should be overruled, although in *Allied-Bruce*, Justice Scalia stated that he would be willing to overrule *Southland* if he could obtain a majority decision. See *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting).

491. *Green Tree*, 531 U.S. at 86. The Court used the same definition of a final judgment that it generally uses, which provides that an aggrieved party can take an appeal when there is nothing else for the court to do but execute the judgment. See *id.* at 87-88.

492. *Id.* at 92.

493. *Id.*

494. *Id.*

495. *Green Tree*, 531 U.S. at 96 (Ginsburg, J., dissenting).

496. *Id.* at 91 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,

In sum, the Court's post-*Southland* cases show that many of the Justices recognize that the Court erroneously decided *Southland*. However, most of them are using stare decisis to prevent an overruling of *Southland*, despite their recognition that *Southland* is contrary to the congressional intent that underlies the FAA, as persuasively outlined by Justice Thomas in his *Allied-Bruce* dissent.

*f. Extension of the Court's Broad Interpretation of FAA to Employment Contracts*

In *Circuit City Stores, Inc. v. Adams*,<sup>497</sup> the Court continued its expansive interpretation of the FAA. First, the Court held that the FAA's section 1 exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" meant that only transportation employees, those directly involved in transporting goods in interstate commerce, are excluded from the FAA's coverage.<sup>498</sup> Unlike what the Court had done in *Southland* in its interpretation of section 2, the Court refused to interpret section 1's exclusion to the farthest reaches of Congress's commerce powers.<sup>499</sup> Having already interpreted section 2 to the farthest reaches of Congress's commerce powers in *Southland* by holding that a contract "involving commerce" means the same thing as a contract "af-

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24 (1923)). Regarding the burden of proofs, the Court stated the following:

We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. (citation omitted). Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss; for in this case neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point. The Court of Appeals therefore erred in deciding that the arbitration agreement's silence with respect to costs and fees rendered it unenforceable.

*Id.* at 91-92.

497. 121 S. Ct. 1302 (2001).

498. *Circuit City Stores*, 121 S. Ct. at 1311. First, the Court did not accept the argument that employment contracts are excluded from the FAA because it covers only "commercial deal[s] or merchant's sale[s]." *Id.* at 1308 (quoting *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1998)). Its reasoning was, in part, premised on its thinking that such a conclusion would be inconsistent with *Gilmer*, holding that an age discrimination suit was subject to arbitration, and *Allied-Bruce's* expansive reading of section 2. *Id.* at 1308. The Court's reliance on its prior decisions is not persuasive in light of Justice Souter's dissenting opinion, which is premised on the FAA's legislative history, and not a blind adherence to stare decisis. In sum, the Court has supported its broad policy of favoring arbitration over litigation, by relying on prior cases stating that policy, and not by relying upon congressional intent from the language of the FAA or from the FAA's legislative history. In other words, the Court is supporting its judicial legislation by relying only on its prior cases of judicial lawmaking. *See id.*

499. *See id.* at 1311.

fecting commerce" (which means that any contract that has any impact on commerce falls within the FAA's coverage), the Court could have held in *Circuit City Stores* that section 1's exclusion of "workers engaged in foreign or interstate commerce" broadly means the same thing as a contract "affecting commerce," as it had held in interpreting section 2.<sup>500</sup> However, to interpret section 1 as broadly as section 2 would have been contrary to the Court's own preference for arbitration over court adjudication. In other words, the Court gave the FAA the interpretation that was most consistent with the Court's preference for arbitration. It broadly interpreted section 2 so that almost every contract falls within the coverage of its binding and irrevocable arbitration requirement, and it narrowly interpreted section 1's exclusion such that fewer contracts and employees are excluded from sections 2's requirement.

To support its conclusion against giving section 1's "engaged in commerce" the apparent broader interpretation that Congress might have had in mind in 1925 when it enacted the statute, the Court refused to give the phrase a variable interpretation because it believed that such interpretation would bring uncertainty to this area of the law.<sup>501</sup> In other

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500. To support its narrow interpretation of section 1, the Court relied on the interpretative maxim *ejusdem generis* ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."). *Circuit City Stores*, 121 S. Ct. at 1308-09 (quoting 2 A.W. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)). Given section 1's language—"contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"—the Court held that "other class of workers" (the general phrase) fell within the same class as "seamen" and "railroad employees;" that is those employees who are directly involved in the transportation industry of moving goods through interstate commerce, and not employees whose work only "affects interstate commerce." *Id.*

However, the Court seemed to recognize that Congress might have intended a broader interpretation of section 1:

In sum, the text of the FAA forecloses the construction of § 1 followed by the Court of Appeals in the case under review, a construction which would exclude all employment contracts from the FAA. While the historical arguments respecting Congress' understanding of its power in 1925 are not insubstantial, this fact alone does not give us basis to adopt, "by judicial decision rather than amendatory legislation," an expansive construction of the FAA's exclusion provision that goes beyond the meaning of the words Congress used. While it is of course possible to speculate that Congress might have chosen a different jurisdictional formulation had it known that the Court would soon embrace a less restrictive reading of the Commerce Clause, the text of § 1 precludes interpreting the exclusion provision to defeat the language of § 2 as to all employment contracts. Section 1 exempts from the FAA only contracts of employment of transportation workers.

*Id.* at 1311 (citation omitted). That the Court seeks to promote its own preference for arbitration over judicial determination is shown by its *Circuit City* interpretation of *Allied-Bruce*: "Considering the usual meaning of the word 'involving,' and the pro-arbitration purposes of the FAA, *Allied-Bruce* held the "word 'involving,' like 'affecting,' signals an intent to exercise Congress's commerce power to the full." *Id.* at 1309 (emphasis added).

501. *Id.* at 1310.



words, the Court gave the “engaged in commerce” language of section 1 the same interpretation that it had given similar language in other statutes during its modern day interpretation of phrases similar to “engaged in commerce.”<sup>502</sup> The Court also relied upon the maxim *ejusdem generis* to interpret section 1’s relevant exclusion language: “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>503</sup> Therefore, the Court held that the phrase “other class of workers engaged in foreign or interstate commerce” means the same thing as the words “seamen” and “railroad employee”—workers such as transportation employees who work directly in the stream of interstate commerce.<sup>504</sup>

Justice Souter, discounting the significance of *ejusdem generis* in his dissenting opinion, and choosing instead to rely upon *ex abundanti cautela*, reasoned that the Court should have given section 1 and section 2 the same expansive interpretation, such that both sections would be interpreted to the fullest extent of Congress’s commerce powers.<sup>505</sup> However, unlike Justice Souter, the Court refused to rely upon the FAA’s legislative history references showing that Congress intended to exclude all employment contracts from the FAA’s coverage.<sup>506</sup> Instead, the Court relied upon a plain meaning interpretation and paid lip service to the FAA’s legislative history.<sup>507</sup>

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502. *Circuit City Stores*, 121 S. Ct. at 1310.

503. 9 U.S.C. § 1 (2000).

504. *Circuit City Stores*, 121 S. Ct. at 1308-09.

505. *Id.* at 1322 (Souter, J., dissenting). In using the maxim *ex abundanti cautela*, Justice Souter asserted that Congress’s use of the specific class of employees in section 1’s relevant language was a mere “abundance of caution.” *Id.*

506. *See id.* at 1320 (Souter, J., dissenting).

507. *See id.* at 1311-12. The Court stated the following:

As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision. See *Ratzlaf v. United States*, 510 U.S. 135, 147-148, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear.”). We do note, however, that the legislative record on the § 1 exemption is quite sparse. Respondent points to no language in either committee report addressing the meaning of the provision, nor to any mention of the § 1 exclusion during debate on the FAA on the floor of the House or Senate. Instead, respondent places greatest reliance upon testimony before a Senate subcommittee hearing suggesting that the exception may have been added in response to the objections of the president of the International Seamen’s Union of America. See Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923). Legislative history is problematic even when the attempt is to draw inferences from the intent of duly appointed committees of the Congress. It becomes far more so when we consult sources still more steps removed from the full Congress and speculate upon the significance of the fact that a certain interest group sponsored or opposed particular legislation. Cf. *Kelly v. Robinson*, 479 U.S. 36, 51, n. 13, 107 S. Ct. 353, 93 L.Ed.2d 216 (1986) (“[N]one of those statements was made by a Member of Congress, nor were they included in the official Senate and House Reports. We decline to accord any significance to these statements.”). We ought not attribute to Congress an official purpose based on the motives of a particular

The Court also noted that *Circuit City Stores* did not present an issue that would require a reconsideration of *Southland* and its interpretation of section 2.<sup>508</sup> Furthermore, the Court emphasized some of the benefits to employees that would flow from including non-transportation workers within section 2's coverage:

Furthermore, for parties to employment contracts not involving the specific exempted categories set forth in § 1, it is true here, just as it was for the parties to the contract at issue in *Allied-Bruce*, that there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. (citation omitted). Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (*and the accompanying burden to the Courts*) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship, (citation omitted) , and the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others. The considerable complexity and uncertainty that the construction of § 1 urged by respondent would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and "breeding litigation from a statute that seeks to avoid it." (citation omitted). The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." (citation omitted). *Gilmer*, of course, involved a federal statute, while the argument here is that a state statute ought not be de-

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group that lobbied for or against a certain proposal—even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case. It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.

*Circuit City Stores*, 121 S. Ct. at 1311-12.

508. *Id.* at 1312-13.

nied state judicial enforcement while awaiting the outcome of arbitration. That matter, though, was addressed in *Southland* and *Allied-Bruce*, and we do not revisit the question here.<sup>509</sup>

In conclusion, the Court's effort to justify its decision in *Circuit City Stores* in the above quotation by emphasizing the benefits that employees can receive from the arbitration of employment disputes, shows that the Court really wanted to reduce courts' caseloads by narrowly interpreting section 1 of the FAA to severely limit the number of employees who are exempted from the FAA. The Court's judicial economy rationale in support of arbitration is contrary to Congress's intent which, unlike the Court's intent, does not favor arbitration over court adjudication, and which through section 1's exclusion sought to exempt from the FAA's coverage all employees whose work affects interstate commerce.<sup>510</sup>

### 3. Lower Courts' Strict Construction of the Supreme Court's Erroneously-Decided Precedent

As stated above, the second step of this Article's proposed method of statutory interpretation is that lower-level courts should strictly construe the Court's erroneously-decided precedents.<sup>511</sup> This means that such precedents should be limited to the specific facts before the Court, and that courts should not extend them to new and different situations.<sup>512</sup> Similarly, lower-level courts should create exceptions to erroneously-decided precedents when necessary to avoid a broad application of such precedents. This step is best exemplified by the Court's decision in *Hubbard v. United States*.<sup>513</sup> There, the Court overruled *United States v. Bramblett*,<sup>514</sup> which defined the word "department" contained in 18 U.S.C. § 1001—which proscribes the intentional making of false and fraudulent statements to "any department or agency of the United States"<sup>515</sup>—as including "the executive, legislative and judicial branches of the Government."<sup>516</sup> As justification for its overruling of *Bramblett*, the *Hubbard* Court relied upon the plain meaning of section 1001 and of Section 6 (the definition section of the above-referenced statute) to conclude that the word "department" did not include statements that

509. *Id.* at 1313 (citations omitted) (emphasis added).

510. See generally *Leading Cases*, 115 HARV. L. REV. 306, 507-17 (2001).

511. See *infra* text accompanying notes 512-28.

512. Cf. *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) (asserting that "since none of our prior holdings is on point, the doctrine of *stare decisis* is not controlling").

513. 514 U.S. 695 (1995).

514. 348 U.S. 503 (1955), overruled by *Hubbard v. United States*, 514 U.S. 695 (1995).

515. 18 U.S.C. § 1001 (1955) (amended 1996).

516. *Bramblett*, 348 U.S. at 509.

one makes to a federal court during the court's judicial function.<sup>517</sup>

To support the overruling of *Bramblett*, the Court noted that there had been an "intervening development" in the law since *Bramblett*.<sup>518</sup> The intervening development was that federal courts of appeals (lower-level federal courts) had created a "judicial function exception" to *Bramblett*'s broad statement that section 1001 was applicable to the "judicial branches of the Government."<sup>519</sup> Because they questioned the Court's interpretation in *Bramblett*, these lower-level federal courts had held that section 1001 is not applicable when false statements are made in civil and criminal judicial proceedings instead of during a court's administrative function.<sup>520</sup> The federal courts of appeals' exception became known as the "judicial function exception," and the Court asserted that the exception was "almost as deeply rooted as *Bramblett* itself."<sup>521</sup>

Relying upon the judicial function exception as one reason for its overruling of *Bramblett*, the *Hubbard* Court stated: "The 'intervening development' is, of course, the judicial function exception. In a virtually unbroken line of cases, respected federal judges have interpreted § 1001 so narrowly that it has had only a limited application within the Judicial Branch."<sup>522</sup> However, instead of officially adopting the judicial function exception, while leaving *Bramblett* as good law, the Court overruled *Bramblett*'s interpretation of "department," and then recognized a definition that excluded the judicial branches, thereby adopting the judicial function exception by implication.<sup>523</sup>

It is important to note that because a majority of the Justices of the Court accepted lower-level courts of appeals' well-reasoned exception to a precedent that the Court had erroneously-decided, the Court is not opposed to lower-level courts' strict construction of erroneously-decided precedents. Furthermore, the Court showed that it might accept such an exception as an "intervening development" in the law to assist the Court in overruling an erroneously-decided precedent.

However, lower-level courts should use caution. For example, in *Rodriguez*, the Court addressed the Fifth Circuit Court of Appeals' decision not to apply *Wilko* because in the Fifth Circuit's opinion the

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517. See *Hubbard*, 514 U.S. at 707-08, 715.

518. *Id.* at 713.

519. *Id.* at 708.

520. *Id.* at 708-11.

521. *Id.* at 708 (emphasis added).

522. *Hubbard*, 514 U.S. at 713.

523. See *id.* at 715. One of the dissenting opinions thought that, pursuant to *stare decisis*, *Bramblett* should not have been overruled, and that the Supreme Court's reliance upon lower-level courts' creation of a judicial function exception to controlling precedent was unwise and would be an invitation to lower-level courts to create such exceptions. See *id.* at 718-19 (Rehnquist, C.J., dissenting).

"Court's subsequent decisions have reduced *Wilko* to 'obsolescence.'"<sup>524</sup> The Court stated the following:

We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing *Wilko*. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.<sup>525</sup>

But, it is significant to note that the Court's comments are limited to a Court precedent that "has a direct application in a case," and that the Court proceeded to overrule *Wilko*.<sup>526</sup>

In any event, the step two proposal in this Article does not advocate that lower-level courts intentionally refuse to apply erroneously-decided Court precedents that are directly on point; however, when such precedents are not directly applicable, lower-level courts should strictly construe the precedents by narrowly interpreting them and by creating necessary exceptions to avoid a broader application of the precedents.<sup>527</sup>

## V. CONCLUSION

Arbitration is supposed to be a consensual dispute resolution process. However, powerful sellers' use of adhesion arbitration agreements essentially converts arbitration into an involuntary process, where purchasers must accept arbitration if they want to purchase many consumer goods and services. These adhesion contracts are against the historical use of arbitration by merchants and others persons who, with equal bargaining power, entered arbitration agreements because of perceived mutual benefits. Therefore, in an adhesion contract regime, a certain amount of consumer protection is needed to protect the weak from the strong, as shown by the English arbitration law that exempts consumer contracts from arbitration and that provides for judicial review of questions of law. Distressingly, the FAA, the major American arbitration law, does not offer such protections.

Furthermore, the United States Supreme Court, in a mad rush to reduce federal courts' caseloads, has expansively interpreted section 2 of the FAA, as shown in *Southland* and in *Allied-Bruce*, such that the

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524. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479 (1989).

525. *Id.* at 484.

526. *Cf. Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) (asserting that "since none of our prior holdings is on point, the doctrine of *stare decisis* is not controlling").

527. *Hubbard*, 514 U.S. at 713.

FAA is now applicable in state court proceedings, despite persuasive and substantial indications that Congress intended only that the FAA be a procedural law that is applicable only in federal courts. To accomplish its surreptitious judicial lawmaking in the various Court precedents that are discussed in the different parts of this Article, the Court has essentially engaged in an "evolutive" dynamic interpretation of the FAA to carry out the Court's own political decision regarding the benefits and use of arbitration. Obviously, the Court's usurpation of Congress's legislative powers is problematic, and the Court mantra that Congress is free to overrule *Southland* and its other FAA precedents rings hollow for anyone who is interested in a democratic system of lawmaking by elected representatives of the people who, unlike the insular Court, are responsible to the American citizenry when making federal laws that balance a myriad of public policy choices.

In short, the Court should return to an originalist mode of statutory interpretation and apply the relevant congressional intent when interpreting federal statutes.<sup>528</sup> The Court's statutory interpretation should be a matter of concern to every American citizen because one day we (including law school students, lawyers, and law professors) will be forced to resolve most of our disputes before an arbitrator, who unlike a jury of our peers, might not care about or value the things that we care about and value.<sup>529</sup> In other words, the Supreme Court, in its arbitration precedents, must enforce congressional intent, especially the intent that the FAA should not be applicable in state courts, an intent that would allow states to enact consumer protection laws, like in England, that exempt consumer goods contracts from arbitration and that otherwise protect weaker consumers from powerful sellers.

The statutory interpretation proposal in this Article will assist the Court in making a change regarding its arbitration precedents, which presently raise an issue as to whether we are a nation of laws or a nation of men and women, especially the men and women in black robes who comprise the United States Supreme Court.

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528. For a discussion of textualism, the evolutive or dynamic interpretation approach, and originalism, along with this author's support of originalism, see Part III of this Article.

529. See Tania Padgett, *Heading Back To Court: Judge Reverses Ruling in 'Boom Boom Room' Sex Harassment Case*, NEWSDAY, Nov. 22, 2001, at A60 (discussing an attorney's belief that arbitration is harmful to the plaintiffs' sexual harassment case against Salomon Smith Barney).