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Tamar Meshel

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THE JUDICIAL GRASSROOTS OF THE “ARBITRATION REVOLUTION”

TAMAR MESHEL*

ABSTRACT

The “arbitration revolution”—the meteoric rise in the use of arbitration in the United States—is commonly imputed to the Supreme Court’s unilateral and ideologically driven expansion of the Federal Arbitration Act (FAA). The portrayal of the FAA’s evolution as a campaign launched by a Supreme Court that is out of touch with society and with the judicial system over which it presides usefully serves to delegitimize both this one-hundred year-old statute and arbitration more generally. This Article argues that the popular description of the Supreme Court as the sole instigator of the “arbitration revolution” is misleading because it conveniently ignores a critically important player in the FAA’s judicial development—the lower courts.

This Article offers a novel, alternative account of the judicial evolution of the FAA. It demonstrates that, contrary to conventional wisdom, the current judicial understanding of the FAA was not created by the Supreme Court out of whole cloth. Rather, some of the most fundamental, and controversial, arbitration principles set out by the Supreme Court were in fact rooted in the lower courts’ interpretation of the FAA and these courts’ own policy preferences regarding arbitration, rather than in the Supreme Court’s unilateral rewriting of arbitration law.

This Article revisits five fundamental arbitration principles set out in Supreme Court decisions rendered between 1967 and 2001—the separability principle, the principle that the FAA reflects a federal policy favoring arbitration, the principle that the FAA preempts state law in state courts, the principle that statutory claims are arbitrable under the FAA, and the principle that employment disputes are arbitrable under the FAA. These

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five principles seem revolutionary and have been criticized as such. However, this Article shows that in establishing all of them the Supreme Court adopted an interpretation of the FAA that had already been accepted by at least some, and at times by the majority, of the Circuit Courts of Appeals as well as by other lower federal and state courts. Therefore, the Court was simply reacting to jurisprudential development already taking place in the lower courts. Accusing the Supreme Court of single-handedly producing the woes associated with modern arbitration does little more than fuel a counterproductive anti-arbitration movement that operates to delegitimize arbitration rather than to improve it.
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INTRODUCTION

Arbitration critics have long lamented the “arbitration revolution”—the meteoric rise in the use of arbitration that is commonly attributed to the Supreme Court’s expansion of the Federal Arbitration Act (FAA). 1 Indeed, “critical arbitration theory’ posits that . . . the Supreme Court’s improper preference” 2 for arbitration has single-handedly transformed the FAA from a “toothless” 3 act to a “super-statute.” 4 This illegitimate transformation


4 Kristen M. Blankley, The Future of Arbitration Law?, 2022 J. DISP. RESOL. 51, 86 (2022) [hereinafter Blankley, Future of Arbitration Law] (defining a “super-statute” as a statute that “carries extra weight, particularly when [it] appears to conflict with another federal statute” and “conclud[ing] that the FAA today meets the definition of a super-statute, even though Congress likely did not consider it to be one when passed in 1925.”). See generally William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 DUKE L.J. 1215 (2001) (coining the concept of a “super-statute”). Contra Noll, supra note 1, at
of the FAA is in turn said to betray Congress’s intention in enacting the FAA, violate public policy and established legal principles, and undermine socially important legislative efforts at the state level. This Article does not dispute the rise of arbitration in the United States, but instead is critical of the proposition that the “arbitration revolution” has been brought about by a solitary instigator—the Supreme Court. This Article argues that, contrary to popular opinion, much of the Court’s approach to arbitration under the FAA did not emerge “out of whole cloth” nor was it unilaterally “imposed” on the judicial system. Rather, the foundational elements of the Supreme Court’s FAA jurisprudence were derived from long-standing developments that had already taken root in the lower courts.

It is important to understand the true origin of the current so-called judicial preference for arbitration. The portrayal of

671–72 (“[T]he FAA is not, on any accepted theory of statutory interpretation, a ‘super-statute’ that occupies a special position in federal law.”) (citation omitted).

5 See Linda R. Hirshman, The Second Arbitration Trilogy: The Federalization of Arbitration Law, 71 VA. L. REV. 1305, 1307–08, 1307 n.14 (1985) (arguing Prima Paint undermined state law defenses to arbitration). See generally Margaret L. Moses, Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, 34 FLA. ST. U. L. REV. 99 (2006) [hereinafter Moses, Statutory Misconstruction] (“Today’s statute—which has been construed to preempt state law, eliminate the requirement of consent to arbitration, permit arbitration of statutory rights, and remove the jury trial right from citizens without their knowledge or consent—is a statute that would not likely have commanded a single vote in the 1925 Congress.”) (citations omitted).

6 Moses, Statutory Misconstruction, supra note 5, at 123.


8 Erin Islo, Not Like Other Contracts: The Supremacy and Exceptionalism of Arbitration, 59 IDAHO L. REV. 1, 11 (2023) (“[A]rbitration supremacy follows from the Supreme Court’s reading of the FAA applied with such muscle that it insulates arbitration agreements from state law and elevates the FAA when in conflict with other federal statutes.”).

9 See Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 109, 111 (2001) (citing nine lower court cases limiting the exemption to the FAA to employees working in transportation including McWilliams v. Logicon, Inc., 143 F.3d 573, 575–76 (10th Cir. 1998) and Tenney Eng’g, Inc. v. Elec. Workers, 207 F.2d 450, 452 (3d Cir. 1953)).
the FAA as having been single-handedly “expanded” by an ideologically motivated Supreme Court usefully serves to undermine both the FAA and arbitration more generally. As proclaimed by one federal district court judge outraged by “forced” arbitration under the FAA, “other than the majority of the Supreme Court whose questionable jurisprudence erected this legal monolith, no one thinks they got it right—no one, not the inferior federal courts, not the state courts . . . .” This perception of the

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10 See, e.g., Preston Douglas Wigner, Comment, The United States Supreme Court’s Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2, 29 U. RICH. L. REV. 1499, 1500 (1995) (“[T]he Court greatly expanded the application of the FAA to contracts containing arbitration agreements.”); Margaret L. Moses, Arbitration of Worker Contracts: New Prime’s Proper Statutory Interpretation of the 1925 Federal Arbitration Act, 21 CARDOZO J. CONFLICT RESOL. 415, 415, 417–18 (2020) [hereinafter Moses, Worker Contracts] (“The U.S. Supreme Court has been expanding the scope of arbitration under the [FAA].”); David L. Noll & Zachary D. Clopton, An Arbitration Agenda for the Biden Administration, 2021 U. ILL. L. REV. ONLINE 104, 104 (2021) (“[A] series of Supreme Court rulings at the behest of big business have blunted private enforcement’s power by expanding the scope of arbitration under the Federal Arbitration Act.”); Hirshman, supra note 5, at 1305–06 (“[The Supreme Court] has fulfilled the promise of its earlier decision and dramatically expanded the ambit of the FAA.”); Cir. City Stores, Inc., 532 U.S. at 132 (Stevens, J., dissenting) (“There is little doubt that the Court’s interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it.”).


12 In re Nexium, 309 F.R.D. at 147.
FAA as a “monster” statute created by the Supreme Court has long fueled calls to extensively amend the Act to prohibit the arbitration of entire classes of disputes, such as consumer and employment disputes. Leaving aside the wisdom of such sweeping amendments, calls to overhaul the FAA that are justified by a depiction of the Act’s evolution as an ideological crusade of a Supreme Court that is out of touch with society and with the judicial system over which it presides serve to delegitimize arbitration rather than to improve it. This Article argues that the Supreme Court–centric account of the judicial evolution of the FAA conveniently ignores a critically important player in the Act’s development—the lower courts.


14 The FAA was recently amended to exclude from its scope sexual harassment and assault claims. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 27 § 402 (in effect since March 3, 2022). In addition, arbitration-related legislation recently passed the House of Representatives as H.R. 963, the Forced Arbitration Injustice Repeal (FAIR) Act of 2022, which prohibits pre-dispute agreements requiring arbitration of employment, consumer, antitrust, or civil rights disputes. H.R. 963, 117th Cong. § 3(a) (2022). Previous legislative efforts to limit the FAA include the Arbitration Fairness Act, which was proposed but did not pass in 2007, 2009, and 2011. See Bland et al., supra note 11, at 598–602. Another proposed amendment to the FAA currently before Congress is included in the Anti-Corruption and Public Integrity Act, which purports to “prohibit pre-dispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes.” S. 5315, 117th Cong. § 409 (2022).

15 See Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 Hous. L. Rev. 457, 460–61 (2011) (referring to the Arbitration Fairness Act as a “draconian antiarbitration measure” that “does not remedy arbitration’s shortcomings” and “overstates the case against arbitration, rendering the legislation unpalatable to corporate and business interests, as well as many consumer and employee advocates”).

16 See Stempel, supra note 7, at 801 (arguing that the Supreme Court’s FAA jurisprudence “diminishes[s] the Court in the eyes of wide segments of the academy, the legal profession, and the public”); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 333 (1996) (arguing that people “are entitled to resent an institution taking it upon itself to construct law that is in so many ways injurious to their interests.”).

17 See Hirshman, supra note 5, which analyzes lower courts’ FAA jurisprudence in depth, for a notable exception.
Congress enacted the FAA in 1925 to overcome early judicial hostility to arbitration.\(^{18}\) After its passage, most federal and state courts adhered to its intended purpose—to support the use of arbitration.\(^{19}\) Given the exponential growth in civil litigation since the FAA’s enactment, it is hardly surprising that lower courts have come to appreciate the benefits of arbitration and these courts have played a leading role in the development of a pro-arbitration interpretation of the FAA.\(^{20}\) Moreover, while the Supreme Court has decided sixty FAA cases since the Act was passed, state and federal lower courts have been deciding hundreds of FAA cases every year.\(^{21}\) These courts are therefore ultimately the ones determining the precise content of general, and at times vague, arbitration principles set out by the Supreme Court.\(^{22}\) As this Article demonstrates, the lower courts have not


\(^{20}\) Indeed, one of the most important interests of judges is their “capacity to deal effectively with the cases brought before them,” including their “capacity to minimize backlogs.” Lawrence Baum, \emph{Lower-Court Response to Supreme Court Decisions: Reconsidering a Negative Picture}, 3 JUST. SYS. J. 208, 214–15 (1978). See also Schwartz, \emph{Enforcing Small Print}, supra note 13, at 122–23, 123 n.375 (“[T]here is strong reason to believe that the courts are motivated by an understandable desire to control their dockets by diverting cases into arbitration.”).

\(^{21}\) See Tamar Meshel, \emph{In Defense of Moses}, 96 ST. JOHN’S L. REV. 395, 395 n.3 (2022) (“[T]he FAA has become a frequently litigated statute and the subject of 59 opinions of the Supreme Court” and over two thousand lower court decisions “between June 1, 2021 and September 1, 2022, alone.”). The last FAA-related case the court had decided at the time of writing was \emph{Coinbase, Inc. v. Bielski}, 143 S. Ct. 1915 (2023).

\(^{22}\) See Stephen G. Breyer, \emph{Reflections on the Role of Appellate Courts: A View from the Supreme Court}, 8 J. APP. PRAC. & PROCESS 91, 92–93 (2006) (“[M]ost determinative legal interpretations occur instead in the federal courts of appeals, in the state supreme courts, and in state appellate courts.”). Viewing the relationship between the Supreme Court and lower courts “in organizational terms,” one scholar has described the Supreme Court’s role as “to establish policies on a selected range of the issues faced by the judicial system.
always passively followed the Supreme Court’s lead when it comes to interpreting the FAA. In fact, in many of its seminal FAA decisions, the Supreme Court has been reacting to jurisprudential developments already taking place in the lower courts rather than “work[ing] a sea change in the law” or acting “in derogation of mainstream legal analysis.”

It stands to reason that the Supreme Court would inevitably interact with lower courts’ FAA jurisprudence. After all, most of the cases heard by the Court emanate from disagreements between the lower courts. While the Supreme Court retains the power to choose which disagreements to resolve and its reasoning may depart from that of the lower courts, “most of the time the Court’s policy choices should be fairly consistent with the preferences of most lower-court judges.” If they are not, lower courts “may ignore Supreme Court decisions, often with impunity.”

Subordinate courts have a responsibility to take these policies into account in their own more extensive decision-making activities.” Baum, supra note 20, at 211. Positive responses by lower courts to Supreme Court policy depends, among other things, on the clarity of the policy. Id.


24 See Stempel, supra note 7, at 798.

25 Id. at 803.

26 Breyer, supra note 22, at 92 (“If every lower court that has addressed a question arrives at the same answer, it is difficult to understand why the Supreme Court should weigh in on the matter. If, however, lower courts disagree about how to answer a particular legal question, the Supreme Court is considerably more likely to hear the case.”).

27 Tom S. Clark & Jonathan P. Kastellec, The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model, 75 J. Pol. 150, 151 (2013) (arguing that “[g]iven the emergence of a new legal question, the Court seeks to find an optimal point at which to grant cert and decide an issue, rather than allowing it to persist further,” and concluding that “the extent to which conflict among the lower courts induces the Court to intervene and resolve the conflict depends on how many previous courts have ruled on the question.”).

28 Baum, supra note 20, at 214.

29 Charles A. Johnson, Lower Court Reactions to Supreme Court Decisions: A Quantitative Examination, 23 Am. J. Pol. Sci. 792, 792 (1979). Even if lower courts apply Supreme Court precedent, they may do so in a way that is
has also been shown that the Supreme Court learns from lower court jurisprudence and is influenced by it. Yet, in the FAA context, the Supreme Court has been viewed as “insular, building more off itself than anything else,” and, with regard to some aspects of the Act, the Court’s jurisprudence has been accused of going against the understanding of courts for decades following 1925. Indeed, some scholars have called on lower courts in FAA cases to “strictly construe the [Supreme] Court’s erroneously-decided statutory interpretation precedents.”

This Article offers an alternative account of the Supreme Court’s FAA jurisprudence. This account posits that some of the most fundamental, and controversial, arbitration principles set out by the Supreme Court were first rooted in lower courts’ interpretation of the FAA and those courts’ own policy preferences regarding arbitration, rather than in the Court’s “rewriting” of arbitration law. This is not to say that the Supreme Court has played no role in the judicial evolution of the FAA or has not designed “to reach outcomes that comport with the judges’ own policy preferences.” Malia Reddick & Sara C. Benesh, Norm Violation by the Lower Courts in the Treatment of Supreme Court Precedent: A Research Framework, 21 JUST. SYS. J. 117, 135 (2000).

30 Clark & Kastellec, supra note 27, at 150.
31 Pamela C. Corley et al., Lower Court Influence on U.S. Supreme Court Opinion Content, 73 J. POL. 31, 42 (2011) (concluding that “the justices systematically incorporate language from lower court opinions into the Court’s majority opinions based on their perceptions as to whether the lower court opinions will enhance their ability to make effective law and policy.”).
32 Kristen M. Blankley, Standing on Its Own Shoulders: The Supreme Court’s Statutory Interpretation of the Federal Arbitration Act, 55 AKRON L. REV. 101, 103 (2022) [hereinafter Blankley, Standing on Its Own Shoulders].
33 Moses, Worker Contracts, supra note 10, at 417.
35 FAA decisions of lower courts reflect, at least in part, the judges’ policy preferences and personal opinions. Baum, supra note 20, at 213. See also JEFFREY A. SEGAL ET AL., THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM 4 (2005) (“All judges make policy; at the top of the judicial policy-making pyramid rests the United States Supreme Court.”).
36 Carrington & Haagen, supra note 16, at 331 (arguing that “the Supreme Court has rewritten the law governing commercial and employment arbitration in the United States.”).
“put its own imprint on [the Act].” Nor does this proposed account suggest that the judicial grassroots of some of the Supreme Court’s FAA decisions necessarily mean that these decisions are legally (or normatively) correct. The Article simply observes that blame for the current scope and impact of the FAA tends to be attributed exclusively to the Supreme Court, which undermines the legitimacy of the Act by portraying the Court’s interpretations of it as judicial outliers. However, a careful examination of the lower courts’ active role in shaping the FAA makes clear that attributing blame—whether justified or not—solely to the Supreme Court is misplaced and misleading.

The Article revisits five fundamental principles governing the interpretation and application of the FAA that the Supreme Court set out in decisions rendered between 1967 and 2001. These principles have earned the Court considerable criticism for building, “case by case, an edifice of its own creation” with respect to the FAA. These principles are:

1. An arbitration agreement is separate from the underlying contract in which it is contained, including in federal diversity cases (Prima Paint Corp. v. Flood & Conklin Manufacturing Co.);
2. The FAA reflects a liberal federal policy favoring the enforcement of valid arbitration agreements, and therefore, doubts concerning the scope of arbitration agreements should be decided in favor of arbitration (Moses H. Cone Memorial Hospital v. Mercury Construction Corp.).

38 See generally Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 TUL. L. REV. 1 (1997).
39 See infra notes 41–48 and accompanying text.
40 Allied-Bruce Terminix v. Dobson, 513 U.S. 265, 283 (1995) (O’Connor J., concurring) (“[O]ver 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.”).
41 388 U.S. 395, 403 (1967). This is also referred to as the “separability” principle.

4. Statutory claims are arbitrable under the FAA (Scherk v. Alberto-Culver Co.,\footnote{44} 417 U.S. 506, 508 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,\footnote{45} 473 U.S. 614, 625–27 (1985); Shearson/American Express Inc. v. McMahon,\footnote{46} 482 U.S. 220, 226 (1987); and

5. Employment disputes are arbitrable under the FAA (Circuit City Stores, Inc. v. Adams).\footnote{47} 490 U.S. 477, 481 (1989).

Since their development, these five fundamental principles have guided much of the Supreme Court’s FAA jurisprudence.\footnote{48} See supra notes 41–48 and accompanying text.

The Court has applied the severability principle to a variety of contracts and challenges to arbitration agreements.\footnote{49} It has also relied on this principle to find that a “delegation” provision that allows the arbitrator to decide the validity or scope of an arbitration agreement is separate from the arbitration agreement in which it is contained and must therefore be enforced by the courts unless it is specifically challenged.\footnote{50} The Court has relied on the principle that the FAA reflects a federal policy favoring the enforcement of valid arbitration agreements in many decisions criticized as “pro-arbitration.”\footnote{51} The principle that the FAA

\footnote{43} 465 U.S. 1, 10 (1984).
\footnote{44} 417 U.S. 506, 508 (1974).
\footnote{46} 482 U.S. 220, 226 (1987).
\footnote{47} 490 U.S. 477, 481 (1989).
\footnote{48} 532 U.S. 105, 109 (2001) (other than “contracts of employment of transportation workers.”).
\footnote{49} See supra notes 41–48 and accompanying text.
\footnote{50} See, e.g., Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (applying the severability principle to an illegality challenge to a consumer adhesion contract containing an arbitration clause).
preempts state law in state courts has led the Court to strike down various state statutes and court decisions that conflicted with the FAA.\textsuperscript{53} The principle that statutory claims are arbitrable under the FAA has led the Court to refer claims arising under a variety of federal statutes to arbitration.\textsuperscript{54} Finally, the principle that employment disputes are arbitrable under the FAA has allowed the Court to uphold waivers of class proceedings in employment contracts.\textsuperscript{55}

These five principles therefore seem revolutionary, and they have certainly been criticized as such. However, this Article shows that in establishing all of them, the Supreme Court adopted an interpretation of the FAA that had already been accepted by at least some, and at times by the majority, of the federal Circuit Courts of Appeals as well as by other lower federal and state courts.\textsuperscript{56} In other words, rather than engaging in unilateral

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\textsuperscript{54} See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that claims arising under the Age Discrimination in Employment Act were arbitrable); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012) (holding that claims arising under the Credit Repair Organizations Act are arbitrable).

\textsuperscript{55} See \textit{Epic Sys.}, 138 S. Ct. at 1632.

\textsuperscript{56} This is not unique to the arbitration context. Studies have found that, generally, the Supreme Court is “likely to support the position taken by a majority of the circuits weighing in on the conflict.” Clark & Kastellec, \textit{supra} note 27, at 152.
“judicial revisionism” of the FAA, the Supreme Court, at least in these seminal decisions, was merely affirming developments already taking root in the lower courts’ FAA jurisprudence.

The Article is structured as follows. Part I introduces the FAA and discusses common critiques directed at the five fundamental principles listed above. Part II describes the decisions in which the Supreme Court set out these principles, and explains how the Court in these decisions was largely reacting to jurisprudential developments already taking place in the lower courts rather than instigating them. The Article concludes that accusing the Supreme Court of unilaterally expanding the FAA achieves little other than to fuel an anti-arbitration movement.

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58 The goal of this Article is not to establish that in all of its FAA decisions the Supreme Court was reactive rather than proactive. The Article simply sets out to show that this has been the case with some of the fundamental principles governing the interpretation and application of the FAA. This showing, in itself, casts doubt over the conventional wisdom that the current scope of the FAA has been entirely derived from the Supreme Court’s idiosyncratic ideological views. The most notable exception is class arbitration, where the Supreme Court did not adopt the position of most lower courts. See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662, 687 (2010) (holding that class arbitration cannot be imposed on parties whose arbitration agreement is silent on the matter, siding with the Seventh Circuit and, overruling the Second, Third, and Ninth Circuits, as well as the Illinois Supreme Court); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that the FAA preempted a state law that conditioned the enforceability of consumer arbitration agreements on the availability of class arbitration procedures, siding with the Third Circuit and the Tennessee Court of Appeals and overruling the First, Ninth, and Eleventh Circuits, as well as the highest state courts in Alabama, California, Illinois, Massachusetts, New Jersey, New Mexico, North Carolina, Washington, and West Virginia). This is the most controversial aspect of recent Supreme Court FAA jurisprudence, and perhaps the only aspect truly in need of careful legislative reform. See, e.g., Cole, supra note 15, at 468 (arguing that amending the FAA to permit class action arbitration would be a better approach than attempting to eliminate arbitration altogether).

60 See discussion infra Part I.
61 See discussion infra Part II.
because doing so misrepresents the Act as being imposed on lower courts against the lower courts’ will.\textsuperscript{62} The reality, however, is that at least some of the fundamental principles governing the interpretation and application of the FAA were not pulled out of thin air by the Supreme Court but were rather already deeply rooted in lower courts’ arbitration jurisprudence.

I. THE FAA AND ITS CRITIQUES

A. The FAA—A Brief History

The FAA is commonly said to have been enacted in response to judicial hostility to arbitration that was prevalent in the eighteenth and early nineteenth centuries.\textsuperscript{63} This hostility was reflected in state and federal courts’ refusal to specifically enforce agreements to submit future disputes to arbitration, allowing such agreements to be revoked at the will of any party.\textsuperscript{64}

\textsuperscript{62} See discussion \textit{infra} Conclusion.

\textsuperscript{63} IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 19 (1992) (referring to the “arbitration reform movement” that has promoted the idea of judicial hostility to arbitration); Sabra A. Jones, \textit{Historical Development of Commercial Arbitration in the United States}, 12 MINN. L. REV. 240, 256 (1928) (“In the early history of the United States there was considerable objection to arbitration. This primarily was due to the fact that in England there was a deep-rooted rule that parties might not, by their agreement, oust the jurisdiction of the courts.”); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270 (1995) (“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate.”); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (“Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes.”).

\textsuperscript{64} See, e.g., Allen v. Watson, 16 Johns. 205, 209 (N.Y. Sup. Ct. 1819) (“There can be no doubt that the defendant could revoke the powers conferred by the arbitration bond . . . . [T]he plaintiff could recover no more than the actual damages sustained.”); Haggart v. Morgan, 5 N.Y. 422, 427 (1851) (“[T]he agreement to arbitrate, only entitled the party to damages, but was no bar to an action.”); Wood v. Lafayette, 46 N.Y. 484, 489 (1871) (“[T]he arbitrator’s power] was revocable by either party, as is the case in every submission to arbitrators . . . .”); Munson v. Straits of Dover, 99 F. 787, 789 (S.D.N.Y. 1900) (“[N]o case is to be found in which, upon a mere refusal to arbitrate and where
However, the judicial approach to arbitration was not entirely negative. For instance, courts did not appear to be as hostile to the arbitral process once it was under way and largely enforced awards in which arbitrators decided disputes submitted to them.65 A factor that contributed to the perceived judicial hostility to arbitration was the lack of federal legislation and the inconsistency of state laws concerning the enforcement of arbitration agreements.66

Early American arbitration law was “the common law of Nowhere. That is to say, it was evidenced by a great hodgepodge of English, state, and federal cases.”67 To begin with, there is “no evidence of a body of federal arbitration law substantively distinct from prevailing state law.”68 As for state arbitration laws, some existed as early as the seventeenth century but were inconsistent

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65 See, e.g., Fudickar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 399–400 (1875) (“It is the general doctrine pervading our jurisprudence on the subject, that the decision of an arbitrator in a matter within his jurisdiction is final and conclusive between the parties . . . . The court possesses no general supervisory power over awards, and if arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment either upon the facts or the law.”); Curtis v. Gokey, 68 N.Y. 300, 305 (1877) (“We are not at liberty to be hypercritical for the purpose of overturning the decisions of these domestic tribunals, and compelling a resort to the courts of justice . . . . A liberal interpretation should be given to the submission, and the award made, to uphold the latter when it is not attacked for corruption or misconduct of the arbitrator.”); Ebert v. Ebert, 5 Md. 353, 364 (1854) (“[Arbitration awards] are to be liberally construed so as to give a full effect and operation to the intention of the arbitrators where it can be done, and every thing is to be presumed and every reasonable intendment made in favor of them.”). See also MACNEIL, supra note 63, at 19 (noting that American courts in the 19th century “allowed arbitrators broad leeway in making their awards, far broader respecting both fact and law than would normally be accorded to lower courts.”). For a useful summary of evidence of early judicial hostility to arbitration, see Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 982–84 (2d Cir. 1942).

66 MACNEIL, supra note 63, at 21.

67 Id.

68 Id. at 22.
across states and not always supportive of arbitration. For instance, many arbitration statutes made agreements to arbitrate future disputes revocable or applied only to court-mandated arbitration, while other state arbitration acts, such as those of Colorado, Pennsylvania, and Washington, recognized arbitration agreements as irrevocable. Given this inconsistency, in the early twentieth century, there were efforts to develop uniform pro-arbitration state legislation. The New York Arbitration Law was passed in 1920 and made arbitration agreements valid, enforceable, and irrevocable under New York law. Other state legislatures followed suit and similar arbitration laws were enacted in New Jersey (1923), Iowa (1924), Oregon (1925), and Massachusetts (1925). By the end of the 1920s, many state arbitration statutes “preclude[d] the idea that the settlement of disputes in [arbitration] [w]as undesirable.”

However, federal courts refused to enforce arbitration agreements well into the twentieth century, even where state statutes

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69 For example, the Colonial Code of 1650 in Connecticut, which allowed arbitration of disputes concerning actions such as trespasses, a 1664 law in the Duke of Yorke’s Books of Laws in Pennsylvania, which allowed “all actions of Debt or Trespasse to be arbitrated,” and a Georgia arbitration law passed in 1698. Jones, supra note 63, at 246–47. See generally Sidney P. Simpson, Specific Enforcement of Arbitration Contracts, 83 U. PA. L. REV. 160, 165 (1934) (all but two of the states, Oklahoma and South Dakota, had in place general arbitration statutes by the early twentieth century).

70 Simpson, supra note 69, at 165.

71 SAMUEL WILLISTON, THE LAW OF CONTRACTS 3278 (1920).


73 On the influence of the First World War on these efforts, see, Imre S. Szalai, Modern Arbitration Values and the First World War, 49 AM. J. LEGAL HIST. 355 (2007).


76 WILLISTON, supra note 71, at 3015–16.
provided for the enforceability of these agreements. The enforceability of arbitration agreements, the federal courts found, was a procedural question of remedy rather than of rights, and one of “general law; i.e., one wherein the courts of the United States are not bound to follow or conform to the decisions of the state jurisdiction in which they may happen to sit.” Federal courts held that they were bound instead by the jurisprudence of the Supreme Court, which at that time had “laid down the rule that [arbitration constituted] a complete ouster of [the courts’] jurisdiction” and was therefore “void in a federal forum.”

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77 Southland Corp. v. Keating, 465 U.S. 1, 34 (1984) (O'Connor J., dissenting) (“By 1925 several major commercial states had passed state arbitration laws, but the federal courts refused to enforce those laws in diversity cases.”). The federal courts’ refusal to apply state law to enforce arbitration agreements must be considered in the light of the different conflict of laws principles prevailing at the time. Prior to the 1938 decision of the Supreme Court in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), the federal judicial approach was that federal rather than state common law governed in diversity cases in federal courts. Therefore, when federal courts refused to enforce arbitration agreements they may have been motivated not only by a “policy respecting arbitration” but also by “the limitations of state law governing in federal courts.” MacNeil, supra note 63, at 22–24.

78 Meacham v. Jamestown, Franklin & Clearfield R.R. Co., 211 N.Y. 346, 346 (1914) (“An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies. The law that governs remedies is the law of the forum . . . .”); Cal. Prune & Apricot Growers’ Ass’n v. Catz Am. Co., 60 F.2d 788, 790 (9th Cir. 1932) (“The arbitration agreement was a valid contract under the state law, and enforceable under that law in the state court. ‘The question is one of remedy, and not of right.’ It is undoubtedly true that a federal court in proper cases may enforce state laws; but this principle is applicable only when the state legislation invoked, creates or establishes a substantive or general right.”).


80 U.S. Asphalt Refining Co., 222 F. at 1012 (citing Ins. Co. v. Morse, 87 U.S. 445 (1874)). See Doyle v. Continental Ins. Co., 94 U.S. 535, 535 (1876); Guar. Tr. & Safe Deposit Co. v. Green Cove & Melrose R.R., 139 U.S. 137, 142–43 (1891). See also Tatsuuma Kisen Kabushiki Kaisha v. Prescott, 4 F.2d 670, 673 (9th Cir. 1925) (noting that the revocability of arbitration agreements was “the established law in the courts of the United States, from which the inferior federal courts are not at liberty to depart.”).
Given this reluctance of the federal courts to enforce arbitration agreements, the American Bar Association and the New York Chamber of Commerce joined forces to draft a federal arbitration law for disputes arising in interstate commerce and in maritime transactions that would be in line with modern state arbitration acts. 81 The drafters’ goal was to enact into law “a policy changing an anachronism of three centuries’ standing” 82 and to overturn “the existing rule that performance of [arbitration] agreements could not be compelled.” 83 By early 1925, the FAA passed both houses unanimously and President Coolidge signed it into law on February 12th of that year. 84

Notwithstanding its seemingly straightforward goal, the scope of the FAA has long been debated by courts and scholars, due in no small part to the Act’s “bare-bones” nature. 85 At the most fundamental level, there are two opposing approaches to the FAA. According to the first approach, the FAA should be interpreted expansively, applying in both federal and state courts, and encompassing commercial disputes broadly defined to include employment, consumer, and statutory claims, while preempting contrary state law. 86 According to the second approach, the FAA should be interpreted restrictively, applying only in federal courts and exclusively to narrowly defined commercial disputes that arise between business parties of equal negotiating power, without preempting state law. 87 Today, it is clear that the former view has prevailed over the latter, and the conventional wisdom among critics is that the Supreme Court is entirely to blame. 88

81 Jones, supra note 63, at 240, 249–50.
84 Jones, supra note 63, at 250.
86 Szalai, Exploring the FAA, supra note 85, at 115, 118, 127.
87 Id. at 119, 121, 126.
88 Id. at 117–18.
B. Critiques of the FAA in the Supreme Court

Much ink has been spilled criticizing the FAA and its deleterious impacts on everything from the constitutional right to a jury trial to consumers’ and employees’ ability to hold corporations legally accountable.\(^89\) Interestingly, the culprit that is most often blamed for these perceived harms is not Congress, which passed the FAA a century ago and has only seen fit to narrow its scope once.\(^90\) Rather, it is the Supreme Court, whose “single-minded posture” has been identified as the “chief obstacle” to balancing the arbitral process with “the basic dictates of legality.”\(^91\) Indeed, if there is a single common theme to the myriad of FAA critiques it is that the Supreme Court has singlehandedly made the Act what it is today by “position[ing] itself as the sole interpreter of the scope of the FAA,”\(^92\) “increasingly expand[ing] [the FAA’s] reach,”\(^93\) and “expand[ing] and chang[ing] the original meaning of the law.”\(^94\) The “new and unexpected ways”\(^95\) in which the Supreme Court has interpreted the FAA have been said to undermine federalism principles,\(^96\) the common law of

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\(^89\) Id. at 116.

\(^90\) The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 was the first substantive amendment intended to restrict the scope of the Act. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26. Previous amendments to the FAA include: section 7, which permits courts to enforce arbitral subpoenas (1951); section 4, which requires courts to compel arbitration (1954); Chapter 2, which adopts the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1970), section 15, which renders inapplicable the Act of State doctrine, section 16, which restricts certain appeals from court orders under the act (1988); and Chapter 3, which adopts the Inter-American Convention on International Commercial Arbitration (1990). By comparison, Congress overrides Supreme Court statutory decisions in other areas “with some regularity.” SEGAL ET AL., supra note 35, at 325.


\(^94\) Szalai, *Failure of Legal Ethics*, supra note 11, at 136.

\(^95\) Bland et al., *supra* note 11, at 588.

\(^96\) Richard L. Barnes, Prima Paint *Pushed Compulsory Arbitration under the Erie Train*, 2 BROOK. J. CORP. FIN. & COM. L. 1, 1 (2007) (“By doggedly favoring
contracts,\footnote{Cunningham, \textit{supra} note 19, at 142 (arguing that the Supreme Court’s “arbitration jurisprudence gives short shrift to [...] fundamental principles” of the “common law of contracts.”); Islo, \textit{supra} note 8, at 11–12 (discussing “the Court’s intrusion into the law of contracts, traditionally the domain of the states.”).} the interests of the “ordinary claimant,”\footnote{Schwartz, \textit{Claim-Suppressing Arbitration, supra} note 11, at 250 (“The ordinary claimant . . . ha[s] had precious little say since the Supreme Court began to turn the statute against them in the early 1980s.”).} as well as to reverse the early “judicial concern about the power of arbitration and a need to limit it in various ways.”\footnote{MACNEIL, \textit{supra} note 63, at 71 (referring to decisions of the Second Circuit from the late 1960s, in which the court was concerned with the public policy implications of arbitrating antitrust claims.); \textit{id.} at 64.}

Critics commonly point to the five fundamental arbitration principles with which this Article is concerned, as well as the decisions in which the Supreme Court has articulated them, as evidence that the Court “holds both principal authority and the authority of principle as to the content of modern American arbitration law.”\footnote{Carbonneau, \textit{Arbitration Plea, supra} note 91, at 242.} Put even more poetically:

As architecture, the arbitration law made by the Court is a shantytown . . . To extricate itself and the nation from the morass it has created, the Court would have to overrule Moses Cone, Mitsubishi, Southland . . . and belatedly limit the holding in \textit{Prima Paint} . . . Had the Court in making commercial arbitration law been more faithful to the controlling legal texts, it would not have built the ugly habitation for which it alone is responsible.\footnote{Carrington & Haagen, \textit{supra} note 16, at 401–02.}

To recap, the five principles are: (1) an arbitration agreement is separate from the underlying contract in which it is contained, including in federal diversity cases;\footnote{Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).} (2) the FAA reflects a liberal federal policy favoring the enforcement of valid arbitration agreements and therefore doubts concerning the scope of arbitration agreements should be decided in favor of arbitration;\footnote{Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–26 (1983).}
(3) the FAA applies in state courts and preempts contradictory state law;\textsuperscript{104} (4) statutory claims are arbitrable under the FAA;\textsuperscript{105} and (5) employment disputes are arbitrable under the FAA.\textsuperscript{106} The remainder of this Part introduces these principles, summarizes the main critiques directed at each principle, and highlights the Supreme Court–centric nature of these critiques.\textsuperscript{107}

\textsuperscript{107} In addition to the sources referenced below, see also, e.g., Kenneth F. Dunham, Great Gilmer’s Ghost: The Haunting Tale of the Role of Employment Arbitration in the Disappearance of Statutory Rights in Discrimination Cases, 29 AM. J. TRIAL ADVOC. 303 (2005) (discussing the negative effect of the Supreme Court’s jurisprudence on labor and employment claims); Janna Giesbrecht-McKee, The Fairness Problem: Mandatory Arbitration in Employment Contracts, 50 WILLAMETTE L. REV. 259, 261 (2014) (criticizing “the U.S. Supreme Court [ ] cases that led to employment arbitration’s current hallowed status.”); Cornelis J.W. Baaij, A Case of Mistaken Identity: Questioning the U.S. Supreme Court’s Contract Theory of Arbitration, 14 VA. L. & BUS. REV. 121, 124 (2020) (“[R]eassessing the legitimacy of an expansive application of the FAA by the Supreme Court” and “advocating for a reexamination of the desirability and appropriateness of the justificatory theory underlying the Supreme Court’s arbitration precedent.”); Myriam Gilles, The Day Doctrine Died: Private Arbitration and the End of Law, 2016 U. ILL. L. REV. 371, 377 (2016) (describing “important transformations in the Supreme Court’s arbitration jurisprudence beginning in the mid-1980s, culminating in the enforceability of arbitration clauses with embedded class bans in standard form agreements”). And criticizing these developments on various policy grounds such as lack of “transparent decision-making process, much less stare decisis, or common law development.” Id. at 372; Paul L. Edenfield, No More the Independent and Virtuous Judiciary: Triaging Antidiscrimination Policy in a Post-Gilmer World, 54 STAN. L. REV. 1321 1327–28 (2002) (“[L]ament[ing] the Supreme Court’s failure in Gilmer to balance conflicting statutory purposes, justified by a wishful presumption that arbitrators are the matches of judges” and “observing that the Supreme Court’s embrace of contractualism as a basis for upholding arbitration agreements is tantamount to installing arbitration as the official dispute resolution body for vast segments of the American workforce.”); Jodi Wilson, How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act, 63 CASE W. RES. L. REV. 91, 96 (2012) (describing “the [Supreme] Court’s progression from hostility to favoritism” and critiquing the Court’s decision in AT&T Mobility LLC v. Concepcion); Kathryn A. Sabbeth & David C. Vladeck, Contracting (Out)
In its 1967 decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Supreme Court set out the severability principle, holding that an arbitration clause is separate from the contract in which it is contained. As a result, an arbitrator is to decide challenges to the underlying contract containing the arbitration clause, such as fraudulent inducement, while courts are to decide challenges to the arbitration clause itself. Moreover, the Supreme Court held that this principle applied in federal diversity cases. *Prima Paint* is viewed as a “critical turning point” in the “transformation of the original FAA into the expansive statute it is today” and is blamed for “unleash[ing] the [FAA] from its moorings and sen[ding] it on a journey from which it has never returned.” Moreover, the severability principle is criticized for negating party consent, because it is “a legal fiction

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108 *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403 (1967). The Court did not explicitly refer to this as the “severability principle” although it did refer to the question of the “severability” of an arbitration clause from the underlying contract. *Id.* The Court labeled this the “severability” principle rule in later cases. *See* Rent-A-Ctr., Inc. v. Jackson, 561 U.S. 63, 72 (2010); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 537 (2019).

109 *Prima Paint Corp.,* 388 U.S. 395 at 403–04 (“[I]f the claim is fraud in the inducement of the arbitration clause itself . . . the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.”).

110 *Id.* at 405 (“The question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’”).


112 *Id.* at 122.
pretending that when a party alleges it has formed a contract containing an arbitration clause, that party actually alleges it has formed two contracts.”113 The Supreme Court, critics argue, “minted”114 this “novel idea of the ‘separability’ of the arbitration clause,”115 thereby “prompt[ing] the distortion of state law.”116 *Prima Paint* is also criticized for the Court’s application of the FAA to federal diversity cases, which is said to have propelled the “bizarre transformation of American arbitration law.”117

The next step in the judicial development of the FAA at the Supreme Court was the 1983 case of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*118 In this case, the Court pronounced that section 2 of the FAA reflected a “liberal federal policy favoring arbitration agreements,” and therefore that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”119 There are increasing calls to “rethink” the *Moses* “canon,”120 because it “diverts courts from the best reading of the text at the first hint of uncertainty, and thereby works a massive alteration of written contracts in America.”121 Moreover, *Moses* is charged with manufacturing what, at the time, constituted a “newly minted”122 federal policy favoring arbitration.123 According to critics, both the policy favoring arbitration and the

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114 Cunningham, supra note 19, at 139.

115 Barnes, supra note 96, at 5.

116 Cunningham, supra note 19, at 157.

117 MACNEIL, supra note 63, at 139.


120 Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1215 (11th Cir. 2021) (Newsom, J., concurring); Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 297 (3d Cir. 2021) (Matey, J., concurring) (“[T]he challenges presented by the judicially magnified presumptions of § 2 deserve a fresh look . . . .”)

121 Calderon, 5 F.4th at 1220–21 (Newsom, J., concurring).


123 Szalai, *Exploring the FAA*, supra note 85, at 118.
accompanying presumption that doubts should be resolved in favor of arbitration were “not firmly grounded in the written or common law”124 and were rather established by the Court “without citing to support or authority.”125 In “creat[ing]”126 the Moses presumption and the federal policy on which it is based, it is argued that the Supreme Court “rewrote”127 the FAA and triggered a “radical transformation and expansion of arbitration law.”128

A year after Moses, the Supreme Court decided in Southland Corp. v. Keating that the FAA applied in state courts and preempted conflicting state law.129 This decision has been described as “[c]ontrary to the text, history, and purpose of the FAA”130 and as having “radically transformed the role and reach of the statute” toward “arbitration supremacy.”131 Moreover, Southland has led critics to accuse the Supreme Court of “over-read[ing] the text of the Act and minimiz[ing] or ignor[ing] traditional mainstream concerns of federalism, historical practice, restraint in expanding congressional power absent a clear statement, and deference to traditional state prerogatives.”132 Some have even accused the FAA preemption principle resulting from the decision in Southland of being “unconstitutional.”133 It is also argued that Southland betrayed a “universal recognition that the [FAA] had nothing to do with proceedings in state courts,” which critics say existed at least in the first few decades following

124 Calderon, 5 F.4th at 1220 (Newsom, J., concurring).
125 Moses, Statutory Misconstruction, supra note 5, at 122.
126 Szalai, Failure of Legal Ethics, supra note 11, at 139.
128 Szalai, Failure of Legal Ethics, supra note 11, at 156.
129 Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”).
130 Szalai, Failure of Legal Ethics, supra note 11, at 137–38.
131 Islo, supra note 8, at 12, 15. See also Szalai, Failure of Legal Ethics, supra note 11, at 137–38 (arguing that Southland “completely transformed the statute.”).
132 Stempel, supra note 7, at 840.
the FAA’s enactment, and “completely federaliz[ed] a body of law that was until recently regarded as an appropriate subject for the exercise of state sovereignty.” Indeed, there is a common perception that, prior to *Southland*, “the FAA was generally considered applicable solely in federal court.” Together with *Prima Paint* and *Moses*, *Southland* is thus said to “constitute a transformation of the [FAA] worthy of the best of medieval alchemists” and is viewed as “start[ing] the Court down a path of creating its own statute.”

In a series of cases starting in 1974 and continuing throughout the 1980s, including *Scherk v. Alberto-Culver Co.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, *Shearson/American Express, Inc. v. McMahon*, and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Supreme Court gradually concluded that statutory claims were generally arbitrable under the FAA. This conclusion led to a backlash against the Court for “eviscerat[ing] the inarbitrability defense,” as parties could no longer argue that all statutory claims were not arbitrable. The Supreme Court’s “policy of moving statutory claims into arbitration” is also criticized for undermining legislative protections. Critics view the resulting “new architecture of the FAA” as

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134 MacNeil, supra note 63, at 130. MacNeil did recognize that after 1959 more state court cases applied the FAA, which he viewed as “surrender[ing] to federal power.” Id. at 227 n.54.

135 Carrington & Haagen, supra note 16, at 332 (citing Southland Corp. v Keating, 466 U.S. 1 (1984)).

136 Szalai, *Failure of Legal Ethics*, supra note 11, at 121. See also Larry J. Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of Powers Between Congress and the Court*, 80 WASH. & LEE L. REV. 893, 917 (“Southland’s interpretation of Section 2 of the FAA is one of the major reasons for the growth of arbitration.”).

137 MacNeil, supra note 63, at 148.


exclusively of the Supreme Court’s design because the Court was enforcing arbitration clauses that, according to these critics, were previously “deemed invalid impairments of rights conferred by Congress in its regulation of commerce,”146 and the Court was doing so by “manhandling” lower court decisions.147 In creating the “new concept” that noncontractual statutory claims were arbitrable,148 the Supreme Court is also accused of relying heavily on its “own judicially created” federal policy favoring arbitration149 and causing a major “paradigm shift[ ] in arbitration.”150

Prior to this shift, according to some commentators, “the federal courts had operated under a strong presumption that arbitration was not a suitable forum for the decision of statutory rights.”151

Finally, in its 2001 decision in Circuit City Stores, Inc. v. Adams, the Supreme Court held that employment disputes other than those involving interstate “transportation workers” who were exempt from the Act under section 1 were arbitrable under the FAA.152 For this, again, the Court has been accused of “rewriting” the FAA153 by deciding an issue—employment arbitration—that had previously been a “foreign concept”154 to employees. Indeed,

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146 Carrington & Haagen, supra note 16, at 332 (citing Rodriguez de Quijas v. Shearson/Am. Express, 490 US 477 (1989)).
147 MacNeil, supra note 63, at 76 (referring to the Supreme Court’s treatment of Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).
148 Moses, Who’s in Charge?, supra note 144, at 172.
149 Moses, Statutory Misconstruction, supra note 5, at 145.
150 Moses, Who’s in Charge?, supra note 144, at 150. See also Islo, supra note 8, at 38 (“[T]he doctrinal shift that followed [Mitsubishi] was a result of the Court opening the floodgates for statutory rights to be ‘adjudicated’ in arbitration.”).
152 Adams, 532 U.S. 105, 106, 119 (2001) (“[T]he text of the FAA forecloses the construction of § 1 . . . which would exclude all employment contracts from the FAA.”).
153 Moses, Who’s in Charge?, supra note 144, at 152–53.
it is commonly argued that, prior to *Circuit City*, mandatory arbitration clauses were rarely used in the employment context. *Circuit City* has purportedly “open[ed] the floodgates of mandatory employment arbitration,” causing lower courts “to revise their own opinions of arbitration in employment contracts.”

Critics seem to agree, therefore, that the Supreme Court, through these FAA decisions, has strayed far afield from Congress’s legislative intentions, lower courts’ judicial interpretations of the Act, and the Court’s own early FAA precedent. There is no consensus, however, as to why the Supreme Court would unilaterally develop such a seemingly radical interpretation of the FAA. Some critics suggest that the Court did so in response to the “litigation explosion” of the 1980s, or as a result of its growing “hostility to litigation.” A less charitable theory posits that the Court “may have been excessively intent on expanding the [FAA] and embracing arbitration on personal preference grounds.” For instance, Chief Justice Burger’s majority opinion in *Southland* has been criticized for being “self-interested speculation.” More generally, it has been argued that the Court’s arbitration decisions reflect “judicial policy preferences to support

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155 As well as the Supreme Court’s prior decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991), discussed further *infra* note 379 and accompanying text, where the Court held that claims arising under the Age Discrimination in Employment Act were arbitrable.


158 Dunham, *supra* note 107, at 315.

159 Some critics have argued that the handful of FAA decisions that the Supreme Court rendered prior to *Prima Paint* “show a strong concern about the lack of protection of rights in an arbitration proceeding” that “never surfaced again after *Mitsubishi.*” Moses, *Statutory Misconstruction*, *supra* note 5, at 143.


162 Siegel, *supra* note 160, at 798.

163 Stempel, *supra* note 7, at 834.

164 Pittman, *supra* note 136, at 918.
businesses that seek to limit consumer access to the courts and to restrict the ability of states to regulate contract law within their borders. At the same time, the Supreme Court’s FAA decisions have not always lined up with its perceived ideological stance. For instance, when it applied the preemption doctrine to the FAA in the 1980s the Court was “otherwise inclin[ed] in the direction of devolving power to the states and avoidance of implied preemption.”

The next Part suggests a much simpler and less sinister explanation for at least some of the Supreme Court’s FAA decisions, namely that they were motivated by jurisprudential developments already taking place in the lower courts. In other words, at least with respect to the five fundamental principles discussed above, the Supreme Court was simply affirming the judicial interpretation of the FAA that was already evolving in the lower courts.

II. THE FAA AT THE SUPREME COURT—LOWER COURT ROOTS

This Part discusses the cases in which the Supreme Court, between 1967 and 2001, set out the five fundamental principles discussed above to govern the application and interpretation of the FAA. It also explains how, in all of these cases, the Court was reacting to developments already taking place in the lower courts rather than instigating changes in the law of arbitration.

A. The Severability Principle and Its Application in Federal Diversity Cases

Prima Paint Corp. v. Flood & Conklin Manufacturing Co. involved a purchase and consultation agreement between Prima Paint, a Maryland corporation, and Flood & Conklin, a New Jersey

165 Moses, Statutory Misconstruction, supra note 5, at 154. See also Bland et al., supra note 11, at 589 (“[B]y the mid-1980s, the Supreme Court began to reinterpret the FAA in service of the ideologically conservative goal of allowing corporations to compel arbitration and eliminate access to courts and juries.”).
166 Carrington & Haagen, supra note 16, at 379.
167 Id.
169 Prima Paint Corp., 388 U.S. at 397–98.
corporation, which contained an arbitration clause. A dispute arose between the parties when Prima Paint alleged that Flood & Conklin had fraudulently induced it to enter into the agreement. Prima Paint sued in the U.S. District Court for the Southern District of New York, seeking rescission of the agreement. Flood & Conklin moved to stay the action pending arbitration, contending that the issue of fraud in the inducement was a question for the arbitrator to decide. The district court granted the stay motion, and the Second Circuit affirmed. Prima Paint appealed to the Supreme Court.

The central question before the Supreme Court was whether a court or an arbitrator was to resolve the claim of fraud in the inducement under the parties’ agreement. The Court considered the language of section 4 of the FAA, which requires a court to compel arbitration 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.” On the basis of this language, the Court held that

if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the ‘making’ of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

The same applies, the Court held, to motions to stay proceedings under section 3 of the FAA—“a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.” Finally, the Supreme Court held that this federal principle of the severability of arbitration agreements was constitutionally permissible. While pursuant to *Erie R.R.*

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170 Id. at 398.
171 Id.
172 Id. at 399.
173 Id. at 395, 400.
174 Id. at 400.
175 Id. at 396–97.
176 Id. at 403.
177 Id. at 403–04.
178 Id. at 404.
179 Id. at 404–05.
Co. v. Tompkins, federal courts were “bound in diversity cases to follow state rules of decision in matters which are ‘substantive,’” the Court held that this case concerned Congress’s power to prescribe rules for federal courts to apply in matters over which it has legislative power, in this case a contract involving commerce. The Court did not opine on the FAA’s application in state courts. Since Prima Paint did not challenge the arbitration clause itself but only the agreement in which it was contained, the Supreme Court held that the challenge must be resolved by the arbitrator and dismissed the appeal.

Contrary to conventional wisdom, the Supreme Court did not dream up the severability principle, nor its application in federal diversity cases. Rather, the Court in Prima Paint affirmed a long line of cases decided by the federal Circuit Courts of Appeals and other courts that developed this principle.

As early as 1945, in Watkins v. Hudson Coal Co., the Third Circuit referred to arbitration a dispute arising from a contract that the court found to be partially illegal for violating the Fair Labor Standards Act (FLSA). The court recognized the severability principle in holding that “the arbitration provision is not rendered ineffective because the contract contains ... clause[s] ... which we deem insufficient under the [FLSA].”

Almost fifteen years later, the Second Circuit decided Robert Lawrence Co. v. Devonshire Fabrics, Inc., which, like Prima Paint, involved a claim of fraudulent inducement of a contract containing an arbitration clause. The Second Circuit first addressed whether

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180 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
181 Prima Paint Corp., 388 U.S. at 404–05.
182 Id. (Black, J. dissenting).
183 Id. at 406–07.
184 Id. at 402–03.
185 Id. at 399–406.
186 151 F.2d 311, 318–21 (3d Cir. 1945).
187 Id. at 312–13, 320. The Third Circuit did not address the question of whether federal or state law should apply as this was not a diversity case.
188 Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 404 (2d Cir. 1959). Earlier, in Almacenes Fernandez, S.A. v. Golodetz, 148 F.2d 625, 629 (2d Cir. 1945), the Second Circuit held that a claim of fraud in the performance of a contract did not preclude arbitration. In In re Pahlberg Petition, 131 F.2d 968, 969–71 (2d Cir. 1942), the Second Circuit held that the alleged repudiation of a contract containing an arbitration clause did not preclude arbitration.
federal or state law should govern this challenge to the enforcement of the arbitration clause. It held that the FAA embodied a “legislative intent to create a new body of substantive law relative to arbitration agreements affecting commerce or maritime transactions” in order to overcome “[o]ne of the dark chapters in legal history concerning the validity, interpretation and enforceability of arbitration agreements.” The body of substantive law created by the FAA, according to the Second Circuit, governed “rights arising out of the exercise by the Congress of its constitutional power to regulate commerce,” rather than “state-created rights.” Therefore, the Second Circuit concluded that there was no constitutional problem with federal law governing questions of validity and interpretation of an arbitration agreement in maritime transactions and contracts involving commerce.

The Second Circuit then turned to the fraudulent inducement claim, noting that arbitration clauses were historically treated separately from their underlying contracts. The court then set out the principle that only a challenge to the arbitration clause, rather than to the underlying contract, could negate arbitration. Given that the arbitration clause in the case was broad and that no allegation was made that the clause was itself induced by fraud, the court held that the claim of fraudulent inducement of the contract fell within the scope of the arbitration clause and that “nothing short of a renascence of the old judicial hostility to arbitration could evolve a contrary ruling.”

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189 Robert Lawrence Co., 271 F.2d at 404–09.
190 Id. at 404.
191 Id. at 406.
192 Id. at 404–05.
193 Id. at 404–05. See also Monte v. S. Del. Cnty. Auth., 321 F.2d 870, 871, 874 (3d Cir. 1963). The Third Circuit expressly agreed with Robert Lawrence that “federal substantive law must be applied” to arbitration agreements falling under the FAA. Id. at 874. However, this case concerned the review of an arbitration award rather than a motion to stay proceedings and compel arbitration.
194 Robert Lawrence Co., 271 F.2d at 410.
195 Id. at 411 (holding that if the “arbitration clause was induced by fraud, there can be no arbitration . . . [but] [i]t is not enough that there is substance to the charge that the contract to deliver merchandise of a certain quality was induced by fraud.”).
196 Id. at 412.
The court therefore ordered a stay of the proceedings in favor of arbitration.\(^{197}\)

The Second Circuit affirmed the severability principle and its decision in *Robert Lawrence* on several occasions,\(^{198}\) and some New York state courts held a similar view.\(^{199}\) In *Prima Paint*, the Second Circuit reiterated that under federal law, “an arbitration agreement is separable from the contract within which it is contained,” and therefore,

> when there is no allegation of fraud in the inducement to enter into the agreement to arbitrate any controversies or claims arising out of, or relating to, the agreement of which the arbitration agreement is a part, and which agreement is allegedly entered into by fraudulent inducement, the resolution of whether there was in fact fraud in the inducement is properly the province of the arbitrators and not of the court.\(^{200}\)

In *Electronic & Missile Facilities, Inc. v. Moseley*,\(^{201}\) the Fifth Circuit relied on *Robert Lawrence* in holding that “[u]nder federal law, arbitration is not barred by an assertion that the entire contract was induced by fraud; there must be a specific claim that the arbitration provision itself was fraudulently procured.”\(^{202}\) Moreover, the Fifth Circuit held that “[w]here a contract comes within the purview of the United States Arbitration

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\(^{197}\) *Id.* at 413.

\(^{198}\) In addition to the Second Circuit’s decision in *Prima Paint*, see, e.g., Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 385 (2d Cir. 1961); *In re Kinoshita & Co.*, 287 F.2d 951, 952 (2d Cir. 1961); and Amicizia Societa Nav. v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808–09 (2d Cir. 1960).

\(^{199}\) See, e.g., Fabrex Corp. v. Winard Sales Co., 200 N.Y.S.2d 278, 280 (N.Y. Sup. Ct. 1960) (stating the law to be that “[w]here an arbitration clause is broad and all inclusive, a request for rescission, either in a pending action or in a demand for arbitration, based upon fraud in the inducement, will be left for determination of the arbitrators,” and referring to earlier authorities from New York courts); see also cases referenced in Arthur Nussbaum, *The Separability Doctrine in American and Foreign Arbitration*, 17 N.Y.U. L.Q. Rev. 609, 614–15 (1940) (recognizing that “On the whole, it may be said that the separability doctrine has gained a solid footing in this country.”).


\(^{201}\) 306 F.2d 554, 554 (5th Cir. 1962); rev’d, 374 U.S. 167 (1963).

\(^{202}\) *Elec. & Missile Facilities, Inc.*, 306 F.2d at 558.
Act, federal not state, law controls as to whether a claim of fraud precludes arbitration of a dispute arising under the contract.”

Several federal district courts similarly relied on Robert Lawrence to uphold the validity of FAA arbitration agreements in the face of contrary state law.

Therefore, many years prior to the Supreme Court’s decision in Prima Paint, some lower courts had already recognized and applied, including in federal diversity cases, the principle that the validity of an arbitration agreement is severable from the validity of the contract in which it is contained. The only partial outlier among the federal circuit courts seemed to be the First Circuit, which recognized the severability principle under federal law but declined to apply it in diversity cases, applying state arbitration law instead. To reach this conclusion, the First Circuit relied on the Supreme Court’s earlier decision in Bernhardt v. Polygraphic Co. of America, in which the Court held that “if arbitration could not be compelled in the [state] courts, it should not be compelled in the Federal District Court.” However,

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203 Id.; Moseley v. Elec. & Missile Facilities, Inc., 374 U.S. 167, 170–71 (1963) (reversing the Fifth Circuit, and finding that the petitioner had challenged the arbitration clause itself for being procured by fraud and therefore it was for the court and not the arbitrator to decide this issue).

204 See, e.g., O’Meara v. Texas Gas Transmission Corp., 230 F. Supp. 788, 790 (N.D. Ill. 1964) (holding that the validity of the arbitration agreement “shall be upheld even when invalid under state law.”); Younker Bros., Inc. v. Standard Constr. Co., 241 F. Supp. 17, 18 (S.D. Iowa 1965) (holding that “the contract is valid where interstate commerce is involved even if such a contract is not enforceable under state law.”).


206 Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 924 (1st Cir. 1960). The court noted that “a strong case can be made for construing arbitration agreements as separable from the principal agreements, and as voidable only for fraud directly affecting their existence, as distinguished from representations relating to the content or making of the principal agreements.” However, the court proceeded to apply New York, rather than federal, law and found on the basis of the New York Court of Appeals’ dicta in Wrap-Vertiser Corp. v. Plotnick, 143 N.E.2d 366 (N.Y. 1957), that under New York law “an arbitration clause cannot be treated as separable from the other parts of the contract.” Lummus Co., 280 F.2d at 925.

207 350 U.S. 198, 205 (1956).

208 Id.
of the circuits that have interpreted the effect of the Bernhardt decision on the application of the Arbitration Act in diversity cases, only the First Circuit . . . apparently held that arbitration issues must be governed by state law. Most circuits . . . continued to apply the act in diversity cases where the disputed contract has evidenced a transaction involving commerce, on the theory that as to these contracts, Congress intended to enact federal substantive law.209

As one commentator predicted after the Second Circuit decided Robert Lawrence, “[i]t is likely that the doctrine of severability, after its acceptance by the state and federal courts in the jurisdiction having the most highly developed arbitration jurisprudence, will make its place in arbitration law.”210 A few years later, the Supreme Court in Prima Paint indeed affirmed the federal doctrine of severability that was originally developed by the lower courts.211

B. The Federal Policy Favoring Arbitration and the Presumption That Doubts Should Be Decided in Favor of Arbitration

Moses H. Cone Memorial Hospital v. Mercury Construction Corp. involved a construction contract, which contained an arbitration clause between a hospital located in North Carolina and a construction contractor operating in Alabama. A dispute arose concerning additional construction costs and the hospital filed an action in the Superior Court of Guilford County, North Carolina, seeking a declaratory judgment against the contractor’s claim and alleging that the contractor had lost any right to arbitration due to “waiver, laches, estoppel, and failure to make

211 Id. at 402-04.
212 460 U.S. 1, 4-5 (1983). For a detailed analysis of this case, see generally Meshel, supra note 21.
a timely demand for arbitration.”213 At the same time, the contractor sought in a federal district court to compel arbitration under the FAA.214 On the hospital’s motion, the federal district court stayed the contractor’s motion pending resolution of the state court suit.215 The Fourth Circuit reversed the district court’s stay order, held that the dispute was arbitrable, and remanded the case with instructions to enter an order to arbitrate.216 The hospital appealed to the Supreme Court.217

The Supreme Court affirmed the Fourth Circuit’s decision, holding that section 2 of the FAA was “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”218 This body of federal law in turn established that “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”219

The Supreme Court did not “invent”220 the “body of federal substantive law of arbitrability,” the FAA’s “federal policy favoring arbitration,” or the presumption that “doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”221 As the Court noted in Moses, the Circuit Courts of Appeals had already “consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration”222 and had developed federal substantive arbitration law.

214 Id.
215 Id.
218 Id. at 24.
219 Id. at 24–25.
220 Cunningham, supra note 19, at 133.
222 Id. at 24.
Indeed, the Fourth Circuit in Moses recognized the "statutory favor for arbitration" and that "substantive federal law" developed in the federal courts for the application of the [FAA]. In accordance with this substantive federal law, the Fourth Circuit held that "any claim of untimeliness, waiver or laches . . . is for the arbitrator and may not be an excuse for non-arbitrability." The rationale for referring such issues to the arbitrator was "the right to a 'speedy (remedy) not subject to delay and obstruction' by the delays inherent in a jury trial." According to the Fourth Circuit, this was "the right the Federal Act was particularly intended to assure."

Earlier examples of federal courts developing and applying substantive federal arbitration law and the FAA's policy favoring arbitration are abundant. In its 1959 decision in Robert Lawrence, discussed above, the Second Circuit held that "any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars." In a case decided two years later, Metro Industrial Painting Corp. v. Terminal Construction Co., the Second Circuit reiterated "the federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration." This federal policy identified by the Second Circuit was also recognized by the Ninth Circuit in 1962, the Seventh Circuit in 1967, the First Circuit in...

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224 Id. at 946.
225 Id. at 942 (distinguishing claims of "untimeliness, waiver or laches" from claims for "inconsistent legal action," which were for the court).
226 Id. at 945.
227 Id.
228 See generally Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959); Metro Indus. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382 (2d Cir. 1961); Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962); Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711 (7th Cir. 1967).
229 Robert Lawrence Co., 271 F.2d at 410.
231 Id.
232 Lundgren, 307 F.2d at 110.
233 Galt, 376 F.2d at 714; see also Halcon Int'l, Inc. v. Monsanto Australia Ltd., 446 F.2d 156, 159–60 (7th Cir. 1971).
1968,234 the Eight Circuit in 1974,235 the Fifth Circuit in 1979,236 and by the Third Circuit in 1976.237 Before the Third Circuit affirmed its decision, the federal district court in New Jersey recognized that the

federal courts, developing a body of federal law . . . ha[d] created certain canons of interpretation of contractual arbitration clauses, commencing with Robert Lawrence . . . . One of the most important of these canons, as enunciated in Lawrence, is that there exists ‘[a] liberal policy of promoting arbitration.’238

The district court then concluded that what emerged from this federal liberal policy was

the principle, that in interpreting the scope of an arbitration clause, that is, in endeavoring to determine what the parties intended would be arbitrable, federal courts are not to apply the traditional rules of construction, but rather . . . if the issue is a doubtful one, the doubt is to be resolved in favor of arbitration. We can fairly say that the Act reflects a legislative determination of the desirability of arbitration as an alternative to litigation.239

Finally, the federal district court in New Jersey also noted that “[t]he trend in the direction of deciding doubtful cases in favor of arbitration has become more and more pronounced.”240 Therefore, federal substantive arbitration law was developed by lower courts to govern the application of the FAA long

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234 Hilti, Inc. v. Oldach, 392 F.2d 368, 371 (1st Cir. 1968).
235 Nat’l R.R. Passenger Corp. v. Missouri Pac. R.R. Co., 501 F.2d 423, 426–27 (8th Cir. 1974) (adding that the purpose of this federal policy was “to further the use of arbitration as a method of expediting the disposition of commercial disputes and as a means of eliminating the expense and delay of extended court proceedings preliminary to arbitration.”).
236 Dickinson v. Heinold Secs., Inc., 661 F.2d 638, 643 (7th Cir. 1981) (noting “the established federal policy that, when construing arbitration agreements, every doubt is to be resolved in favor of arbitration.”).
239 Id. at 329.
240 Id. at 330.
before the Supreme Court decided *Moses*.241 These courts were also already interpreting the FAA to embody a liberal federal policy favoring arbitration, which in turn required doubts to be resolved in favor of enforcing arbitration agreements.242 Again, the Supreme Court simply affirmed this long-standing judicial interpretation of the FAA.243

**C. The FAA Applies in State Courts and Preempts State Law**

*Southland Corp. v. Keating* involved a franchise agreement between Southland, the franchisor of 7-Eleven convenience stores, and Keating, one of its franchisees, which contained an arbitration clause.244 Keating sued Southland in a California Superior Court alleging, inter alia, violations of the California Franchise Investment Law.245 Southland petitioned to compel arbitration of the action under the FAA.246 The Superior Court granted the motion to compel except as to the claims based on the Franchise Investment Law, the California Court of Appeal reversed and ordered arbitration, and the California Supreme Court then reinstated the trial court decision and denied arbitration of the statutory claims.247 Southland appealed to the Supreme Court.248

The Supreme Court reversed the judgment of the California Supreme Court, holding that the FAA's national policy favoring
arbitration “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”\textsuperscript{249} In other words, the FAA preempted contradictory state law.\textsuperscript{250} In addition, the Court found that the fact that the FAA “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.”\textsuperscript{251}

Again, these holdings seem less revolutionary when considered in the context of the then existing lower court jurisprudence. Indeed, by the time \textit{Southland} was decided, “[t]he clear majority of decisions ha[d] held that a state court [wa]s obliged to apply the Federal Arbitration Act to arbitration disputes involving interstate commerce.”\textsuperscript{252}

In 1959, the Second Circuit in \textit{Robert Lawrence}, discussed above, held that section 2 of the FAA, which provides that arbitration agreements shall be “valid, irrevocable, and enforceable,” constituted “a declaration of national law equally applicable in state or federal courts.”\textsuperscript{253} That same year, the Sixth Circuit held that where “the contract evidences a transaction ‘involving commerce’ [state] law and policy must yield to paramount Federal law and such an agreement.”\textsuperscript{254} In a 1961 concurring opinion, \textit{In re Mercury Const. Corp.}, 656 F.2d 933, 948 n.3 (4th Cir. 1981) (Hall, J., dissenting). There were admittedly few court cases considering this issue in the first decades after the enactment of the FAA. However, there are persuasive reasons for why this was the case, chief among which is the considerably narrower scope of Congress’s commerce power before its expansion in the late 1930s and early 1940s. In this regard, see Christopher R. Drahozal, \textit{In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act}, 78 NOTRE DAME L. REV. 101, 160–63 (2002). Moreover, by the late 1960s, “an ever-increasing number of state courts” did apply the FAA. \textit{MACNEIL, supra} note 63, at 139.

\textsuperscript{249} Id. at 10.
\textsuperscript{250} Id.
\textsuperscript{251} Id. at 12.
\textsuperscript{252} In re Mercury Const. Corp., 656 F.2d 933, 948 n.3 (4th Cir. 1981) (Hall, J., dissenting). There were admittedly few court cases considering this issue in the first decades after the enactment of the FAA. However, there are persuasive reasons for why this was the case, chief among which is the considerably narrower scope of Congress’s commerce power before its expansion in the late 1930s and early 1940s. In this regard, see Christopher R. Drahozal, \textit{In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act}, 78 NOTRE DAME L. REV. 101, 160–63 (2002). Moreover, by the late 1960s, “an ever-increasing number of state courts” did apply the FAA. \textit{MACNEIL, supra} note 63, at 139.
\textsuperscript{254} Am. Airlines, Inc. v. Louisville & Jefferson Cnty. Air Bd., 269 F.2d 811, 817 (6th Cir. 1959). The court ultimately found that state law governed the issue in that case and held that the FAA required arbitration agreements to be “valid and enforceable in accordance with ordinary contract principles under applicable State and Federal law.” \textit{Id}. 
Chief Judge Lumbard of the Second Circuit reiterated that the FAA “render[ed] arbitration clauses in interstate commerce and admiralty contracts valid, irrevocable, and enforceable in federal and state courts regardless of state law.”\textsuperscript{255} The Chief Judge further held that “[i]rrespective of state court decisions regarding the construction of arbitration clauses, all such clauses in contracts coming within the scope of the [FAA] must be interpreted in the light of federal decisional law.”\textsuperscript{256} In 1972, the Eighth Circuit held that the FAA “bars resort to state arbitration rules to determine the validity of arbitration clauses in interstate contracts,” because the “plain meaning of § 2 is that federal courts are no longer to apply state statutes and decisions which limit arbitration agreements with rules not applicable to other contracts.”\textsuperscript{257} This statement was reiterated by the Tenth Circuit in 1973.\textsuperscript{258} In 1976, the Seventh Circuit noted the “Congressional policy, as interpreted by the courts, that the [FAA] is not to be restricted by state law which is hostile to arbitration agreements.”\textsuperscript{259} In 1978, the Fifth Circuit held that “state courts are entirely able, as well as required, to apply the [FAA] and compel arbitration pursuant to the Act if the statutory requisites are present.”\textsuperscript{260} Some state courts also adopted this view long before the Supreme Court did in \textit{Southland}.\textsuperscript{261} For instance, a state court in New York concluded as early as 1944 that the FAA applied to the dispute before it, which involved a marine surveyor who sued to recover his fees as an arbitrator in an international arbitration


\textsuperscript{256} \textit{Id}.

\textsuperscript{257} Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 997–98 (8th Cir. 1972).

\textsuperscript{258} Medical Dev. Corp. v. Indus. Molding Corp., 479 F.2d 345, 348 (10th Cir. 1973).

\textsuperscript{259} Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1269 (7th Cir. 1976).

\textsuperscript{260} Com. Metals Co. v. Balfour, Guthrie, & Co., 577 F.2d 264, 269 (5th Cir. 1978). \textit{See also} Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F.2d 391, 395 (5th Cir. 1981) (“Because the United States Arbitration Act is a national substantive law that supplants state arbitration laws, a state court is bound to apply the Act if the statutory requisites are present.”).

\textsuperscript{261} French v. Petrinovich, 46 N.Y.S.2d 846, 849 (City Ct. 1944).
involving a damaged vessel. One of the parties to the arbitration had paid its share of the plaintiff’s fees while the defendant in the litigation, which was the other party to the arbitration, had refused to do so on the ground that the arbitrator’s fees were capped under New York law. According to the defendant, “since the action was brought in a state court the New York statute as ‘the law of the forum’ control[ed] all the incidents of the arbitration, including compensation to the arbitrator.” The court’s response was prophetic of what was to become Supreme Court precedent forty years later. The New York court said:

Is not the federal statute as much the law of the forum as the New York statute to the extent that it determines the rights of parties as distinguished from ‘procedure’, and does not that statute control? Certainly the question of compensation of an arbitrator is a matter of ‘right’; hardly of ‘procedure’. And, if the federal statute does control, the plaintiff may recover for his services without reference to the limitation in the New York statute. It may seem strange to regard the case as one involving the conflict of laws between federal and state law, and yet in essence that is what the question in the case becomes.

A similar view was expressed by the Court of Appeals of New York in 1970 in a case involving an arbitration agreement contained in a maritime contract. Noting that the parties’ dispute was “solely Federal in character and governed exclusively by Federal substantive law,” the Court of Appeals held that the appellant “should not be permitted to come into our State courts and here institute a proceeding to enjoin enforcement of the arbitration provisions contained in the contract, on grounds concededly unavailable under Federal law.” The court also noted that

262 Id.
263 Id. at 847.
264 Id. at 848.
266 French, 46 N.Y.S.2d at 848.
268 Id.
[i]t is particularly important to apply Federal law in the present case, for, to hold otherwise would (1) permit, indeed encourage, forum shopping; (2) prevent and undermine the need for nationwide uniformity in the interpretation and application of arbitration clauses in foreign and interstate transactions; and (3) permit individuals to circumvent the national law relating to arbitration agreements as called for by the F.A.A. 269

The New York Court of Appeals concluded that the Supreme Court’s holding in *Prima Paint*, which applied federal law in federal diversity cases, also applied “equally to suits involving maritime transactions regardless of the forum in which they are brought.” 270 To the Court of Appeals, it was “[q]uite obvious[ ] [that] a state court which prevents arbitration on a ground not recognized under Federal law denies the full measure of enforceability provided for by the F.A.A. to arbitration clauses in maritime agreements.” 271 It was therefore “wise, indeed necessary, that a litigant in a controversy governed exclusively by Federal substantive law be not permitted to come into our courts solely for the purpose of avoiding an arbitration directed and compelled under the Federal statute.” 272

Beyond New York, other state courts were following a similar legal trajectory. 273 In 1973 the Supreme Court of Georgia held that the rule under Georgia law asserting arbitration agreements were revocable was not applicable to cases involving interstate commerce, because the FAA “was intended to avoid the common law rule that an agreement between parties to a contract to settle any dispute between them by arbitration was void and against public policy as and [sic] effort to oust the courts of

269 Id. at 776.
270 Id. at 778.
271 Id. at 777.
272 Id. at 779.
273 Courts in the District of Columbia implicitly applied the FAA as early as 1962 and did so explicitly in 1968. See, e.g., Coles v. Redskin Realty Co., 184 A.2d 923, 926–27 (D.C. Mun. App. 1962) (holding that the FAA did not apply, but only because the contract at issue did not involve interstate commerce); Rubewa Products Co. v. Watson’s Quality Turkey Products, Inc., 242 A.2d 609, 616 n.7 (D.C. 1968) (recognizing the court had held, “at least by implication, that the [FAA] applies to the District of Columbia Court of General Sessions.”).
their jurisdiction.”274 That same year, a Texas appellate court, relying on decisions of federal courts in the First and Second Circuits, held that the FAA was:

[t]he law of Texas with respect to any ‘contract evidencing a transaction involving commerce,’ as defined in that act. The federal act has been held to be substantive rather than procedural, and equally applicable in state and federal courts, even though the contract provides that any dispute should be settled by arbitration under the laws of a particular state.275

In 1975, a court of appeals in Indiana held that the FAA “must prevail wherever there is an arbitration agreement in a contract evidencing a ‘transaction in commerce.’”276 In reaching this conclusion, the court of appeals considered that by enacting the FAA pursuant to its broad commerce power, “Congress could hope to inject some uniformity into the field of interstate commerce, and into disputes which may arise in connection therewith.”277 Therefore, no issue arose under Erie, which allowed for the development of a general federal common law “in matters governed by the Federal Constitution or by acts of Congress,” including the FAA.278 Even in California, whose supreme court was overturned in Southland, a California court of appeals recognized in 1977 that by that time it had been “widely held that the [FAA] is equally applicable to such proceedings brought in

274 West Point-Pepperell, Inc. v. Multi-Line Indus., Inc., 201 S.E.2d 452, 454 (Ga. 1973) (providing the state law rule that “[a]greements whereby the validity, and effect of a contract, or the rights of the parties, are submitted to arbitration, may operate to oust the courts of jurisdiction, and are so far contrary to public policy that the submission may be revoked at any time before the award.”).


277 Id. at 851.

278 Id. at 851 n.3.
state courts arising out of transactions involving interstate commerce, or admiralty." To support its conclusion, the court of appeals set out a long list of decisions from various state courts, adding that it was advised of "no contrary authority."280

Between 1977 and 1980, the Supreme Court of Kentucky held that the FAA applied "to actions brought in the courts of this state where the purpose of the action is to enforce voluntary arbitration agreements in contracts evidencing transactions in interstate commerce,"281 and the Supreme Court of South Carolina similarly held that, where applicable, the FAA "will supersede the common law of South Carolina."282 The Supreme Court of Washington affirmed an earlier decision of a Washington court of appeals that emphasized "the primacy of the federal arbitration act, substantively and procedurally, over state law when interstate commerce is the subject matter of the contract in dispute."283 The Supreme Court of Washington noted that "the majority rule" at the time was that the FAA applied in state courts and "require[d] a state court to enforce an arbitration clause despite a contrary state law or policy."284

In sum, to the extent that Southland expanded the reach of the FAA into state courts and over state laws, it was firmly grounded in the jurisprudence of many federal and state courts spanning four decades.285 Once again, the Supreme Court's role in this regard was more reactive than proactive—it merely confirmed what lower courts had already concluded was the appropriate interpretation of the FAA.

280 Id.
281 Fite & Warmath Constr. Co., v. MYS Corp., 559 S.W.2d 729, 734 (Ky. 1977).
284 Allison, 597 P.2d at 382.
D. Statutory Claims Are Arbitrable

The treatment of statutory claims in the Supreme Court’s FAA jurisprudence begins in 1953 with *Wilko v. Swan*.286 This case involved a dispute between a customer and a securities brokerage firm.287 The customer sued in the United States District Court for the Southern District of New York, claiming misrepresentation in violation of the Securities Act of 1933.288 The brokerage firm moved to stay the action pursuant to an agreement signed by the customer that contained an arbitration clause.289 The district court denied the stay and the Second Circuit overturned.290 The customer appealed to the Supreme Court.291

The Supreme Court overturned the Second Circuit’s decision.292 The Court recognized that the FAA could be “useful[]” both in controversies based on statutes or on standards otherwise created.”293 Nonetheless, it held that agreements to arbitrate claims arising under the Securities Act were unenforceable, because that Act prohibited a waiver of the statutory right to select a judicial forum for the resolution of disputes arising under it.294 The Supreme Court also expressed doubt as to the propriety of arbitration in this particular context, considering that arbitrators make determinations “without judicial instruction on the law,” that arbitral awards “may be made without explanation of their reasons and without a complete record of their proceedings,”295 and that “[p]ower to vacate an award is limited.”296

287 Id. at 428.
288 Id. at 428–29; Securities Act of 1933 § 12, 15 U.S.C.A. § 77l.
289 Wilko, 346 U.S. at 429.
290 Id. at 429–30.
291 Id. at 430.
292 Id. at 438.
293 Id. at 432.
294 Section 14 of the Securities Act provided that “Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.” Securities Act of 1933 § 14, 15 U.S.C.A. § 77n. Section 12(2) of the Act “created a special right to recover for misrepresentation . . . [that] is enforceable in any court of competent jurisdiction—federal or state.” Wilko, 346 U.S. at 431. The Court held that this right to a judicial forum could not be waived. Id. at 434–35.
295 Wilko, 346 U.S. at 436.
296 Id.
While the Supreme Court’s decision in Wilko may have been “pervaded by . . . ‘the old judicial hostility to arbitration,’”\(^{297}\) the same cannot be said for lower courts’ approach to the arbitration of statutory claims pre-Wilko. Indeed, the Second Circuit in its decision in Wilko confirmed what had long been held by other courts, namely “[t]hat the suit asserts a statutory cause of action is not alone enough to preclude arbitration of the controversy.”\(^{298}\) The Second Circuit also recognized:

There is good reason why [the plaintiff] may prefer to seek enforcement of his statutory right to damages through the speedy remedy of arbitration rather than by the long delayed remedy of trial in the courts. Particularly is this true in the City of New York where calendar congestion both in the state courts and the federal court is notorious and results in excessive delay.\(^{299}\)

Other courts had held prior to Wilko that claims arising from a variety of federal statutes, including the Miller Act,\(^{300}\) the Fair Labor Standards Act,\(^{301}\) and the Sherman Act,\(^{302}\) were arbitrable. Some lower courts held agreements to arbitrate statutory claims to be unenforceable only where the purpose or language of a particular federal statute reflected a policy intending to override the policy of the FAA.\(^{303}\) As the Third Circuit noted in

\(^{297}\) Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480 (1989) (citing Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).

\(^{298}\) Wilko v. Swan, 201 F.2d 439, 443 (2d Cir. 1953).

\(^{299}\) Id. at 444.

\(^{300}\) Miller Act, 40 U.S.C. § 270a; see Agostini Bros. Bldg. Corp. v. United States, 142 F.2d 854, 855 (4th Cir. 1944).


\(^{303}\) See, e.g., Wilko v. Swan, 201 F.2d 439, 446 (2d Cir. 1953) (“[W]e do not find in the purpose or in the language of the statute, any policy argument strong enough to override the policy of the Arbitration Act. If Congress had intended to forbid arbitration in a suit based on section 12(2), we believe it would have expressed such intent.”).
1943 regarding the FAA’s applicability to claims arising under the FLSA, Congress “could have provided that any claim under the [Fair Labor Standards] Act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language.”

The Third Circuit then equated statutory and contractual employment rights for the purpose of arbitration, noting that

[n]o doubt [the FLSA] creates rights which make a basis of a claim by an employee against an employer who violates it. So does any contract. A claim under the Act and a claim based on a contract,—each is based on a legal right which the claimant asserts against someone else. Arbitration is one way by which such a right can be enforced. There is no reason why it cannot be availed of to secure rights under the Fair Labor Standards Act just as well as a right arising out of a contract or imposed by law as a consequence of a tort.

It is not surprising that following the Wilko decision many lower courts were reluctant to enforce arbitration agreements in cases involving statutory claims, particularly claims arising under securities legislation. Nevertheless, Wilko did not dissuade some lower courts from referring statutory claims to arbitration, including in the securities context. For instance, the Eighth Circuit held that Wilko did not apply to claims arising under the Securities Exchange Act of 1934. The First Circuit refused to apply

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304 Donahue, 138 F.2d at 6.
305 Id. at 6–7.
306 Indeed, most Circuit Courts of Appeals held that claims under both the Securities Act of 1933 and the Securities Exchange Act of 1934 were not arbitrable pursuant to Wilko. See, e.g., Sterne v. Dean Witter Reynolds, Inc., 808 F.2d 480, 483 (6th Cir. 1987); Wolfe v. E.F. Hutton & Co., Inc., 800 F.2d 1032, 1038 (11th Cir. 1986); Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197, 1203 (3d Cir. 1986); King v. Drexel Burnham Lambert, Inc., 796 F.2d 59, 60 (5th Cir. 1986); Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 527 (9th Cir. 1986); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823, 828 (10th Cir. 1978); McMahon v. Shearson/Am. Express, Inc., 788 F.2d 94, 99 (2d Cir. 1986).
308 Id. at 1398. Courts in the Second Circuit held that Wilko did not extend to the Securities Exchange Act of 1934 where the dispute at issue was “between members” of a national securities exchange rather than between an investor
Wilko to find that claims arising under the Commodity Exchange Act were not arbitrable.\textsuperscript{309} The Fifth and Seventh Circuit continued to hold that claims under the Miller Act were arbitrable.\textsuperscript{310}

The Second Circuit similarly held that \textit{Wilko} did not extend to the Lanham Act\textsuperscript{311} and refused to hold that claims arising under the Bankruptcy Act\textsuperscript{312} were not arbitrable.\textsuperscript{313} Distinguishing \textit{Wilko}, the Second Circuit noted that the Bankruptcy Act had “a section dealing with arbitration of controversies,” which, “[i]f anything . . . evince[d] a receptivity to arbitration,” and found that “the fact that a right under a federal statute is indirectly involved [did not] necessarily make arbitration inappropriate.”\textsuperscript{314} The Second Circuit also continued to refer claims under the Miller Act to arbitration, finding that “there [wa]s no explicit inconsistency between the provisions of the Miller Act and the provisions of the [FAA].”\textsuperscript{315} Again applying the “contrary congressional intention” test, the Second Circuit noted that there was:

\begin{quote}
no language or legislative history which indicates that Congress meant to prohibit a materialman from voluntarily substituting the mechanisms of arbitration for his right to proceed directly to a federal court. On the other hand, the [FAA], when it is applicable, quite clearly is broad enough to include Miller Act suits within its scope, and, with equal clarity, it gives the parties an enforceable right to agree to refer to arbitration differences arising under their contract.\textsuperscript{316}
\end{quote}

\begin{footnotes}
\textsuperscript{309} In\textsuperscript{309}gbar v. Drexel Burnham Lambert Inc., 683 F.2d 603, 605 (1st Cir. 1982).
\textsuperscript{311} Lanham Act, 15 U.S.C.A. §§ 1051–72; see Saucy Susan Products, Inc. v. Allied Old English, Inc., 200 F. Supp. 724, 728 (S.D.N.Y. 1961) (noting that “[t]here is no non-waiver provision in the Lanham Trademark Act . . . under which plaintiff’s trademarks are registered, and it does not appear that an agreement to arbitrate future disputes would thwart Congressional policy.”).
\textsuperscript{313} Fallick v. Kehr, 369 F.2d 899, 904 (2d Cir. 1966).
\textsuperscript{314} Id. at 904.
\textsuperscript{315} Elec. & Missile Facilities, Inc., 364 F.2d at 706.
\textsuperscript{316} Id. at 708.
\end{footnotes}
Gradually, the Supreme Court moved away from Wilko in a series of decisions upholding agreements to arbitrate statutory claims, including Scherk v. Alberto-Culver Co., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., Shearson/American Express Inc. v. McMahon, and Rodriguez de Quijas v. Shearson/American Express, Inc. Of these cases, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. is particularly noteworthy. This case involved an international antitrust dispute, and, as critics often point out, the Supreme Court overturned the majority of federal Circuit Courts that had refused to refer any antitrust claims, domestic or international, to arbitration given the “great public interest” of these claims. However, this refusal was specific to antitrust claims and did not negate the lower courts’ general willingness to refer other statutory claims to arbitration. Indeed, the Supreme

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318 473 U.S. 614, 638–40 (1985) (holding that statutory antitrust claims were arbitrable in international disputes).


321 Mitsubishi, 473 U.S. at 614.

322 Also known as the “public policy exception” to arbitrability, established in Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827 (2d Cir. 1968). See Schwartz, If You Love Arbitration, supra note 122, at 406; Sternlight, supra note 38, at 21–22. See also A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 715–16 (9th Cir. 1968); Buffler v. Elec. Comput. Programming Inst., Inc., 466 F.2d 694, 699–700 (6th Cir. 1972); Mitsubishi, 723 F.2d at 162–63. Earlier courts upheld the arbitrability of antitrust claims (see, e.g., U.S. v. Paramount Pictures, 66 F. Supp. 323, 359 (S.D.N.Y. 1946), rev’d in part on other grounds, 334 U.S. 131 (1948)), and some scholars have recognized the role of the lower courts in weakening the “public policy exception” to the arbitrability of such claims. Schwartz, Enforcing Small Print, supra note 13, at 94–95.

323 As the Second Circuit noted in Am. Safety Equip. Corp., 391 F.2d at 827–28 (“We express no general distrust of arbitrators or arbitration; our decisions reflect exactly the contrary point of view . . . . We conclude only that the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make the outcome here clear.”).

Moreover, some courts were also willing to enforce post-dispute agreements to arbitrate antitrust claims. See, e.g., Cobb v. Lewis, 488 F.2d 41, 47
Court in *Mitsubishi* adopted the long-standing general view of the lower courts that the FAA “provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.” The Court thus confirmed what the lower courts had already held—that parties to an arbitration agreement “should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” The lower courts simply found such a congressional intention to be present in the Sherman Act, while the Supreme Court in *Mitsubishi* did not.

Also worth noting is *Rodriguez de Quijas v. Shearson/American Express*, which involved a dispute arising from failed investments made pursuant to a brokerage agreement containing an arbitration clause. The plaintiff investors sued the respondent brokerage firm, alleging violations of the Securities Act of 1933, and the respondent moved to compel arbitration. The district court held that the plaintiffs' claims arising under the Securities Act could not be referred to arbitration on the basis of the Supreme Court’s decision in *Wilko*. The Fifth Circuit reversed the district court’s denial of the motion to compel arbitration, finding that the arbitration agreement was enforceable notwithstanding *Wilko*. The investors then appealed to the Supreme Court.

The Supreme Court overruled its prior decision in *Wilko* and affirmed the judgment of the Fifth Circuit. The Court

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325 Id. at 628.
326 Id.; see also *Mitsubishi*, 723 F.2d at 168.
328 Id. at 478–79.
329 Id. at 479.
330 Id. Some of the Supreme Court Justices accused the Fifth Circuit of engaging in “an indefensible brand of judicial activism.” Id. at 486 (Stevens, Brennan, Marshall, and Blackmun, JJ., dissenting).
331 Id. at 478.
332 Rodriguez de Quijas, 490 U.S. 477 at 485–86.
noted that its “characterization of the arbitration process in Wilko is pervaded by . . . ‘the old judicial hostility to arbitration,’” which “ha[d] been steadily eroded over the years, beginning in the lower courts.” The Court also rejected Wilko’s “suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.” Finally, the Court found that the plaintiffs had not carried out their burden of showing that “Congress intended in [the Securities Act] to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of [the Securities Act].” The Supreme Court therefore concluded that Wilko was “incorrectly decided.”

While the Supreme Court ultimately held that claims arising under particular laws—such as securities statutes, the Racketeer Influenced and Corrupt Organizations Act (RICO), and the Sherman Act—were arbitrable, it only did so after lower courts had already been enforcing agreements to arbitrate a wide range of statutory claims since the 1940s, including those that the Court had initially held to be non-arbitrable.

E. Employment Disputes Are Arbitrable

_Circuit City Stores, Inc. v. Adams_ involved an employment contract containing an arbitration clause. The plaintiff filed an employment discrimination lawsuit against his employer in

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333 Id. at 480 (citing Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).
334 Id. at 481.
335 Id. at 483.
336 Id. at 484.
338 See generally, e.g., Donahue v. Susquehanna Colliers Co., 138 F.2d 3 (3d Cir. 1943); Agostini Bros. Bldg. Corp. v. Virginia-Carolina Elec. Works, Inc., 142 F.2d 854 (4th Cir. 1944); Watkins v. Hudson Coal Co., 151 F.2d 311 (3d Cir. 1945); Gatilff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944).
state court, asserting claims under California law. The employer sought to compel arbitration of the claims under the FAA in the U.S. District Court for the Northern District of California. The district court granted the motion to compel and the Ninth Circuit reversed. Following circuit precedent, the Ninth Circuit held that the FAA “does not apply to labor or employment contracts.” The employer appealed to the Supreme Court.

The Supreme Court reversed the Ninth Circuit. While section 1 of the FAA contains an exemption from the Act for certain workers, such as “seamen” and “railroad employees” who are “engaged in commerce,” the Court held that this exemption did not evidence a “congressional intent to regulate to the full extent of its commerce power,” which would mean that all employment contracts were exempt from the FAA. Rather, the Court held that section 1 “exempts from the FAA only contracts of employment of transportation workers.” The Court also rejected the contention that the phrase “engaged in commerce”

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340 Id. at 110.
341 Id.
342 Id.
343 See, e.g., Craft v. Campbell Soup Co., 177 F.3d 1083, 1094 (9th Cir. 1999).
344 Cir. City Stores, Inc. v. Adams, 194 F.3d 1070, 1070 (9th Cir. 1999).
345 Cir. City Stores, Inc., 532 U.S. at 110–11.
346 Id. at 109.
347 9 U.S.C. § 1 (1947) provides that:
“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
348 Cir. City Stores, Inc., 532 U.S. at 114.
349 Id. at 119.
in section 1 should be assessed in light of the more narrow scope of congressional authority to regulate under the commerce power at the time the FAA was passed in 1925, holding that “[i]t would be unwieldy for Congress, for the Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment.”

The Supreme Court further noted that the Ninth Circuit was alone among the Circuit Courts of Appeals in its narrow interpretation of the FAA as inapplicable to all employment contracts. Indeed, some Circuit Courts of Appeals had been referring employment disputes to arbitration under the FAA since the 1940s, interpreting the section 1 exemption narrowly. For instance, in 1943 the Third Circuit held that FLSA claims could be arbitrated pursuant to the FAA, noting that the court “should not choke the arbitration process which has been given congressional approval by the fetters of earlier judicial conceptions.”

The Fourth Circuit adopted this interpretation of the FAA in 1944 and the Third Circuit reaffirmed it in 1945.

However, these courts changed course after Congress codified the FAA as Title 9 of the U.S. Code in 1947, adding a title to section 1 that read “Sec. 1. ‘Maritime transactions’ and ‘commerce’ defined; exceptions to operation of title.” As a result of

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350 Id. at 117–18.
351 Id. at 109 (“All but one of the Courts of Appeals which have addressed the issue interpre[ted] this provision as exempting contracts of employment of transportation workers, but not other employment contracts, from the FAA’s coverage.”).
353 Donahue, 138 F.2d at 7 (although the court did not expressly refer to the § 1 exception).
354 Agostini Bros. Bldg. Corporation, 142 F.2d at 856.
355 Watkins, 151 F.2d at 320–21 (the court held that a stay of proceedings could properly be ordered under § 3 of the FAA notwithstanding the exception set out in § 1). Not all Circuit Courts of Appeals agreed. See, e.g., Gatliff Coal Co., 142 F.2d at 882 (holding that § 1 “was deliberately worded by the Congress to exclude from the National Arbitration Act all contracts of employment of workers engaged in interstate commerce.”).
356 Int’l Union United Furniture Workers v. Colonial Hardwood Flooring Co., 168 F.2d 33, 37 (4th Cir. 1948); Amalgamated Ass’n St. Elec. Ry. & Motor
this addition, several circuit courts during the 1950s held that the words “nothing herein contained” in section 1 meant “nothing contained in Title 9,” and therefore that the exemption applied to arbitration clauses contained in all employment contracts.\footnote{Amalgamated Ass’n, 192 F.2d at 313 (“[W]e conclude that our earlier construction of the exception is inconsistent with the intention of Congress as subsequently made manifest. For that reason we now abandon that construction and hold that the words ‘nothing herein contained’ mean ‘nothing contained in Title 9.’ It follows that arbitration of a dispute arising out of a ‘contract of employment’ cannot be required under that Title.”).}

Other courts during this time period held that the section 1 exemption applied to “contracts for personal services” but not to “collective labor agreements.”\footnote{Hoover Motor Exp. Co. v. Teamsters, Chauffeurs, Helpers & Taxicab Drivers, Loc. Union No. 327, 217 F.2d 49, 53 (6th Cir. 1954). See also Elec. Workers v. Gen. Elec. Co., 233 F.2d 85, 100 (1st Cir. 1956) (“[W]e hold that the exclusion in § 1 does not embrace collective bargaining agreements, as distinguished from individual ‘contracts of employment.’”), aff’d Gen. Elec. Co. v. Loc. 205, United Elec., Radio & Mach. Workers of Am., 353 U.S. 547 (1957).} Referring to the rise of arbitration in the labor context since the 1930s, two commentators noted in 1957 that “industrial society could hardly function without this remarkable device for the settlement of controversies between employers and unions, and employees.”\footnote{William M. Hepburn & Pierre R. Loiseaux, \textit{The Nature of the Arbitration Process}, 10 VAND. L. REV. 657, 657 (1957).}

Although the early days of section 1 in the lower courts were checkered, the Circuit Courts of Appeals, beginning with the Third Circuit’s 1953 decision in \textit{Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America},\footnote{207 F.2d 450, 454–55 (3rd Cir. 1953).} ultimately formed a consensus that the section 1 exemption did not apply to all employment contracts. \textit{Tenney} involved a contractual dispute between a corporation engaged in the manufacturing of goods for sale in interstate commerce and a labor union representing its employees.\footnote{\textit{Id.} at 451.} The corporation claimed damages under the Labor Management Relations Act\footnote{29 U.S.C.A. § 185 (1947).} resulting from an alleged violation of a collective bargaining agreement between

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\textit{Amalgamated Ass’n, 192 F.2d at 313 (“[W]e conclude that our earlier construction of the exception is inconsistent with the intention of Congress as subsequently made manifest. For that reason we now abandon that construction and hold that the words ‘nothing herein contained’ mean ‘nothing contained in Title 9.’ It follows that arbitration of a dispute arising out of a ‘contract of employment’ cannot be required under that Title.”).}


\textit{207 F.2d 450, 454–55 (3rd Cir. 1953).}

\textit{Id.} at 451.

\textit{29 U.S.C.A. § 185 (1947).}
the parties. The question before the Third Circuit was whether the employees, who were “engaged in the manufacture of goods for commerce and plant maintenance incidental thereto,” constituted a “class of workers engaged in foreign or interstate commerce” within the meaning of the exception in section 1.363

The Third Circuit examined the legislative history of the FAA and the meaning of the phrase “engaging in commerce” as used by Congress in other statutes.364 It concluded that the FAA’s draftsmen had in mind the two groups of transportation workers [i.e., seamen and railroad employees] as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers” who are “engaged in interstate transportation or in work so closely related to it as to be practically a part of it.365

Applying this interpretation, the Third Circuit held that the employees’ activities in this case “will undoubtedly affect interstate commerce” but that “they [we]re not acting directly in the channels of commerce itself. They [we]re, therefore, not a ‘class of workers engaged in . . . interstate commerce’” within the meaning of section 1 of the FAA.366 The Third Circuit’s holding was not limited to labor disputes arising out of collective bargaining agreements, as the court did not draw this distinction but simply confirmed that “the ‘contracts of employment’ to which [Section 1] refers include collective bargaining agreements.”367

While some Circuit Courts of Appeal were initially slow to follow the Third Circuit’s lead,368 the tide began to turn in 1956 with the Second Circuit’s decision in Bernhardt v. Polygraphic Co., where the court held that the phrase “any other class of workers” in section 1, “read in connection with the immediately

363 Tenney Eng’g, 207 F.2d at 452.
364 Id. at 453.
365 Id. at 452–53.
366 Id. at 453.
367 Id. at 451–52.
preceding words, show an intention to exclude contracts of employment of a ‘class’ of ‘workers’ like ‘seamen’ or ‘railroad employees.’” The Second Circuit affirmed this interpretation of section 1’s exemption in *Signal-Stat Corporation v. Local 475, United Electrical Radio and Machine Workers of America.* At issue in that case was a labor dispute between a manufacturer of automotive electrical equipment and the union representing its employees. The Second Circuit noted that the Third Circuit’s interpretation of section 1’s exemption in *Tenney* “accord[ed] both with the modern trend [of labor arbitration] and with what we deem to be the intention of Congress.” It then held that the employees in the case before it were not “engaged in . . . commerce,” because they were not “actually engaged in interstate and foreign commerce. They [we]re merely engaged in the manufacture of goods for interstate commerce. Therefore, the collective bargaining agreement here d[id] not come within the exclusionary clause of Section 1.”

The Seventh Circuit followed the Second in 1965 in a case involving a labor dispute between a construction company and a union, and by the 1970s, the Third Circuit’s reasoning in *Tenney* was adopted by some circuit courts also in cases involving employment disputes outside the labor context. For instance, in 1971, the First Circuit relied on *Tenney* in a non-labor employment case.
case to find that “[c]ourts have generally limited [Section 1’s] exception to employees, unlike appellant, involved in, or closely related to, the actual movement of goods in interstate commerce.”376 The First Circuit’s decision was later cited with approval by the Sixth Circuit in a non-labor employment dispute involving “account executives” with an investment firm.377 The Second Circuit also applied its previous decision in Signal-Stat in a case involving a non-labor employment dispute.378

Twenty years later, in 1991, the Supreme Court decided Gilmer v. Interstate/Johnson Lane Corp., holding that claims arising under the Age Discrimination in Employment Act (ADEA) were arbitrable.379 While this decision suggested that the Court looked favorably on arbitration of employment disputes under the FAA in general, it did not decide this “antecedent question.”380 Therefore, lower courts were free to continue to “reassess[] and develop[ ] . . . Section 1 doctrine.”381 In doing so, however, the lower courts did not change their previous interpretation of section 1’s exemption.382 By the end of the 1990s, it was cemented in the

376 Dickstein, 443 F.2d at 784–85 (the plaintiff in this case was a “registered representative” employed by a member of the New York Stock Exchange).
377 Stokes, 523 F.2d at 436.
378 Erving, 468 F.2d at 1065, 1069 (holding that “[i]n light of the strong national policy in favor of arbitration as a means of settling private disputes we see no reason to give an expansive interpretation to the exclusionary language of Section 1 by reexamining our decision in Signal-Stat.”).
380 Gilmer, 500 U.S. at 36 (Stevens and Marshall, JJ., dissenting) (“In holding that the FAA compels enforcement of arbitration clauses even when claims of age discrimination are at issue, [the majority] skirts the antecedent question whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue.”)
382 Another development in 1991 was the enactment of the Civil Rights Act of 1991, 42 U.S.C. § 1981a(c) (1994) which provided the right to trial by jury on employment discrimination claims. Theodore Eisenberg & Elizabeth Hill, Arbitration and Litigation of Employment Claims: An Empirical Comparison,
jurisprudence of the vast majority of the Circuit Courts of Appeals\textsuperscript{383} that in both individual employment contracts and collective bargaining agreements the scope of the section 1 exemption should be “narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are.”\textsuperscript{384}

\textsuperscript{383} The only early Circuit Court of Appeals decision to the contrary that was left standing was the Fourth Circuit’s decision in \textit{United Elec., Radio & Mach. Workers v. Miller Metal Prod., Inc.}, 215 F.2d 221, 224 (4th Cir. 1954). However, the Sixth Circuit has noted that \textit{Miller Metal Products} was limited to collective bargaining agreements and that it was “questionable whether \textit{Miller Metal Products} is still good law even in the Fourth Circuit.” Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 600 (6th Cir. 1995). The Tenth Circuit suggested the same in \textit{McWilliams v. Logicon, Inc.}, 143 F.3d 573, 577 n.4 (10th Cir. 1998) (“Because the Fourth Circuit has not reaffirmed this holding in over forty years, some question whether it is still good law.”). In \textit{O’Neil v. Hilton Head Hosp.}, 115 F.3d 272, 276 (4th Cir. 1997), the Fourth Circuit itself questioned the continued validity of \textit{Miller Metal Products}. The court agreed with other circuit courts that had “limited the section 1 exemption to seamen, railroad workers, and other workers actually involved in the interstate transportation of goods.” \textit{Id.} at 274. Moreover, the court noted that “[e]ven if we were to assume that \textit{Miller Metal Products} had any remaining vitality, however, it clearly does not apply to individual employment contracts.” \textit{Id.} at 274 n.1.

\textsuperscript{384} \textit{Asplundh Tree Expert Co.}, 71 F.3d at 599–601 (noting that, with the exception of the Fourth Circuit in \textit{Miller Metal Products}, 215 F.2d at 224, “every circuit court which has addressed this question since \textit{Tenney} has held that the exclusionary clause of § 1 of the Act should be narrowly construed.”); \textit{Rojas v. TK Commc’ns, Inc.}, 87 F.3d 745, 746, 748 (5th Cir. 1996) (The plaintiff in this case was employed as a disc jockey at a radio station. The court agreed “with the majority of other courts which have addressed this issue and conclude that § 1 is to be given a narrow reading.” Therefore, the court found that the plaintiff’s “employment contract was subject to the requirements of the FAA.”); \textit{Paladino v. Avnet Comput. Techs., Inc.}, 134 F.3d 1054, 1061 (11th Cir. 1998) (The plaintiff in this case provided technical support to computer system salespeople. The court held that there was “no evidence that this required her to move goods in interstate commerce. The employment contract therefore does not fall within § 1’s exclusion.”); \textit{Logicon}, 143 F.3d at 574, 576 (The plaintiff in this case worked as a “work area controller” for a company
By the time the Supreme Court decided *Circuit City* in 2001, the Ninth Circuit was the sole remaining Circuit Court of Appeals to still hold that section 1 of the FAA exempted all individual employment contracts from the scope of the FAA.\(^{385}\) The Supreme Court attracted considerable criticism for overturning the Ninth Circuit and subjecting millions of employment contracts to so-called “forced” arbitration.\(^{386}\) The reality, however, is that the Court simply affirmed what had already been established by the vast majority of lower courts for 50 years in the labor context and for 30 years in the non-labor context—that section 1 of the FAA does not exclude all employment disputes from the scope of the Act.\(^{387}\)

**Conclusion**

Fair-minded people may debate whether the judicial evolution of the FAA accords with the “true” intentions of Congress when the Act was passed in 1925, and whether those intentions may even be accurately gauged from its text and legislative history.\(^{388}\) And, on some aspects of the FAA, the Supreme Court

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\(^{385}\) See *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999).

\(^{386}\) See Blankley, *Standing on Its Own Shoulders*, supra note 32, at 124.

\(^{387}\) Tenney Eng’g, Inc. v. United Elec. Radio & Mach. Workers, 207 F.2d 450, 454 (3rd Cir. 1953).

\(^{388}\) See Noll, *supra* note 1, at 671–72; see also Blankley, *Future of Arbitration Law*, supra note 4, at 86.
has certainly undone limitations placed on arbitration by the lower courts\textsuperscript{389} or has taken pro-arbitration jurisprudence of the lower courts a step further.\textsuperscript{390} However, to the extent that the FAA is stigmatized on the basis of “flawed Supreme Court decisions expanding the [Act],”\textsuperscript{391} it is important to recognize that in some of its most seminal decisions the Court was merely affirming interpretations of the FAA already entrenched in the lower courts rather than “creating” them.\textsuperscript{392} These grassroots jurisprudential developments spanned decades and Supreme Court Chief Justices—Warren, Burger, Rehnquist, and Roberts—and may well have continued on the same trajectory even without the affirmation of the Court.\textsuperscript{393} That the Supreme Court responded positively to these developments is not surprising, as “[d]epartures from values widely shared in the court system almost inevitably will create conflict, a conflict that in turn provides a fertile ground for resistance to the Court.”\textsuperscript{394}

For those who lament the perceived expansion of the FAA by the judiciary it may be of little comfort that this expansion was, at least in part, already under way in the lower courts when the Supreme Court joined the chorus.\textsuperscript{395} Nevertheless, it is far easier for opponents of arbitration to challenge a “legislative program . . . . judicially created”\textsuperscript{396} by a single ideologically motivated Supreme Court than to challenge legal principles and interpretative cannons that have long enjoyed judicial support.

\textsuperscript{389} For instance, in the class action context. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).
\textsuperscript{390} For instance, in the context of the arbitrability of statutory antitrust claims, supra notes 321–26 and accompanying text.
\textsuperscript{391} Szalai, Failure of Legal Ethics, supra note 11, at 143.
\textsuperscript{392} Moses, Statutory Misconstruction, supra note 5, at 101 (criticizing the FAA as “created by the Supreme Court.”).
\textsuperscript{393} SEGAL ET AL., supra note 35, at 369, 386.
\textsuperscript{394} Baum, supra note 20, at 214. Put differently, lower courts’ compliance with Supreme Court decisions “is not automatic and is most definitely a political process.” Sara C. Benesh & Malia Reddick, Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent, 64 J. Pol. 534, 535 (2002).
\textsuperscript{395} See, e.g., Moses, Who’s in Charge?, supra note 144, at 156 (expressing concern that in the United States “policy choices concerning the appropriate use of arbitration have been made judicially, not legislatively.”).
\textsuperscript{396} Moses, Statutory Misconstruction, supra note 5, at 147.
across the country. Ignoring the judicial grassroots of the “arbitration revolution” has therefore contributed to a popular dogma which usefully undermines the legitimacy of the FAA and of arbitration more generally. Yet accusing the Supreme Court of singlehandedly producing the woes associated with modern arbitration does little more than fuel a counterproductive anti-arbitration movement that operates to delegitimize arbitration rather than to improve it.

397 Stempel, supra note 7, at 801.