# "DEFECTS, POLITICAL AND SOCIAL": ABROGATING THE SUPREME COURT'S FEDERAL GENERAL COMMON LAW OF ARBITRATION

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## INTRODUCTION

In early 2022, the United States Congress passed—and President Joe Biden signed into law—H.R. 4445, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("Ending Forced Arbitration Act").[1] The Ending Forced Arbitration Act is a powerful political response to the Supreme Court's expansive Federal Arbitration Act ("FAA") doctrine. It amends the Federal Arbitration Act by rendering any "predispute arbitration agreement" unenforceable "at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute"[2] and voiding "predispute joint-action waiver[s],"[3] thereby allowing the named representative in a class or collective action alleging sexual assault or sexual harassment to avoid submitting to mandatory arbitration. The Chair of the U.S. Equal Employment Opportunity Commission praised the Ending Forced Arbitration Act for reducing barriers to justice.[4]

Indeed, the Ending Forced Arbitration Act is a promising step away from forced arbitration for relatively less powerful employees and consumers alike, but its scope is limited to claims of sexual harassment and sexual

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[1] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2022).

[2] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 27 (2022).

[3] *Id.*

[4] *See* Press Release, EEOC Chair Applauds Passage of Ending Forced Arbitration Act (Mar. 3, 2022), EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/newsroom/eeoc-chair-applauds-passage-ending-forced-arbitration-act https://perma.cc/ST4G-GQYL.

assault. It does not open the courthouse doors for employees alleging discrimination or harassment based on race, disability, age, religion, or national origin. Nor does it offer recourse to consumers hoping to challenge deceitful business practices on the part of companies. The Ending Forced Arbitration Act is thus a narrow refuge from the Court's capacious federal arbitration apparatus. Without further action on the part of the Court or Congress, there is no question that the Federal Arbitration Act will remain a charter for federal judicial freedom.

Above all, the Supreme Court has used the Federal Arbitration Act to expand federal judicial power significantly, upset federal principles by subverting states' law-making power and regulatory autonomy in contract law, and facilitate procedural and substantive litigation benefits for corporate actors at the expense of politically powerless groups.

If it sounds familiar, it is. We must situate the Court's federal arbitration jurisprudence in the historical context of the *Swift v. Tyson* doctrine and its eventual demise at the hands of *Erie Railroad Co. v. Tompkins*, in which the Court held that federal courts sitting in diversity must apply state substantive law. In this article, I identify three links between the Court's *Swift* doctrine and the Supreme Court's application of the Federal Arbitration Act, all of which can help us imagine more effective solutions to the problem of judicial overreach in federal arbitration law.

First, the Supreme Court has transformed the Federal Arbitration Act—a legal tool designed to resolve commercial disputes between sophisticated parties—and misread it in a way that has significantly expanded federal judicial power. Second, the Supreme Court has subverted states' law-making power and regulatory autonomy to develop contract/arbitration law. Third, the Supreme Court has facilitated a litigation environment that significantly benefits corporate actors and limits judicial relief for politically powerless groups. These circumstances demand a new *Erie* revolution. Whether by the Court or Congress, the Court's *Swift*-like arbitration regime must be turned back to its statutory moors.

This article proceeds in four parts. Part I chronicles the expansion of the *Swift* doctrine and federal general common law before the *Erie* decision. Part II excavates the origins of arbitration as an alternative dispute resolution practice and discusses the statutory text, legislative history, and constitutional source of the Federal Arbitration Act. Part III links the *Swift* doctrine to the Court's FAA jurisprudence. Part IV examines current FAA doctrine in the context of *Erie* and explores the possibility for further congressional action and judicial involvement.

## I. A "BROODING OMNIPRESENCE IN THE SKY"[5]: FROM *SWIFT* TO *ERIE*

The story of the rise and fall of federal general common law starts at the founding. The Rules of Decision Act ("RDA")[6]—which comes from Section 34 of the Judiciary Act of 1789[7]—established the jurisdiction of the federal court system.[8] It provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[9]

### *A. The Rise of Swift v. Tyson*

In *Swift v. Tyson*,[10] the Supreme Court held that the RDA does not require federal courts sitting in diversity to follow state court precedent—i.e., state common law—in cases involving "the doctrine from the general principles of commercial law," such as "contracts and other instruments of a commercial nature."[11] In such cases, judges may "find" federal general common law,[12] a sort of judge-made law applied in the federal courts in commercial cases. At the time, this type of law was also described as general law.[13]

*Swift* concerned a question of commercial law, on which there was no controlling state statute or constitutional provision. There was, however, applicable state common law, which the federal court could have applied. But the Court understood the text "the laws of the several states" in the RDA to refer only to "local" law, such as real property.[14] It "mean[t] nothing else than the written constitutional system and statutes of such states."[15] The decisions of state tribunals, in contrast, "are, at most, only evidence of what

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[5] S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified[.]").

[6] 28 U.S.C. § 1652 (2018).

[7] The Judiciary Act of 1789, Ch. 20, § 34, 1 Stat. 73 (1789) (codified as amended at 28 U.S.C. § 1652 (2018)).

[8] *See generally* Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421 (1989).

[9] 28 U.S.C. § 1652 (2018).

[10] 41 U.S. 1 (1842), *overruled by* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[11] *Id.* at 12.

[12] *See generally* Stephen Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019).

[13] *See generally* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 519 (2006).

[14] *Swift*, 41 U.S. at 12–13; *see* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1527–28 (1984).

[15] *Swift*, 41 U.S. at 3.

the laws are, and are not, of themselves, laws."[16] Put simply, *Swift* provided that the federal courts could ignore state decisional law in commercial cases[17] and apply general law.[18] The view of the federal courts as to a particular rule of "general law" was not binding on the state courts; nor was the view of the state courts on the same rule binding on the federal courts.

Justice Joseph Story wrote the majority opinion in *Swift.* He laid out a vision for the federal courts to be "expositors of a national commercial law" that would "help immunize the national economy from provincial regulation."[19] In theory, general law would serve as a national uniform commercial law.[20]

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[16] *Id.* at 12.

[17] As Judge Fletcher explained in his seminal 1984 article on marine insurance, the Swift decision's endorsement of general law was descriptive of a longstanding practice in the federal courts, in at least some legal contexts. *See* Fletcher, *supra* note 14, at 1513–15 ("[L]ong before Swift, federal courts employed the general common law as an important part of their working jurisprudence."). For example, in the marine insurance realm, federal courts "consistently followed the general common law and exercised their independent judgment on what the law required." *Id.* at 1515; *see* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.1, 391–92, 394–95 (7th ed. 2016) (discussing development of federal general common law in admiralty and maritime context) [hereinafter CHEMERINSKY, FEDERAL JURISDICTION]. Moreover, federal courts may develop common law for other reasons, such as to effect congressional intent or to protect the federal government's interests. *Id.* at 392. "[I]t is often difficult to separate where statutory and constitutional interpretation ends and where federal common law begins." *Id.* at 393.

[18] It is important not to conflate general law/federal general common law—which, as mentioned is a judge-made law (that is, a common law) applied in the federal courts in commercial cases when the cases came into federal court in diversity—with federal common law. Unlike the federal general common law, which is neither jurisdiction-conferring nor supreme, true federal common law is both jurisdiction-conferring and supreme. "The phrase 'federal common law' refers to the development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions." CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 389. And "[t]he term 'federal common law' embraces a range of doctrines representing different types of federal judicial lawmaking." Stephen B. Burbank & Tobias B. Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1, 29 (2018). Furthermore, Justice Amy Coney Barrett has "underscore[ed] three features of the common law that federal courts develop without congressional authorization." Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 814 (2008). It is (1) "truly federal law in the sense that it is controlling in . . . actions in state courts as well as federal courts"; (2) "to the extent that federal courts proceed without congressional authorization, federal common law is specialized" in that it is "confined, at least as a matter of doctrine, to several well-recognized enclaves, such as interstate disputes, international relations, admiralty, and proprietary transactions of the United States"; and (3) "Congress can always abrogate it." *Id.* (internal quotation marks and citations omitted).

[19] David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1267 (2007). Many judges, including Justice Story, had "faith in the federal courts as engines of economic development." *Id.* at 1266. As Professor Marcus has noted, this belief "rested on a venerable assumption that these judges appreciated that they had a certain role to play as guarantors of a national free market." *Id.*

[20] *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 53 (2000) [hereinafter PURCELL, BRANDEIS] ("*Swift* was designed to expand the role of the federal judiciary and help generate a uniform national commercial law.").

Justice Story's dream was not realized. Worse, the *Swift* doctrine became a charter for judicial freedom across various common law subjects, far beyond the confines of commercial law. In the decades that followed, the Court used *Swift* to expand the reach of general law into numerous subjects traditionally governed by state law.[21] In so doing, the Court "expanded Swift's mandate far beyond its original boundaries" of general commercial law.[22] Furthermore, the federal courts faced little accountability under the *Swift* regime because they could make rules without justifying them or identifying their origin. Between the 1840s and the 1930s, the federal courts swept tort, property, mortgages, wills, deeds, insurance, and other subjects traditionally reserved to the states into the ambit of the general law.[23]

The general law of *Swift* faced tremendous criticism.[24] It upset the constitutional balance of federalism[25] between state and federal courts.[26] *Swift* also "undermined the very purpose of diversity jurisdiction," which was "to level the playing field between citizens and noncitizens of a state."[27] Compared to state law, the general law was much more favorable to corporate interests, and through its expansion, the federal judiciary became increasingly friendly to corporate defendants at the expense of parties with significantly less political power.[28] Accordingly, corporate defendants used manipulative litigation tactics to establish diversity jurisdiction and access favorable federal forums that would apply the "amorphous" general law.[29] This enabled them to escape unfavorable state law that would otherwise be applicable.[30]

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[21] EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY 59 (1992) [hereinafter PURCELL, LITIGATION] (observing that "[i]n theory federal judges applied the common law of the states in which they sat, but in practice they developed their own conflicting and to some extent nationally uniform 'federal [general] common law'").

[22] Marcus, *supra* note 19, at 1268.

[23] *See generally* PURCELL, BRANDEIS, *supra* note 20.

[24] CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 346–47 (citing *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812)).

[25] As Professor Chemerinsky has explained, "the Supreme Court has shifted between two different views of constitutional federalism" throughout American history: a "nationalist" vision and a "federalist" approach. Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7–8 (2001). I understand that the vision that *Swift* upset was the "federalist approach." *Id.* at 8.

[26] CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 346 ("Instead of promoting the development of uniform law, *Swift* caused enormous variances between the laws applied by federal courts and those followed in state judiciaries.").

[27] Alexander A. Reinert, *Erie Step Zero*, 85 FORDHAM L. REV. 2341, 2371 (2017). "Because *Swift* made choice of law turn on whether the case was brought in federal or state court, it gave the out-of-state citizen-plaintiff the power to determine choice of law with the initial filing decision." *Id.*

[28] PURCELL, LITIGATION, *supra* note 21, at 63, 226.

[29] *Id.* at 61.

[30] Consider the example of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), in which the plaintiff, a Kentucky corporation, reincorporated in a

As Professor Purcell has observed, *Swift* had social, economic, and political consequences.[31] It fortified the public's view of the federal courts as protectors of corporate interests.[32] It eventually became clear to the Court that *Swift* needed to be overruled.[33]

### *B. The* Erie *Doctrine*

In the 1930s, a major transformation was underway in the federal courts. In 1934, near *Swift*'s end, Congress passed the Rules Enabling Act,[34] which authorized the Supreme Court to develop uniform procedural rules for the federal courts, subject to Congress's approval.[35] In 1938, the Federal Rules of Civil Procedure took effect.[36] That same year, the Supreme Court decided *Erie*[37] and formally overruled *Swift*.[38] In *Erie*, the Court held that when sitting in diversity, federal courts must apply state substantive law (including the decisions of state courts), not general law.

Justice Brandeis, who wrote for the Court's majority, reasoned that *Swift*'s widespread application "revealed its defects, political and social."[39] The "benefits expected to flow from [*Swift*]"—presumably a reference to the uniform national commercial law Justice Story envisioned—"did not accrue."[40] Rather, *Swift* produced "mischievous results."[41]

One of the Court's justifications for overruling *Swift* was its unconstitutionality.[42] Justice Brandeis reasoned that "[t]here is no federal

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neighboring state to establish diversity jurisdiction in federal court (which applied federal common law) and avoided the application of unfavorable Kentucky law.

[31] PURCELL, LITIGATION, *supra* note 21, at 61–64.

[32] PURCELL, LITIGATION, *supra* note 21, at 62, 65–66, 72–73, 75–66.

[33] In 1945, Justice Frankfurter wrote for the Court in *Guaranty Trust Co. v. York* that *Swift v. Tyson* reflected "a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. . . . Law was conceived as a 'brooding omnipresence of Reason, of which decisions were merely evidence and not themselves the controlling formulation." Guaranty Trust Co. v. York, 326 U.S. 99, 101–02 (1945).

[34] 28 U.S.C. § 2072(a) (2018).

[35] For example, the Federal Rules of Civil Procedure emerged through the Rules Enabling Act, which grants the Supreme Court the power to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts." 28 U.S.C. § 2072 (2018).

[36] PURCELL, LITIGATION, *supra* note 21, at 227.

[37] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[38] To be sure, neither side requested that the Court overrule *Swift v. Tyson*. *See* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 347.

[39] *Erie*, 304 U.S. at 74.

[40] *Id.* at 74–75.

[41] *Id.* As Professor Chemerinsky observed, "Justice Brandeis discussed the unfairness of having the law vary depending on whether the lawsuit was between in-staters or based on diversity and decried the forum shopping that resulted." CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 348.

[42] *Erie*, 304 U.S. at 77–78; CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 349 (citing

general common law" and "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."[43] Further, "no clause in the Constitution purports to confer such a power upon the federal courts."[44] Accordingly, the Court "abandon[ed] the [*Swift*] doctrine" altogether.[45] After *Erie*, there were only two categories of domestic law: federal law and state law. To be clear, *Erie* abolished general law (i.e., federal general common law), not federal common law.[46] In contexts where "uniquely federal interests" are implicated—such as admiralty cases, disputes between states, and cases affecting government contractors—judge-created federal common law can displace substantive state law.[47]

### *C.* Erie*'s Constitutional Underpinnings*

The "precise nature" of *Swift*'s unconstitutionality has fostered great debate among legal scholars.[48] Professor Mishkin contends that the "Constitution bears not only on congressional power but also imposes a distinctive, independently significant limit on the authority of the federal

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*Erie*, 304 U.S. at 78).

[43] *Erie*, 304 U.S. at 78.

[44] *Id.*

[45] *Id.* at 77–78. "Without a doubt, the strongest argument for overruling *Swift* was its pernicious effects on the fair administration of civil justice. *Swift* encouraged forum shopping, and it was unjust that the result in a case depended on the citizenship of the parties." CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 349.

[46] Note that the Supreme Court credits *Erie* for "spark[ing] 'the emergence of a federal decisional law in areas of national concern.'" *See* Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 421 (2011) (quoting Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n. 119, 421-22 (1964)). Thus, *Erie* did not outlaw federal common law altogether. The Court recognizes the existence of federal common law in the context of "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *Am. Elec. Power Co.*, 564 U.S. at 421 (quoting Friendly, *supra*, at 408, 421–22). Federal statutes can "explicitly or implicitly authorize the creation of federal common law." Barrett, *supra* note 18, at 822. "[D]etermining whether a statute implicitly authorizes such creation is frequently a difficult and contested question of statutory interpretation." *Id.* It is also the case that it can be difficult to distinguish federal common law made in the shadows of federal statutes from interpretation of the statutory text itself." *Id.* Thus, under certain circumstances, the development of common law principles "is an inherent part of the judicial role of deciding cases." CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 394. In essence, there is no specific guidance—under federalism or separation of powers principles—on when the development of federal common law is appropriate. *Id.* at 393.

[47] Suzanna Sherry, *Normalizing Erie*, 69 VAND. L. REV. 1161, 1171–72 (2016).

[48] Bradford R. Clark, *Erie's Constitutional Source*, 95 CALIF. L. REV. 1289, 1290 (2007); ERWIN CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 349 (stating that "[t]he constitutional basis for the Erie decision has confounded scholars"); Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 676 (1998) (noting that Erie's "holding has been subject to disagreement and controversy over the years")); Craig Green, *Repressing Erie's Myth*, 96 CALIF. L. REV. 595 (2008); *see also* THE FEDERALIST NO. 39, at 245 (Madison).

courts to displace state law."[49] Professor Chemerinsky believes that federalism *and* Tenth Amendment[50] concerns informed *Erie*'s constitutional discussion.[51] Professor Clark "t[ied] Erie directly to the Supremacy Clause."[52]

At the very least, the *Erie* decision rests significantly on federalism principles. As the Court said about 60 or so years after *Erie*, "[i]t is incontestible [sic] that the Constitution established a system of dual sovereignty."[53] "Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty that is reflected throughout the Constitution's text."[54] "The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people."[55]

Thus, even if *Erie*'s constitutional source cannot be pinpointed, some things are clear. *Erie* announced significant limitations on federal judicial power and denounced *Swift*'s "defects, political and social."[56] *Erie* restored the power of states to develop substantive common law, and thereby restored a constitutional balance between the state and federal courts. *Erie* discouraged "jurisdictional manipulation" and brought "greater order and predictability to litigation practice."[57] From a political and social standpoint, *Erie* "deprived corporations of the favorable rules of the federal common law and remedied one of the major disadvantages that plaintiffs faced in the system of corporate diversity litigation."[58]

As Judge Henry Friendly wrote, *Erie* reflects a "familiar setting of a Congress of limited powers, with considerable areas of law-making reserved

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[49] Clark, *supra* note 48, at 1289, 1301 (quoting Paul J. Mishkin, *Some Further Last Words on Erie – The Thread*, 87 HARV. L. REV. 1682, 1682 (1974)). Professor Mishkin also said that "Congress may have constitutional power to make federal law displacing state substantive policy, [but this] does not imply an equal range of power for federal judges." Mishkin, *supra*, at 1683.

[50] Clark, *supra* note 48, at 1290 (citing ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3 (2d ed. 1994)); U.S. CONST. amend. X ("powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

[51] ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 18–19 (2008) (asserting that federalism and Tenth Amendment concerns were central to Erie's outcome and analysis); CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 349–50.

[52] Clark, *supra* note 48, at 1290.

[53] Printz v. United States, 521 U.S. 898, 918–19 (1997) (internal quotation marks and citations omitted).

[54] *Id.* (citation omitted).

[55] *Id.*

[56] Erie R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).

[57] PURCELL, LITIGATION, *supra* note 21, at 225.

[58] *Id.*

to the states, and a judiciary article where, in general, 'Laws of the United States' mean federal statutes and decisions applying them."[59] Thus, *Erie* "le[ft] to the states what ought to be left to them" by requiring "federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states."[60] Since 1938, the *Erie* doctrine, and its fundamental holding—that federal courts sitting in diversity must apply substantive state law—has controlled.

In sum, *Erie* "brought about a wholesale reexamination of the doctrine of federal common law."[61] But *Erie* also led to "confusion about the interplay of the Constitution, the Federal Rules, the lawmaking power of federal courts, and the relationship between federal and state authority."[62] The test announced in *Erie* is seemingly simple: in diversity cases, federal courts must apply state substantive law. But the application of the *Erie* doctrine "has posed many problems."[63] Professor Chemerinsky points out two: (1) "[u]nder what circumstances may federal courts apply federal procedural law" and (2) "how should a federal court determine the content of a state's law?"[64] The "distinctions between substance and procedure are inherently ephemeral and thus difficult to draw."[65] As discussed further below, it took the Court decades to clarify *Erie*'s role.

### *D.* Hanna v. Plumer *Gives the* Erie *Inquiry a Tune-up*

In *Guaranty Trust Co. v. York*, the Court announced an "outcome-determinative" test for resolving *Erie* problems.[66] The *Erie* question in that case concerned a clash between the application of a state statute of limitations, which would have blocked a lawsuit, or equitable principles, which would have allowed it to proceed. Justice Frankfurter, writing for the majority, reasoned that the resolution of such clashes depends on whether the application of state law would determine the outcome of the dispute.[67] Because the state statute of limitations was outcome determinative, the Court

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[59] Friendly, *supra* note 46, at 393–94 (citing THE FEDERALIST NO. 39 (James Madison).

[60] *Id.* at 405, 422.

[61] Burbank & Wolff, *supra* note 18, 34.

[62] *Id.* In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), for example, "the Court confirmed the power of federal courts to promulgate doctrines for the administration of the actions they adjudicate, even when they sit in diversity and hear cases over which they have no authority to declare controlling liability rules--what might be termed a weak form of inherent judicial power." *Id.* at 34, 34 n.189.

[63] CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 350.

[64] *Id.*

[65] *Id.*

[66] Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[67] *Id.* at 110.

held that it should apply.[68] Unfortunately, *Guaranty Trust*'s outcome-determinative test proved to be unworkable.[69]

In *Hanna v. Plumer*,[70] the Court provided a clearer test for resolving *Erie* conundrums by clarifying the role of the Rules of Decision Act in the doctrinal economy.[71] *Hanna* involved a conflict between Rule 4(d)(1) of the Federal Rules of Civil Procedure[72] and a state law that provided for service of process.

Pursuant to *Hanna*, if the source of the federal law in any federal-state law conflict is a federal statute or a Federal Rule, then the "question facing the court is a far cry from the typical, relatively unguided Erie Choice[.]"[73] The court must apply the Federal Rule—e.g., federal evidence and federal procedural rules—even if the Rule conflicts with state law. It may "refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[74] (Recall that the Rules of Decision Act calls for the application of state law *only* in the absence of governing authority in the Constitution or a federal statute.) *Hanna* "confirmed that the Federal Rules have the status of 'Acts of Congress' through the grant of delegated lawmaking authority that Congress made to the Supreme Court" in the Rules Enabling Act.[75] All in all, *Hanna* emphasized Congress's far-ranging authority when it comes to procedural matters.[76] It explained that Article III, "the constitutional provision for a

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[68] *Id.*

[69] CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 358–60.

[70] Hanna v. Plumer, 380 U.S. 460 (1965).

[71] Burbank & Wolff, *supra* note 18, at 35 (*Hanna* "provided a restatement of the [*Erie*] doctrine that emphasized the distinction between cases in which the form or mode of proceeding in federal court is the product of a Federal Rule and those where federal common law provides the rule."). As Professor Burbank has explained elsewhere, "the Supreme Court [in *Hanna*] sought to do with *Erie* what the Court in *Erie* had sought to do with federal common law—to reorient the law by recalling attention to its sources." Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1033 (1982).

[72] FED. R. CIV. P. 4(d)(1).

[73] Hanna v. Plumer, 380 U.S. 460, 471 (1965).

[74] *Id.*

[75] Burbank & Wolff, *supra* note 18, at 35 (citing 28 U.S.C. § 2072(a) (2018) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.")). *Hanna* provides that a Federal Rule controls so long as it "neither exceed[s] the congressional mandate embodied in the Rules Enabling Act nor transgress[es] constitutional bounds." *Hanna*, 380 U.S. at 463–64. "As with any federal statute, the federal courts have the power to carry into effect the policies of the Federal Rules of Civil Procedure through judge-made federal common law." Burbank & Wolff, *supra* note 18, at 35.

[76] *Hanna*, 380 U.S. at 472 ("For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though

federal court system," "augmented by the Necessary and Proper Clause," "carries with it congressional power to make rules governing the practice and pleading" in the federal courts.[77] "[I]n turn [this] includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[78]

Further, *Hanna* held that if there is a conflict between federal judge-made law and state law, the Court must ask whether the choice of law would determine the outcome, based on the "outcome-determinative" test announced in *Guaranty Trust*, and consider "the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[79] If the state law is not outcome determinative, then federal judge-made law applies. But if the state law is outcome determinative, the court must also inquire into whether there is an overriding federal interest that nevertheless compels the application of federal judge-made law.[80] As a practical matter, it is "almost impossible for federal judge-made law to survive *Hanna*'s modified outcome-determination test in a diversity case, and equally unlikely for a Federal Rule of Civil Procedure to fail *Hanna*'s tests for validity under the Constitution and the [Rules Enabling Act]."[81]

Importantly, *Hanna* articulated a core federalism principle limiting federal judicial power: "neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution."[82] "[I]n such areas state law must govern because there can be no other law."[83] Nearly thirty years earlier, *Erie* had provided that the federal courts may not generate their own rules of decision for state-created rights in diversity cases.[84] *Hanna* thus echoed and

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falling within the uncertain area between substance and procedure, are rationally capable of classification as either."); *id.* at 473–74 (describing "long-recognized power of Congress to prescribe housekeeping rules for federal courts").

[77] *Id.*

[78] *Id.*

[79] *Id.* at 468.

[80] This inquiry, dubbed "*Byrd* balancing," comes from *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958). In that case, the Court confronted the question of whether an individual has a right to a jury trial in a diversity case when there is a clash between federal law, which provides for the right to a jury trial, but state law permits only a bench trial. Citing the importance of compliance with the Seventh Amendment's conferral of the availability of jury trials in civil cases, the Supreme Court held that "affirmative countervailing considerations"—namely the important, overriding interest of the guarantees in the Seventh Amendment—compelled the application of federal law.

[81] Burbank & Wolff, *supra* note 18, at 47.

[82] *Hanna*, 380 U.S. at 471..

[83] *Id.* at 471–72.

[84] Erie R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938). Under *Erie*, "state law generally supplies

strengthened *Erie*'s protection of states' interests and their regulatory autonomy.

For purposes of this article, we should keep in mind *Hanna*'s "central insight": "solutions to problems in the allocation of lawmaking power between the federal government and the states depend on the source of putative federal law."[85]

In its arbitration precedent, the Supreme Court has assembled an apparatus of judge-made federal law that is *Swift*-like, complete with all of the attendant "defects, political and social."[86] Like *Swift*, the Court's FAA jurisprudence is constitutionally questionable.[87] Once again, the Supreme Court has seized power to enact a policy that cannot be found in the text or history of the statute that supposedly gives rise to that power.[88] To understand how we got here, we must turn back the clock and follow the rise of arbitration.

## II. THE FEDERAL ARBITRATION ACT: THEN AND NOW

The Federal Arbitration Act was enacted in 1925, before *Erie* overruled *Swift* and before *Hanna* clarified the *Erie* inquiry. As mentioned, *Hanna* said that the resolution of an *Erie* inquiry turns largely on locating the source of the federal law—meaning the constitutional authority on which Congress relied in enacting the statute—as well as an assessment of two of *Erie*'s fundamental principles: avoiding forum shopping and the inequitable administration of the laws. Thus, before we can attempt to resolve *Erie* problems involving the FAA, we must excavate the statute's source via an examination of its text, legislative history, and constitutional basis.

First, some basics. Arbitration is an alternative dispute resolution mechanism to civil litigation.[89] As a general matter, parties who agree to submit to arbitration choose a third-party arbitrator who assumes full legal

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the rules of decision in federal diversity cases . . . [but] it does not control the resolution of issues governed by federal statute." Budinich v. Bechton Dickinson & Co., 486 U.S. 196, 198 (1988) (citing U.S. CONST., art. VI, cl. 2 (the Supremacy Clause) and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404–05 (1967)).

[85] Burbank & Wolff, *supra* note 18, at 47.

[86] *Erie R. Co.,* 304 U.S. at 74.

[87] Specifically "restrain[t] [of] the power of the federal courts to intrude upon the states' determination of substantive policy in areas which the Constitution and Congress have left to state competence." *See* Mishkin, *supra* note 49, at 1688.

[88] As mentioned, in *Swift*, the statute in question was section 34 of the Judiciary Act of 1789, now understood as the Rules of Decision Act. The Court's arbitration jurisprudence stems from the Court's misunderstanding and misapplication of the Federal Arbitration Act.

[89] F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 1-4 (8th ed. A.B.A. Section of Labor & Employment Law 2016).

authority over a dispute, oversees a private proceeding, and delivers a binding determination on the matter.[90] Arbitration awards are subject to judicial review under extremely limited circumstances, so they are essentially final.[91] Moreover, arbitration proceedings are generally secret and therefore "shielded from public scrutiny."[92]

Of course, arbitration has its downsides. The House Judiciary Committee, when considering the Ending Forced Arbitration Act, observed that "arbitration lacks the transparency," "procedural safeguards[,]" "and precedential guidance of the justice system, [so] there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process."[93]

Who would agree to resolve a dispute through a process that provides little guarantee of fairness and equity? Look no further than arbitration's origins: a quick and cheap method of dispute resolution for sophisticated merchants.

### A. *From Common Law Hostility to Mainstream Acceptance: The Expansion of Commercial Arbitration in the United States*

Shortly after the Federal Arbitration Act's enactment, Julius Henry Cohen, the principal drafter of the FAA, and Kenneth Dayton, his colleague, recalled that "[t]he use of arbitration dates back to the earliest days of which we have historical knowledge."[94] Arbitration was a "necessity": it "cut the Gordian knot of the law's delay" and offered "a remedy for business difficulties."[95] As a historical matter, sophisticated parties traded the judicial protection of rights for the efficiency and finality of arbitration, in which the arbitrator functions as a sovereign decision-making authority.

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[90] IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 7 (1992).

[91] THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 1 (5th ed. 2014); MACNEIL, *supra* note 90. The Supreme Court recently announced more limitations on federal jurisdiction over arbitration awards. *See* Badgerow v. Walters, 142 S. Ct. 1310 (2022) (holding that a federal court, in determining whether it has jurisdiction to decide an application to confirm, vacate, or modify an arbitral award, looks only to the application submitted to the court, not the underlying substantive controversy between the parties); Brian Flood, *Justices Limit Federal Jurisdiction over Arbitration Awards*, BLOOMBERG LAW (Mar. 31, 2022), https://news.bloomberglaw.com/us-law-week/justices-limit-federal-jurisdiction-over-arbitration-awards [https://perma.cc/X5V5-S8KN].

[92] H.R. REP. NO. 117–270, at 3–4 (2022) [hereinafter 2022 House Report].

[93] *Id.* at 3, 5.

[94] Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 266 (1926).

[95] It furnished almost exclusively the tribunals for the settlement of business disputes in the medieval period, and in England, up to Lord Mansfield's day, was practically the sole remedy open to English merchants. *Id*.

In the 19th century, though, federal courts were deeply suspicious of arbitration. Federal judges viewed extra-judicial tribunals as an encroachment on their jurisdiction.[96] Justice Story once described arbitration as an "instrument of injustice" that would "deprive parties of rights,"[97] and federal courts in the United States regularly invalidated arbitration agreements. In *Circuit City Stores v. Adams*,[98] Justice Stevens described this "extensive and well documented" history,"[99] which "makes clear that the FAA was a response to the refusal of courts to enforce commercial arbitration agreements[.]"[100] "Judges in the 19th century disfavored private arbitration,"[101] he explained, and the FAA "was intended to overcome that attitude[.]"[102]

### 1. Congress Understands Arbitration as a Dispute Resolution Mechanism for Businesses, Not Parties with Unequal Bargaining Power

In the early 20th century, American industrialization flourished. Labor and business disputes increased and intensified. In light of these conditions, federal courts' negative attitude towards arbitration—as a dispute resolution mechanism specifically for business disputes—eventually shifted. Business groups joined forces with the American Bar Association, and together, they lobbied for a federal arbitration statute.[103]

Cohen and Dayton described the Federal Arbitration Act as a "movement which commands an unusually widespread support in the business world because the reform is directed primarily toward settlement of commercial disputes[.]"[104] Indeed, commercial actors trusted that arbitration tribunals

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[96] Andrea Cann Chandrasekhar & David Horton, *Arbitration Nation*, 107 CALIF. L. REV. 1, 64 (2019).

[97] Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845).

[98] Circuit City Stores v. Adams, 532 U.S. 105 (2001).

[99] *Id.* at 125–33 (Stevens, J., dissenting).

[100] *Id.* at 125 (Stevens, J., dissenting); *see also* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 Geo. L.J. 1217, 1219 (2013) ("Congress passed the FAA in 1925 to abolish the ouster and revocability doctrines--principles that reflected 'longstanding judicial hostility to arbitration' and made agreements to arbitrate unenforceable.") (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)); Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) ("The problems Congress faced were therefore twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.").

[101] *Circuit City*, 532 U.S. at 131 (Stevens, J., dissenting).

[102] *Id.*

[103] Before the FAA, "in federal courts a general federal law governed the key arbitration questions." MACNEIL, *supra* note 90, at 24. "This was true whether the case was in federal court because of its admiralty jurisdiction or its diversity jurisdiction, and whether the case was one in law or equity." *Id.* "And it was true whether the otherwise applicable state law was statutory or judge-made." *Id.*

[104] Cohen & Dayton, s*upra* note 94, at 265.

could resolve commercial disputes more expeditiously, inexpensively, and "justly"—"when measured by the standard of the business world"—than the courts.[105] Hence, one of "[t]he most important fact[s] about the testimony, hearings, and reports leading up to congressional enactment of the FAA is that every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants."[106] "Congress did not intend for parties with unequal bargaining power"—like employees and consumers—"to be forced to arbitrate claims."[107]

### 2. The Federal Arbitration Act's Drafters View Arbitration as Remedial and Procedural in Nature, Not Substantive

Furthermore, there was widespread "consensus" at the time of the Federal Arbitration Act's passage that arbitration is a procedural device, not substantive in nature.[108] The legislative history also affirms that the Act should apply in diversity disputes, which reflects that it is not federal substantive law.[109] Likewise, business lobbyists hoped that a federal statute would result in the enforcement of arbitration agreements in federal courts "as a matter of federal procedural and remedial law."[110] In essence, the FAA would "follow…the same course as do ordinary motions before the given

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[105] *Id.* at 269.

[106] Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 305 (2015); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967) (Black, J., dissenting) ("On several occasions [the members of Congress] expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power."). The "legislative history . . . indicates that the Act was to have a limited application to contracts between merchants for the interstate shipment of goods . . . " *Id*. at 409.

[107] 2022 House Report, *supra* note 92, at 7. Justice Stevens made this point clear in a dissenting opinion as well. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 125–26, 132 (2001) (Stevens, J., dissenting).

[108] *See, e.g.*, H.R. REP. NO. 68–96 at 1–2 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made."); S. REP. NO. 68-536, at 2 (1924); *see also* Andrew D. Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603, 629 (2015) ("As MacNeil and others have noted, the primary goal of those pushing the federal statute was to ensure that arbitration agreements were enforceable in federal courts as a matter of federal procedural and remedial law.") (citing MACNEIL, *supra* note 90, at 93–97, 114–17); *see also* Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 93 n.9 (2012); Cohen & Dayton, *supra* note 94, at 266, 271 (describing arbitration as a remedy).

[109] Cohen & Dayton, *supra* note 94, at 267; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 418 (1967) (Black, J., dissenting) (recalling legislative history).

[110] Bradt, *supra* note 108, at 629.

District Court."[111] As such, the FAA was intended to limit the federal judiciary's power to invalidate arbitration agreements.[112] And at its root, the FAA was enacted to place arbitration agreements "upon the same footing as other contracts, where [they] belong…."[113] The lobbying efforts were successful. In 1924, Congress passed the Federal Arbitration Act with "very little controversy."[114]

The FAA is a relatively short statute that provides a legislative framework to enforce arbitration agreements and issue arbitration awards. Section 2,[115] "[t]he Act's centerpiece provision,"[116] makes an arbitration provision in a contract enforceable, so long as the provision is connected to a transaction involving foreign or interstate commerce or a maritime transaction.[117] Section 2's last clause, the "saving clause," allows courts to invalidate arbitration agreements under generally applicable state contract law defenses.[118]

To summarize, the FAA's text and legislative history are unambiguous. The FAA's proponents lobbied for a statute that would eradicate the "common law hostility"[119] toward arbitration tribunals and put arbitration on the "same footing" as civil litigation.[120] Their goal was to allow sophisticated commercial parties with equal bargaining power to settle business disputes in an efficient fashion.[121] The constitutional origin of the FAA presents an admittedly closer question.

### *B. Unearthing the Constitutional Source of the FAA's Power*

To better understand the constitutional backdrop of the Federal Arbitration Act, we must review the political and legal landscape in the 1920s. The FAA was enacted in 1925, during the *Lochner*[122] era, when the

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[111] Cohen & Dayton, *supra* note 94, at 271.

[112] *See, e.g.,* 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).

[113] H.R. REP. NO. 68–96, at 2 (1924).

[114] Bradt, *supra* note 108, at 628.

[115] 9 U.S.C. § 2 (2018).

[116] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (describing section 2 as the FAA's "centerpiece").

[117] WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 3569 (2021).

[118] As Professor Jodi Wilson has written, "Congress did not include an explicit statement of purposes in the text of the FAA, but the Senate Report declared that '[t]he purpose of the [Act] is clearly set forth in section 2.'" Wilson, *supra* note 108, at 125 (quoting S. Rep. No. 68-536, at 2 (1924)). "[T]he savings clause is part and parcel of the purpose of the FAA." *Id.*; *see also* Horton, *supra* note 100, at 1219–20.

[119] Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

[120] H.R. REP. NO. 68–96, at 2 (1924).

[121] Cohen & Dayton, *supra* note 94, at 281.

[122] Lochner v. New York, 198 U.S. 45 (1905).

Supreme Court routinely overturned progressive economic legislation—at the state and federal level—under the Fourteenth Amendment's Due Process Clause.[123] In *Lochner*, the Supreme Court struck down a New York state labor law that prescribed maximum working hours for bakers, holding that the law infringed on the individual right to freedom of contract, a right enshrined in the Fourteenth Amendment's Due Process Clause.[124] The *Lochner* period was "characterized by federal injunctions blocking state efforts to address social issues in the rising industrial world."[125] Particularly relevant here, federal courts invalidated efforts "to set minimum terms of fairness in employment contracts."[126]

Other significant social, economic, and political changes occurred in the years immediately following the FAA's passage. For example, in 1935, Congress enacted the National Labor Relations Act, the nation's foremost legislation for protecting workers' rights.[127] In 1937, the Court overruled *Lochner*.[128] After President Franklin D. Roosevelt took office in 1933, the government spent the next eight years instituting New Deal federal programs.

When it comes to the FAA's constitutional origins, the text has little to say and the legislative history points in a few different directions. Cohen and Dayton's 1926 article is the most comprehensive resource on the Act's constitutional source and legislative purpose.[129] They point to the following constitutional authorities: the Commerce Clause[130] and Article III.[131]

### 1. The Commerce Clause Is One, But Not an Exclusive Source

The Commerce Clause states that "Congress shall have the power…To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"[132] It empowers Congress to "prescribe the rule by which commerce is to be governed."[133] It authorizes Congress to regulate interstate commercial activity and limits the power of states to discriminate

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[123] Todd W. Shaw, *Rationalizing Rational Basis Review*, 112 NW. U. L. REV. 487, 491 (2017) ("between 1897 and 1937, the Supreme Court employed a rigorous form of judicial review to strike down a wide range of statutes that it found to have violated individuals' freedom of contract").

[124] *Lochner*, 198 U.S. at 53.

[125] Texas Alliance for Retired Americans v. Scott, 28 F.4th 669, 676 (5th Cir. 2022) (Higginbotham, J., dissenting).

[126] Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 183 (2015); *see* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

[127] National Labor Relations Act of 1935, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169).

[128] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

[129] *See generally* Cohen & Dayton, *supra* note 94.

[130] U.S. CONST. art. I, § 8, cl. 3.

[131] *See* U.S. CONST. art. III, § 2; Cohen & Dayton, *supra* note 94, at 275.

[132] U.S. CONST. art. I, § 8, cl. 3.

[133] United States v. Lopez, 514 U.S. 549, 553 (1995).

against or burden interstate commerce.[134] All told, the Commerce Clause imposes a key constitutional limit on states' regulatory authority.

But "[t]he pre-New Deal Congress that passed the [FAA] in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case."[135] Between the 1890s and 1937, the Supreme Court "narrowly defined the scope of Congress's [commerce] powers" and "made substantial use of the Tenth Amendment as a limit on congressional power."[136] Between 1937 and the 1990s, "the pendulum swung back" and the Court interpreted Congress's commerce powers broadly; between 1937 and 1995, "not one federal law was found to exceed the scope of Congress's Commerce Clause authority."[137]

In any event, Cohen and Dayton rejected the possibility "that the [Federal Arbitration Act] depends entirely for its validity upon the exercise of interstate-commerce and admiralty powers of Congress."[138] In saying as much, they made clear that the commerce power is not the exclusive constitutional source of the Federal Arbitration Act.

### 2. Article III as the FAA's Primary Constitutional Foundation

For purposes of our *Erie* inquiry, it matters little if the Commerce Clause played any role in Congress's enactment of the FAA. What matters is whether—under the *Hanna* test—Congress acted pursuant to its authority to make rules governing procedure in the federal courts.[139] That power lies in Article III, and as *Hanna* explained, it is "augmented" by the Necessary and Proper Clause.[140]

Article III authorizes Congress to control the jurisdiction of federal courts by "ordain[ing] and establish[ing]" the "inferior Courts."[141] The Supreme Court has recognized Congress's power under Article III to define

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[134] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978).

[135] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 275 (1995). Congress certainly had the power to pass a federal arbitration statute that displaces state arbitration laws affecting interstate commerce. But in 1925, "Congress enacted no such statute." *Allied-Bruce Terminix*, 513 U.S. at 283 (O'Connor, J., concurring); *see* Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012) ("Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time."); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power").

[136] Chemerinsky, *supra* note 25, at 8.

[137] *Id.*

[138] Cohen & Dayton, *supra* note 94, at 275.

[139] *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965); *Hanna*'s significance is discussed *supra* Part I.D.

[140] *Id.*

[141] U.S. CONST. art. III, § 1.

the jurisdiction of the lower federal courts.[142] Cohen and Dayton made exceptionally clear that the power upon which the FAA "rests" is "the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."[143] Cohen and Dayton wrote that "[t]he primary purpose of this statute is to make enforceable in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."[144]

If one accepts that Congress invoked its power under Article III and the Necessary and Proper Clause[145] to "make rules governing the practice and pleading" in the federal courts[146] when it enacted the FAA, then, as Professor Linda Hirshman has suggested, any *Erie* conflict between the FAA and state law should result in the application of the FAA.[147] However, she also observed that "Congress made no effort to specify which . . . course… it was following when it enacted the FAA."[148]

I agree with Professor Hirshman that "the FAA merely added procedures—staying litigation and compelling arbitration—previously disfavored by the courts."[149] I doubt, though, that Congress—via its commerce powers—enacted the FAA as federal substantive law binding in federal and state courts alike. As mentioned, the legislative record makes unmistakably clear that Congress enacted the FAA as a procedural/remedial

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[142] Sheldon v. Sill, 49 U.S. 441, 448–49 (1850); *see also* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 17, at 209–11 ("*Sheldon v. Sill* . . . stands as a strong precedent for the proposition that because Congress has discretion to create lower federal courts, Congress also possesses authority to determine their jurisdiction.").

[143] Cohen & Dayton, *supra* note 94, at 275 (referring to U.S. CONST. art. III, § 1). Professor Resnik has observed that "[d]uring much of the FAA's first six decades, congressional power to enact the statue was linked to its authority under Article III to regulate the lower federal courts." Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2837 (2015). "This point was stressed to the Supreme Court by both the Chamber of Commerce and the AAA." *Id.* at 2837 n.147 (citing Brief for the Chamber of Commerce of the State of N.Y. & Am. Arb. Ass'n, Inc., as Amici Curiae Supporting Respondent, Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932) (No. 172), 1931 WL 32404, at *14-15)). Cohen and Dayton were the primary authors of the brief in the *Marine Transit* case. *See id.*

[144] Cohen & Dayton, *supra* note 94, at 278.

[145] The Necessary and Proper Clause confers on Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I.

[146] *Id.*

[147] *See* Linda Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1345 n.266 (1985).

[148] *Id.* at 1314–18.

[149] *Id.*

statute, not substantive law that granted "new rights."[150] And at the time of the FAA's enactment, neither the Court nor Congress understood the Commerce Clause to reach as far as it does now.[151]

In my view, the Commerce Clause's significance in the context of the federal arbitration statute merely reflects Congress's intent to limit the FAA's domain to "contracts relating to interstate subjects and contracts in admiralty,"[152] not to make the FAA far-reaching substantive law that applies in federal and state courts alike. "When the Act was passed[,]" "the commerce power was closely confined[.]"[153] The Supreme Court's jurisprudence "indicated that the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce."[154]

Furthermore, I believe that the text and legislative history foreclose the possibility that the Supremacy Clause is the constitutional authority upon which Congress relied in enacting the FAA. Cohen and Dayton contemporaneously explained that the federal statute would not infringe upon states' right to decide "what contracts shall or shall not exist under its laws."[155] The text of the federal arbitration statute—namely the saving clause—bolsters this view. By including the phrase "save upon such grounds as exist at law or in equity for the revocation of any contract,"[156] Congress recognized the role of states to regulate contracts and make available common-law contract defenses.[157]

It appears, therefore, that the FAA's constitutional authority is rooted mostly in Article III, and to a certain extent, the Commerce Clause. However, Professor Hirshman argues, the constitutional source of the Act is nevertheless elusive.[158] But no matter how nebulous the FAA's constitutional foundation may be, the FAA that exists today is irreconcilable from the Act the Congress enacted.

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[150] 65 CONG. REC. 1931 (1924).

[151] *See* United States v. Lopez, 514 U.S. 549, 555–56 (1995). Three Supreme Court decisions decided after the FAA's 1925 enactment—in 1937, 1941, and 1942—"ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause." *Id.* at 556.

[152] 65 CONG. REC. 1931 (1924)

[153] Circuit City Stores v. Adams, 532 U.S. 105, 136 (2001) (Stevens, J., dissenting).

[154] *Id.*

[155] Cohen & Dayton, *supra* note 94, at 276.

[156] 9 U.S.C. § 2 (2018).

[157] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 367 (2011) (Breyer, J., dissenting).

[158] Hirshman, *supra* note 147, at 1314–15.

### *C. The Federal Arbitration Act's Erie question*

Before *Erie*, Congress "had reason to believe that it still had power to create federal rules to govern questions of 'general law' arising in simple diversity cases—at least, absent any state statute to the contrary."[159] As mentioned, the FAA was enacted in the "pre-*Erie* days," when general law "lawfully existed" and federal courts sitting in diversity ignored state decisional law.[160] Admittedly, state laws favored arbitration in the business context during the *Swift* era,[161] at least compared to their federal counterparts, so the FAA worked as a congressionally mandated analog to those laws. One would imagine, then, that the forum of the dispute would not determine the outcome of an arbitration dispute and this uniformity between federal and state law would discourage forum shopping.[162]

Nevertheless, the *Swift* doctrine's "preeminence…create[d] an interpretive headache for the FAA."[163] It was unclear whether the *Swift* doctrine authorized the federal courts to continue applying general law in FAA diversity cases, or if the FAA's saving clause in section 2 required federal courts to defer to state contract law defenses against the enforcement of arbitration agreements, such as unconscionability or public policy.[164] When the Supreme Court decided *Erie*, it became clear that "[t]he absence of an express grant of federal question jurisdiction caused the evolving federal doctrine on arbitration to follow an uncertain path."[165] "[T]he federal law on arbitration lost its coequal standing with state law and entered into a competitive relationship with state legislation on the topic."[166]

To be sure, Ian MacNeil wrote that *Erie* "gave every appearance of being a non-event in the history of the [Federal Arbitration Act]" because the Act was "aimed at governing the procedure in federal courts, not the substantive law those courts applied."[167] Nevertheless, it remained to be seen whether the FAA was applicable if state law conflicted with the FAA "[i]n diversity cases concerning transactions involving commerce."[168] In light of *Erie*'s

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[159] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967).

[160] The rise and fall of federal common law is discussed *supra* Part I.

[161] *See* Cohen & Dayton, *supra* note 94, at 266.

[162] MACNEIL, *supra* note 90, at 134–35.

[163] Horton, *supra* note 100, at 1258.

[164] *Id.* at 1258–61.

[165] CARBONNEAU, *supra* note 91, at 157 ("When there was no interstate or foreign commerce basis for the application of federal law, *Erie* required federal courts sitting in diversity to apply state laws on arbitration").

[166] *Id.*

[167] MACNEIL, *supra* note 90, at 134.

[168] *Id.*

federalism principles and its objective to limit federal judicial power,[169] federal courts sitting in diversity initially adjudicated FAA cases in a manner that did not undermine states' authority to make arbitration law.[170]

But *Erie* nevertheless "let loose forces that . . . transform[ed] the [Federal Arbitration Act] from the procedural statute Congress had enacted thirteen years before into a substantive statute greatly reducing the power of the states."[171] It became clear to the Supreme Court that in diversity cases involving commerce, the FAA's primacy could be subordinated by state contract law.[172]

In the years following *Erie*, the Court confronted numerous tricky *Erie*-adjacent questions with respect to the Federal Arbitration Act.[173] For instance, is the FAA's applicability limited to federal courts? In diversity cases that do not implicate interstate commerce, the FAA was "undoubtedly . . . inapplicable."[174] But in diversity cases where the underlying dispute concerned "arbitration clauses in contracts affecting interstate commerce,"[175] it was unclear to what extent the FAA's application in that dispute was procedural or substantive, especially given the FAA's status as a jurisdictional "anomaly."[176]

Next, are the federal courts obligated to apply the FAA in diversity cases if it conflicts with otherwise applicable state law? If the federal court applies the FAA, then it could encourage vertical forum shopping. (Of course, the application of state law could result in horizontal forum shopping.) If it applies state law, then the court risks subordinating an important federal statute. If a state contract rule threatens to subordinate the FAA's power, then does the Supremacy Clause back the FAA's power to preempt contrary state law?[177]

Over several decades, the Court set out to answer these questions and cement the FAA's place in the greater legal landscape, taking into account the *Erie* doctrine's command, Congress's legislative authority, limits on federal judicial power, and important policy interests. Unfortunately, the

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[169] *See id.*

[170] *Id.*

[171] *Id.* at 135.

[172] *See* Sherry, *supra* note 47, at 1208 (citing Hirshman, *supra* note 147, at 1313–18).

[173] Professor Schwartz was the first to expound upon the *Erie* problem with the FAA. *See* David Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and The Federal Arbitration Act*, 67-SPG LAW & CONTEMP. PROBS. 5, 32–39 (2004) (describing the Court's "missteps and non sequiturs" in "attempting to resolve an Erie problem").

[174] MACNEIL, *supra* note 90, at 134.

[175] 9 U.S.C. § 2 (2018).

[176] *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983).

[177] *See* Burbank & Wolff, *supra* note 18, at 9 ("Pertinent and valid federal common law is binding on state courts under the Supremacy Clause of Article VI.").

Court took "many wrong turns."[178] It ultimately "federalize[d] the law of arbitration and thereby allowed the federal law to [enjoy] controlling status."[179]

As mentioned, *Hanna v. Plumer*'s "central insight" is that the resolution of *Erie* questions "depend[s] on the source of the putative federal law."[180] But *Hanna*'s important clarifications of the *Erie* test may have been too little too late. The Court decided *Hanna* in 1965, nearly ten years after *Bernhardt v. Polygraphic Co*.,[181] the case in which the Court first confronted the *Erie*–FAA conundrum. Thus, *Hanna*'s essential guidance—that assessing the constitutional source of a federal law is an indispensable step in the resolution of *Erie* problems—had not yet materialized. To be sure, the *Bernhardt* Court did inquire into the constitutional authority upon which Congress enacted the FAA, but *Bernhardt*'s *Erie* analysis mostly hung its hat on the "outcome-determinative" test from *Guaranty Trust*, which, as mentioned, proved unworkable.[182]

### 1. *Bernhardt v. Polygraphic Co.* Holds that Arbitration Is Substantive and Outcome-Determinative

*Bernhardt* involved an employment contract containing an arbitration clause and a conflict between Vermont state law and the FAA.[183] The Supreme Court was faced with resolving whether the district court, which was sitting in diversity, should stay litigation and compel arbitration pursuant to section 3 of the FAA, or apply Vermont law and continue with litigation.

The Court could have avoided this thorny question. The employment contract in dispute concerned neither a maritime transaction nor interstate commerce, and thus, it fell outside the scope of section 2 of the FAA.[184] Vermont law therefore undoubtedly controlled the issue.[185] But the lower court—the U.S. Court of Appeals for the Second Circuit—had inquired into whether section 3 of the FAA was procedural or substantive.[186] Hence, the Supreme Court, on review, "felt obliged to consider the power of federal

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[178] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1645 (2018) (Ginsburg, J., dissenting).

[179] CARBONNEAU, *supra* note 91, at 157–58 (2014).

[180] Burbank & Wolff, *supra* note 18, at 47.

[181] Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956).

[182] Guaranty Trust Co. v. York, 326 U.S. 99 (1945). *Guaranty Trust* is discussed *supra* Part I.D.

[183] The FAA section in question was 9 U.S.C. § 3 (2018).

[184] 9 U.S.C. § 2 (2018).

[185] *Bernhardt*, 350 U.S. at 200–01. The Court also took the opportunity to clarify that the FAA does not "cover…all arbitration agreements," only those that "involve maritime transactions or transactions in commerce." *Id.* at 201–02.

[186] Bernhardt v. Polygraphic Co., 218 F.2d 948, 951 (2d Cir. 1955).

courts to enforce arbitration contracts as a matter of federal common law."[187]

The Court recognized a problem. If the contract had been covered by the FAA, then the outcome of the litigation would have been determined[188] by the federal court's decision to apply either the FAA or Vermont arbitration law.[189] Under those circumstances, if the Court applied the FAA to interpret or assess the validity of the arbitration clause in the contract, this would render the arbitration agreement enforceable in federal court but not in state court. The FAA would therefore inescapably present a "serious constitutional question under *Erie*."[190] This "gave rise to concern that the FAA could thereafter constitutionally be applied only in federal court cases arising under federal law, not in diversity cases."[191]

*Bernhardt* illuminated the tension between the FAA and *Erie*. On the one hand, the legislative history makes clear that Congress intended for the Federal Arbitration Act to apply in diversity cases,[192] but Cohen and Dayton insisted that the FAA should not "infringe…upon the right of each State to decide for itself what contracts shall or shall not exist under its laws."[193] Neither Congress nor the FAA's drafters could have foreseen that the FAA's domain and applicability would be called into question just thirteen years later by *Erie*'s imposition of limits on federal judicial power in diversity cases and its renewal of the federalism balance between federal and state courts.

Against the backdrop of the *Erie* decision, Justice William Douglas suggested that the FAA is substantive because "[t]he remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State."[194] He also recognized a risk of forum shopping and cautioned that "[t]here would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be."[195] Accordingly, the Court held that in such a scenario, Vermont law should govern.[196] The Court emphasized *Erie*'s "'policy . . . that for the same

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[187] Hirshman, *supra* note 147, at 1320. "If the Court had held § 3 to be simply procedural, no constitutional problem under Erie would have been presented." *Id.* at 1320 n.78.

[188] Guaranty Tr. Co. v. York, 326 U.S. 99 (1945).

[189] *Bernhardt*, 350 U.S. at 203–04 ("If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the court-house where suit is brought.").

[190] Sherry, *supra* note 47, at 1208.

[191] Southland Corp. v. Keating, 465 U.S. 1, 23 (1984) (O'Connor, J., dissenting).

[192] Cohen & Dayton, *supra* note 94, at 267.

[193] *Id.* at 276.

[194] Bernhardt, 350 U.S. at 203.

[195] *Id.* at 204.

[196] *Id.* ("We agree with [the U.S. District Judge who decided the case in the federal district court] that if arbitration could not be compelled in the Vermont courts, it should not be compelled in the Federal

transaction the accident of a suit by a non-resident litigant in a federal court instead of a State court a block away, should not lead to a substantially different result.'"[197]

"By declaring enforcement of arbitration to be 'substantive' in effect, the Bernhardt decision shut off the option of treating the FAA as a rule of federal procedure without significance in the Erie scheme."[198] One would imagine that what logically follows the Court's assessment in *Bernhardt* is the principle that the *Erie* doctrine categorically bars the application of the FAA in diversity cases involving a clash between the FAA and state law, or perhaps even in diversity cases altogether. But the Court declined to go this far. Justice Frankfurter did, however, adopt this position in a concurrence.[199]

In sum, *Bernhardt* avoided an FAA–*Erie* problem head-on, reiterated *Erie*'s holding and its federalism principles by highlighting limits on federal judicial power, and recognized states' authority to create rights and liabilities.[200] Nevertheless, in concluding that the FAA "substantially affects the cause of action created by the State," and presumably falls within the domain of state contract law,[201] the Court had no choice but to turn its back on the FAA's procedural origins. *Bernhardt* also "forced the Court to decide whether Congress had enacted the FAA as an exercise of its powers over commerce and admiralty or instead had exercised its Article III powers to provide a rule of decision only for diversity cases in the federal courts."[202] As such, *Bernhardt* inadvertently "laid the groundwork for the supersession of state arbitration laws by the [FAA]."[203]

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District Court.").

[197] *Id.* (quoting Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945)). In a later FAA decision, Justice O'Connor recalled that "*Bernhardt* held that the duty to arbitrate a contract dispute is outcome-determinative—*i.e.*, 'substantive'—and therefore a matter normally governed by state law in federal diversity cases." Southland Corp. v. Keating, 465 U.S. 1, 23 (1984) (O'Connor, J., dissenting).

[198] Hirshman, *supra* note 147, at 1320.

[199] *Bernhardt*, 350 U.S. at 207–09 (Frankfurter, J., concurring) ("Since the [FAA]does not obviously apply to diversity cases, in the light of its terms and the relevant interpretive materials, avoidance of the constitutional question is for me sufficiently compelling to lead to a construction of the Act as not applicable to diversity cases.").

[200] MACNEIL, *supra* note 90, at 136.

[201] Bernhardt, 350 U.S. at 203.

[202] Hirshman, *supra* note 147, at 1320. "If the Court found that Congress had taken the latter course, it would have had to decide if Congress could legislate where *Erie* had forbidden the federal courts to create common law." *Id.*

[203] MACNEIL, *supra* note 90, at 136; *see also* Schwartz, *supra* note 173, at 33 ("[T]he Bernhardt Court expressly put off for another day the thorny constitutional question it had created: what would happen if a dispute on a contract that did involve interstate commerce--and therefore came within the scope of the FAA--appeared in federal court on diversity grounds?").

### 2. Prima Paint Holds that the FAA Is Backed by Congress's Commerce Power

About two years after *Hanna v. Plumer*, the Supreme Court decided *Prima Paint*,[204] which concerned a dispute between the buyer of a paint business and the seller, and a conflict between the FAA and state law.[205] Unlike the contract at issue in *Bernhardt*, the agreement in *Prima Paint* involved a transaction involving commerce, and thus, the FAA applied.[206] The Court referred the case to arbitration. This was a peculiar outcome, given that the *Bernhardt* Court had concluded that arbitration is substantive and outcome-determinative.[207]

Citing *Bernhardt*, the *Prima Paint* Court explained that "[t]he question in this case . . . is not whether Congress may fashion federal substantive rules to govern questions in simple diversity cases."[208] The majority reasoned that it was "clear beyond dispute that the federal arbitration statute" is based upon Congress's commerce power, through which "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate."[209] Accordingly, the Court ruled that the FAA provides "not only the remedy of enforcement [of arbitration agreements] but a body of federal doctrines to determine the validity of an arbitration agreement."[210]

*Prima Paint*'s analysis is not supported by the legislative history.[211] Congress did not rely—at least exclusively—on the Commerce Clause when it enacted the FAA. Rather, the FAA's constitutional basis is chiefly Article III, which authorizes Congress to prescribe procedures for the federal courts.

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[204] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[205] To briefly explain, the buyer sought to rescind a contract containing an arbitration provision, claiming fraudulent inducement. *Id.* at 397–399. In the district court, the seller moved to stay litigation pursuant to section 3 of the FAA, just as the employer did in *Bernhardt*. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 262 F. Supp. 605 (S.D.N.Y. 1966); Bernhardt v. Polygraphic Co., 350 U.S. 198, 199–201 (1956). The federal district court granted the seller's motion to stay the action pending arbitration. *Prima Paint*, 262 F. Supp. at 607. The Second Circuit dismissed the buyer's appeal. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 360 F.2d 315 (2d Cir. 1966).

[206] *Prima Paint*, 388 U.S. at 406–07.

[207] Bernhardt v. Polygraphic Co., 350 U.S. 198, 203–04 (1956).

[208] *Id.* at 405.

[209] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967). Justice Douglas also acknowledged Congress's powers under the Commerce Clause in *Bernhardt*, but he only did so expeditiously. *Bernhardt*, 350 U.S. at 202 ("If respondent's contention is correct, a constitutional question might be presented.") (explaining that the foundation of the FAA is "the Federal control over interstate commerce and over admiralty") (internal quotation marks omitted). Justice Fortas, who wrote for the majority in *Prima Paint*, however, brought Congress's commerce powers to the forefront of his analysis. *Prima Paint*, 388 U.S. at 405.

[210] *Prima Paint*, 388 U.S. at 424–25 (Black, J., dissenting).

[211] *See* Part II.A–B, *supra*. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924).

In this regard, Justice Hugo Black's dissent in *Prima Paint* is important.[212] He disputed the majority's position that the FAA stemmed from Congress's full commerce powers because the FAA is a statute of "limited application to contracts between merchants for the interstate shipment of goods."[213] He noted that *Prima Paint* involved no such contract.[214] Moreover, he reasoned that Congress did not use the phrase "affect commerce" in the FAA, which is "the statutory language Congress normally uses when it wishes to exercise its full powers over commerce."[215] All in all, he believed the majority strayed from the Act's historical origins[216] and purpose.[217]

Justice Black recognized that following *Bernhardt*, the Court was at an analytical crossroad. On the one hand, if the Court were to hold that the FAA is backed by Congress's power "to prescribe general federal law applicable in diversity cases"—a power "widely recognized in 1925 but negated in *Erie*"—then the Act would be "unconstitutional as applied to diversity cases under *Erie* and *Bernhardt*" because *Erie* mandates that a federal court sitting in diversity must apply state substantive law.[218] On the other hand, if the Court were to conclude that the FAA "rested on Congress' power to enact substantive law governing interstate commerce"—meaning that the FAA is a federal statute stemming from Congress's commerce powers—then "the *Erie-Bernhardt* problem would be avoided and the application of the Act to diversity cases involving commerce could be saved."[219] In Justice Black's view, neither option was "clear beyond dispute upon reference to the Act's legislative history."[220] And although the majority adopted the latter approach, it also "ventured one arguably unnecessary step further": it "supplanted *Erie* altogether."[221] Justice Black did not support the majority's

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[212] *Prima Paint*, 388 U.S. at 407–25 (Black, J., dissenting). Justice Douglas, who wrote the majority opinion in *Bernhardt*, joined him.

[213] *Id.* at 409 (Black, J., dissenting).

[214] *See id.* at 406–07.

[215] *Id.*

[216] *Id.* at 410 (Black, J., dissenting) (explaining that the FAA was "designed to provide merely a procedural remedy which would not interfere with state substantive law" yet the *Prima Paint* majority "authorizes federal courts to fashion a federal rule to make arbitration clauses 'separable' and valid").

[217] *Id.* at 423 (Black, J., dissenting) ("The avowed purpose of the Act was to place arbitration agreements 'upon the same footing as other contracts.'"). For example, "[o]n several occasions, [members of Congress] expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power." *Id.* at 414 (Black, J., dissenting).

[218] *Id.* at 417 (Black, J., dissenting) (emphasis added); *see* Erie R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938).

[219] *Id.* (emphasis added).

[220] *Id.* at 417–19.

[221] Matthew J. Stanford, Note, *Odd Man Out: A Comparative Critique of The Federal Arbitration Act's Article III Shortcomings*, 105 CALIF. L. REV. 929, 943 946–47 (2017) (emphasis added). As Justice Black explained, the Congress that enacted the Act "intended no such thing." *Prima Paint*, 388 U.S. at 422 (Black, J., dissenting); *see also* Cohen & Dayton, *supra* note 94, at 276–77 ("So far as the present

decision "that the Act gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means."[222] By failing to limit the Act to "the mere enforcement in federal courts of valid arbitration agreements," Justice Black believed that the conclusion that the Act provides "a body of federal doctrines" created a risk of forum shopping.[223] He noted that these "problems" would be avoidable "if the Act had been limited to its "proper scope."[224]

To summarize, the *Prima Paint* majority did what the *Bernhardt* Court was reticent to do: it held that there was no constitutional problem with applying the FAA in a diversity case involving interstate commerce, even though—as the *Bernhardt* Court had concluded—the FAA is substantive, can be "outcome determinative," and generates an *Erie* problem.[225] *Prima Paint* insulated the FAA from future *Erie* challenges by holding that Congress enacted the FAA pursuant to the commerce power, a "subject matter over which Congress plainly has power to legislate."[226] Pursuant to *Prima Paint*, federal courts are bound to follow the FAA because it is a "rule[] of decision in civil actions in the courts of the United States," pursuant to the Rules of Decision Act.[227]

But *Prima Paint* was not the Court's first wrong turn. *Bernhardt* was. If the Court in *Bernhardt* had held that the FAA is inapplicable in diversity cases because it is outcome-determinative and therefore implicates *Erie*'s guiding principles, then the Court in *Prima Paint* would have been bound by that precedent. The Court never would have had the opportunity to invoke the Rules of Decision Act, anchor the FAA to the Commerce Clause, and immunize the FAA from an *Erie* challenge. To make matters worse, *Prima Paint* was decided after *Hanna*, which meant that *Hanna* was available to the Court as a tool to guide the *Erie* inquiry, but the Court declined to use it. Since *Prima Paint*, the Supreme Court has not directly confronted the FAA's constitutionally significant *Erie* problem.

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law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States.").

[222] *Prima Paint*, 388 U.S. at 422 (Black, J., dissenting).

[223] *Id.* at 424–25 (Black, J., dissenting). The majority in *Bernhardt*, in contrast to the Court in *Prima Paint*, "recogni[zed] that there would be unconstitutional discrimination if an arbitration agreement were enforceable in federal court but not in the state court." *Id.* at 417–18 (Black, J., dissenting) (citing *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 276 (1956)).

[224] *Prima Paint*, 388 U.S. at 425 (Black, J., dissenting).

[225] *Id.* at 401–02; *see Bernhardt*, 350 U.S. at 198. "The Court's basis of decision made it logically inescapable that the [Federal Arbitration Act] governs in state courts as well, and the Court all but said so. It refrained, however, from any dictum to this effect." MACNEIL, *supra* note 90, at 138.

[226] *Prima Paint*, 388 U.S. at 405.

[227] Hirshman, *supra* note 147, at 1321–22; 28 U.S.C. § 1652.

Furthermore, *Prima Paint* made the FAA's place in the greater legal landscape no less of a quagmire.[228] The Court stopped short of suggesting that Congress, via its commerce power, could impose federal substantive law applicable in state courts.[229] Nor did the Court make clear whether the FAA, through the Supremacy Clause, preempts state law. Those questions would remain unanswered for some twenty years—that is, until the Court's decisions in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*[230] and *Southland v. Keating*.[231]

### 3. Moses H. Cone and Southland Provide that the FAA Is Federal Substantive Law, Applies in State Courts, and Preempts Contrary State Law via the Supremacy Clause

"[I]n the 1980s, the Court decided a rash of cases that pushed arbitration into the mainstream" and "backtracked from its view that arbitration was subordinate to the judicial system."[232] First, in *Moses H. Cone*, the Court announced that section 2 of the FAA "create[s] a body of federal substantive law of arbitrability" and that it "is a congressional declaration of a liberal federal policy favoring arbitration agreements."[233]

In *Southland Corp. v. Keating*, the Court built upon its error in *Prima Paint*. Chief Justice Warren Burger, in a 7–2 decision, declared that the FAA applies in state courts and eclipses contrary state law under the Supremacy Clause.[234] "In creating a substantive rule applicable in state as well as federal courts [pursuant to the Commerce Clause], Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[235] The Court then voided a California state statute, holding that

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[228] MACNEIL, *supra* note 90, at 138 (noting the Court's own unwillingness to "express clearly what it had done").

[229] As Linda Hirshman notes, "a substantial number of state courts held that they were bound to apply the FAA," perhaps in part "to avoid the forum shopping that would ensue if a different rule prevailed in state and federal courts." Hirshman, *supra* note 147, at 1326.

[230] Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

[231] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[232] Chandrasekhar & Horton, *supra* note 96, at 12.

[233] Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). As mentioned, this so-called policy, as Justice O'Connor later observed in 1995, is "an edifice of [the Court's] own creation." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

[234] As Professor David Schwartz has noted, however, "[t]he proposition that the FAA preempted any state law that would limit the enforceability of arbitration agreements was brand new." *See* Schwartz, *supra* note 173, at 8. *Southland* "strain[ed] to draw favorable inferences from a legislative history" and "ignor[ed] clear indications that the FAA was not intended to bind the states." *Id.* At the time *Southland* was decided, some states had statutes that made the enforcement of arbitration agreements illegal pursuant to public policy. *Southland* essentially rendered these state statutes invalid.

[235] *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("The statements of the Court in Prima

it conflicted with section 2 of the FAA and therefore "violate[d] the Supremacy Clause."[236]

Ironically, the majority in *Southland* backed its decision by invoking *Erie* concerns: preventing federal courts from deviating from state law in diversity actions.[237] But *Erie* requires federal courts to follow state law in diversity actions.[238] In her dissent, Justice O'Connor remarked that *Erie* "denie[s] the federal government the power to create substantive law solely by virtue of the Article III power to control federal court jurisdiction."[239] It is peculiar, then, that the Court justified the FAA's domination over state law by invoking *Erie*, which stood for the opposite of what the *Southland* Court did.

Furthermore, based on the *Bernhardt* Court's conclusion that arbitration is "outcome-determinative,"[240] the Court in *Southland* should have held that *Erie* compels federal courts in FAA diversity actions to recognize state-granted rights and "abandon the federal statute in favor of state law."[241] Instead, the Court blazed an entirely different path, holding in *Southland* that the FAA displaces state law-making power altogether.[242]

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Paint that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts."). As Ian MacNeil observed, Chief Justice Burger quoted a "quotation within a quotation . . . the House Judiciary Committee Report" which also "in the very same paragraph explicitly stated that the act pertained to questions of procedure to be determined by the forum court and was not substantive law." MACNEIL, *supra* note 90, at 140 (citing H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924)). The Court "conveniently omitted" this context from both *Prima Paint* and *Southland*. *Id.*; *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 417–18 (1967) (Black, J., dissenting). For more on *Southland*'s improper treatment of the FAA's legislative history, Professor MacNeil's book on arbitration provides significant insights. *See* MACNEIL, *supra* note 90, at 140–41.

[236] *Southland*, 465 U.S. at 16.

[237] *Id.* at 15 ("The interpretation given to the Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping."). This is the exact risk Justice Hugo Black recognized in his dissent in *Prima Paint*. *See* discussion *supra* Part II.C.2.

[238] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[239] *Southland*, 465 U.S. at 23 (O'Connor, J., dissenting).

[240] Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956) (citing *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108 (1945)).

[241] Alan H. Molod, Note, *Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 YALE L.J. 847, 847 (1960). As the U.S. District Court for the District of Vermont concluded before the Supreme Court overruled it in *Bernhardt*, the district court was "bound by the substantive law of the state within the boundaries of which it sits" under *Erie* because the case was "based solely on diversity of citizenship." Bernhardt v. Polygraphic Co., 122 F. Supp. 733, 734 (D. Vt. 1954).

[242] Southland Corp. v. Keating, 465 U.S. 1, 17 (1984). As Professor MacNeil wrote, "[o]ne need only read the legislative record of the enactment of the [FAA] to see that the congressmen and senators involved were indeed very concerned not to be seen to be overreaching in exercising federal power." MACNEIL, *supra* note 90, at 146.

Many have criticized *Southland.* Professor Schwartz has suggested that the *Southland* decision is a "latter-day *Swift v. Tyson*"; is "constitutionally dubious"; and raises "serious, unaddressed constitutional doubts."[243] Likewise, Matthew Stanford and David Carrillo argued in 2019 that the Court's "sweeping holding in *Southland* defies th[e] basic presumption" that state law determines the rights and duties of the parties in diversity cases.[244]

As previously mentioned, Justice Frankfurter, in his *Bernhardt* concurrence, was the first member of the Supreme Court to suggest that "it would raise a serious question of constitutional law whether Congress could subject arbitration litigation in the federal courts which is there solely because" of diversity of citizenship "in disregard of the law of the State in which the federal court is sitting."[245] Of course, the Court has "strayed far afield in giving the Act" an even "broad[er] . . . compass" by holding that it applies in state courts.[246] As Justice Black remarked in his dissent in *Prima Paint*, the FAA was "designed to provide merely a procedural remedy which would not interfere with state substantive law."[247]

Justice O'Connor, who joined the Court in 1981, was intensely critical of the Court's FAA jurisprudence, particularly its "judicial revisionism" in *Southland.*[248] She dissented in *Southland*, stating that the Court "utterly fail[ed] to recognize the clear congressional intent underlying the FAA": "Congress intended to require federal, not state, courts to respect arbitration agreements."[249] She reasoned that *Swift v. Tyson* "set up a major obstacle to the enforcement of state arbitration laws in federal diversity courts," a problem that Congress "sought to rectify . . . by enacting the FAA."[250] *Erie* and *Bernhardt* contributed to the solution by "significantly curtail[ing] federal power."[251] She had no problem with the Court's *Prima Paint* decision, which "upheld the application of the FAA in a federal court proceeding as a valid exercise of Congress's Commerce Clause and Admiralty powers."[252] But she was reluctant to support the Court's

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[243] Schwartz, *supra* note 173, at 46–50, 54 ("In *Southland*, the Court made an error of constitutional proportions that is in significant respects comparable to the error of *Swift v. Tyson*, which the Court famously corrected in *Erie*.") (emphasis added).

[244] Matthew J. Stanford & David A. Carrillo, *Judicial Resistance to Mandatory Arbitration as Federal Commandeering*, 71 FLA. L. REV. 1397, 1416 (2019).

[245] Bernhardt v. Polygraphic Co., 350 U.S. 198, 208 (1956) (Frankfurter, J., concurring).

[246] Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

[247] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 411 (1967) (Black, J., dissenting).

[248] Southland Corp. v. Keating, 465 U.S. 1, 36 (1984) (O'Connor, J., dissenting).

[249] *Id.* at 23.

[250] *Id.* at 35.

[251] *Id*.

[252] *Id*. As discussed in Part II.B, however, the legislative history of the FAA does not support the position that the Commerce Clause is the exclusive or primary authority backing the FAA's power. *See*

determination that there is "a federal right in FAA § 2 that the state courts must enforce."[253]

Justice O'Connor is correct to some extent. *Southland* was certainly "unfaithful to congressional intent, unnecessary, and in light of the FAA's antecedents and the intervening contraction of federal power, inexplicable."[254] Against the backdrop of the Act's history, the Court has erred again and again.[255] Justice Scalia, who dissented from the majority in *Allied-Bruce Terminix*, likewise observed that the FAA "entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes."[256] As Professor Schwartz has explained, the Court preempted an area that is traditionally regulated at the state level without any apparent strong federal interest.[257] Nevertheless, the Court has relied on *Southland* in many of its subsequent decisions to displace state law and expand the reach of the FAA.[258]

Before *Southland*, states had the power to void arbitration agreements as a matter of public policy via state statute. The Supreme Court—"in apparent compliance with *Erie*"—believed at that time that state law applies to arbitration agreements in state courts.[259] Moreover, the Supreme Court "narrowly construed" both "the meaning of interstate commerce" and "the applicability of the FAA."[260] "This narrow view of commerce coupled with

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*supra* Part II.B.

[253] *Southland Corp*., 465 U.S. at 35 (O'Connor, J., dissenting) ("Apparently confident that state courts are not competent to devise their own procedures for protecting the newly discovered federal right, the Court summarily prescribes a specific procedure, found nowhere in § 2 or its common law origins, that the state courts are to follow.").

[254] *Id.* at 36.

[255] Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting) ("As I have stated on many previous occasions, I believe that the Federal Arbitration Act (FAA), does not apply to proceedings in state courts.") (internal citations omitted); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285-297 (1995) (Thomas, J., dissenting).

[256] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 284-85 (1995) (Scalia, J., dissenting).

[257] Schwartz, *supra* note 173, at 5 ("Despite its constant, talismanic repetition, the 'national policy favoring arbitration' is illusory and is highly dubious federalism.") (citing *Southland*, 465 U.S. at 10). Professor Schwartz also observed that if Congress intended for the FAA to be procedural law, then the *Southland* Court's invocation of Supremacy Clause as the source authorizing the FAA's preemptive power was erroneous, as was the Court's invocation of Congress's power under the Commerce Clause to make federal substantive law. The Supremacy Clause only gives preemptive power to federal law that is substantive, not procedural.

[258] *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006); Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 689 (1996).

[259] Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 207–08 (2006) (emphasis added).

[260] *Id.* Consider *Wilko v. Swan*, 346 U.S. 427 (1953), a pre-*Southland* decision, in which the Supreme Court held that parties cannot waive their right to adjudicate federal statutory claims in federal court via an arbitration clause. *Id.* at 437. Federal courts understood *Wilko* to preserve claims under ERISA, Title

the *Erie* doctrine forced federal courts to apply state law in diversity cases like *Bernhardt*."[261] But due to the Court's missteps in *Prima Paint* and *Southland*, the FAA, via the Commerce Clause,[262] applies to state court actions affecting interstate commerce, and the Supremacy Clause[263] "preempts any contrary state statute that conflicts with the FAA, because the FAA clearly expresses the intent of Congress to enforce arbitration agreements to the full reach of the Commerce Clause."[264]

*Southland* elicited a significant social response: it "led to cheers from the business community and jeers from the plaintiff's bar and consumer advocacy groups."[265] Nowadays, the business community and conservative scholars praise arbitration for "quick and cheap" dispute resolution, but progressives and other scholars have criticized the "partial privatization" of the civil justice system.[266]

In sum, beginning with *Bernhardt* and *Prima Paint*, the Court unshackled the FAA from its history and context, and "nationalized" it.[267] As a result, an otherwise benign federal statute of limited applicability became the charter for a general law of arbitration. As the next section illustrates, following its enactment, the Federal Arbitration Act's domain ballooned radically and stunted the power of states to develop substantive state contract law, either through legislation or common law rules.[268] As Professors Chandrasekhar and Horton noted in their 2019 article, *Arbitration Nation*, "doctrinal chaos . . . has plagued federal arbitration law."[269] And the Ending Forced Arbitration Act's scope is too limited to make things rights.

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VII, and various other federal statutes, despite arbitration agreements that arguably barred them. *See* Comment, *Arbitration and Title VII Pattern-or-Practice Claims after* Epic Systems, 88 U. CHI. L. REV. 1157, 1171 (2021); *see also* Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201 (2012). But in 1989, the Court overruled *Wilko*, holding that arbitration clauses that require parties to arbitrate claims under the Securities Act of 1933 are enforceable. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485–86 (1989). As a result, now,"the FAA can be used to bar access to courts when individuals claim breaches of federal securities law; when employees allege discrimination on the basis of age; when employees file sex discrimination suits under state law; when consumers assert rights under state consumer protection laws; when merchants allege violations of the antitrust laws; and when family members claim that negligent management of nursing homes resulted in the wrongful deaths of their relatives."
Resnik, *supra* note 143, at 2839.

[261] Dunham, *supra* note 259, at 208 (emphasis added).

[262] U.S. CONST. art. I, § 8, cl. 3.

[263] U.S. CONST. art. VI.

[264] Dunham, *supra* note 259, at 208 (emphasis added).

[265] *Id.* at 213.

[266] Chandrasekhar & Horton, *supra* note 96, at 14.

[267] MACNEIL, *supra* note 90, at 139.

[268] *See* Part II.D, *infra.*

[269] Chandrasekhar & Horton, *supra* note 96, at 3–4.

### *D. The Supreme Court's Endorsement of Adhesive Arbitration in Employee and Consumer Contracts*

The Supreme Court's fifty-plus rulings on the Federal Arbitration Act make the Court's position on arbitration abundantly clear. The Court favors arbitration in most circumstances, if not all.[270] These days, arbitration clauses have snaked far beyond arm's length agreements between businesses.[271] It is now commonplace to see arbitration clauses "buried deep within the fine print of employment and consumer contracts."[272] These clauses—often described as forced arbitration or mandatory arbitration agreements—"deprive[] millions of Americans of their day in court to enforce state and federal rights."[273] For instance, employees alleging discrimination under Title VII or consumers claiming antitrust violations under the Sherman Act can be contractually barred from bringing federal statutory claims in federal court and be forced to submit them to arbitration.[274]

Although some companies have abandoned these clauses in response to social pressure,[275] data from 2017 suggests that "60.1 million workers—the majority of non-union employees in the private sector—have signed away their rights through forced arbitration clauses."[276] The Ending Forced Arbitration Act's potential impact on this data is yet unknown.

In forced arbitration disputes, companies enjoy significant procedural and substantive advantages. Consider, for example, that "the company is entitled to choose the arbitrator who decides the case, as well as the rules of procedure and evidence that apply, and the distribution of costs of the arbitration."[277] They can limit discovery, the protections offered by formal civil procedure rules, access to counsel, and the ability to engage in collective action. Furthermore, in consumer disputes, arbitration clauses can "impose high costs on consumers, such as requiring travel to a distant forum or selection of a high-fee arbitrator—possible expenses which a plaintiff filing in a local court would not have to incur."[278] Companies also avoid "oversight

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[270] CARBONNEAU, *supra* note 91, at 7.

[271] *See* Wilson, *supra* note 108, at 92.

[272] The proliferation of arbitration agreements between businesses and politically powerless parties has long been controversial, and many scholars have criticized the Court's ever-expanding FAA jurisprudence. *See, e.g.,* Wilson, *supra* note 108, at 91; David S. Schwartz, *If You Love Arbitration, Set it Free: How 'Mandatory' Undermines 'Arbitration'*, 8 NEV. L. J. 400 (2007); 2022 House Report, *supra* note 92, at 3.

[273] 2022 House Report, *supra* note 92, at 7.

[274] *Id.* at 5.

[275] *Id.* at 11.

[276] *Id.* at 9.

[277] *Id.* at 4.

[278] *Id.* at 5 n.12.

and accountability."[279] Workers who are bound by forced arbitration tend to lose in arbitration or receive lower awards than they would in court.[280] Many do not bother bringing their claims at all.[281] Recent research from Professor David Horton suggests the existence of a new troubling phenomenon in this area: "infinite arbitration clauses."[282] These clauses affect disputes outside of the original transaction or contract by "extend[ing] beyond the original contractual partners."[283]

Initially, states attempted to legislate around the Federal Arbitration Act and state courts invoked state common law rules to invalidate unfair arbitration clauses, but the Supreme Court's increasingly favorable view of arbitration has debilitated these efforts.[284] For instance, consider the Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*,[285] in which the Court announced the FAA's limitation on states' ability to police arbitration agreements. In that case, the Court determined that the FAA preempted California's common law rule—the *Discover Bank* rule[286]—a state doctrine that allowed for the invalidation of class-arbitration waivers in adhesive contracts as unconscionable under certain circumstances.[287] Section 2 of the FAA's saving clause,[288] which "explicitly saves all generally applicable state laws,"[289] would arguably permit a California common law rule to invalidate an arbitration clause. But *Concepcion* rendered arbitration provisions "bulletproof" against state contract law.[290] Indeed, *Concepcion*[291] "dealt a significant blow to the savings clause" and "subverted Congress's…purpose" of putting arbitration on "equal footing" with other contracts.[292] "As a result, generally applicable state-law doctrines that should

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[279] *Id.* at 6.

[280] *See* Theodore Eisenberg, Geoffrey P. Miller, & Emily Scherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 873, 873 n. 7 (2008).

[281] *Id.* at 9–10.

[282] David Horton, *Infinite Arbitration Clauses*, 168 PENN. L. REV. 633 (2020).

[283] *Id*. at 639–40.

[284] *See* Stanford & Carrillo, *supra* note 244, at 1402 (explaining that "state statutes like the [California Arbitration Act], and state contract law in general, have faded into irrelevance" because they live in the FAA's "preemptive shadow, and the basic conflict between FAA preemption and state contract law continues"); David Horton, *An Empirical Study of Consumer Arbitration*, 104 GEO. L. J. 57, 59–60 (2015) ("[U]ntil 2011, over a dozen jurisdictions refused to enforce class arbitration waivers when plaintiffs asserted numerous low-value claims.").

[285] AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

[286] Discover Bank v. Superior Court, 113 P.3d 1100, 1108-09 (Cal. 2005).

[287] *Discover Bank*, 113 P.3d at 1110.

[288] *See* 9 U.S.C. § 2 (2018).

[289] Wilson, *supra* note 108, at 127.

[290] Horton, *supra* note 100, at 633.

[291] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)

[292] *See* Wilson, *supra* note 108, at 138.

be protected by the savings clause are now at risk if they interfere with the Court's newly established policy of promoting arbitration as a streamlined proceeding."[293]

The Court did not stop there. In 2013, the Court issued *American Express Co. v. Italian Colors Restaurant*,[294] which provides that an arbitration clause prohibiting class actions is enforceable even if its enforcement frustrates vindication of another federal statute. In that instance, the federal law in question was the Sherman Antitrust Act.[295] Because of *Italian Colors*, individual plaintiffs must pursue their "small-dollar" lawsuits through individualized arbitration. Soon after the Court decided *Italian Colors*, the *New York Times* launched an investigation into the "soaring number" of individual arbitration clauses in consumer and employment agreements, describing them as "a far-reaching powerplay orchestrated by American corporations" to "circumvent the courts and bar people from joining together in class-action lawsuits," which are "realistically the only tool citizens have to fight illegal or deceitful business practices."[296]

Most recently, in *Viking River Cruises, Inc. v. Moriana*, the Supreme Court yet again rejected a California state rule because it interfered with the FAA's goals.[297] An employee sued a former employer under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"),[298] alleging both an individual claim (for failure to timely pay her final wage) and representative claims (based on Labor Code violations allegedly suffered by other employees). In short, PAGA delegates to employees the power to assert the same legal right and interest as state law enforcement agencies. The former employer moved to compel arbitration but the California courts held that PAGA claims cannot be split into arbitrable "individual" claims and non-arbitrable "representative" claims.[299] In other words, a California rule would preserve the employee's right to pursue the aggregate claims under PAGA. The Supreme Court held that the Federal Arbitration Act preempts California's rule—insofar as it imposes an aggregation device on parties to an agreement requiring individual arbitration.[300] Unsurprisingly, the Court faced backlash for yet another decision that placed a thumb on the scale for

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[293] *Id.*

[294] 570 U.S. 228 (2013).

[295] 15 U.S.C. § 1 (2018).

[296] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html https://perma.cc/33DE-BYCV.

[297] Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (U.S. June 15, 2022).

[298] CAL. LAB. CODE § 2698 *et seq.*

[299] *Viking River Cruises*, 142 S. Ct. at 1916.

[300] *Id.* at 1924–25.

employers,[301] although the Court's decision left room for California to modify the scope of statutory standing under PAGA.

To be sure, the Supreme Court also announced some limits on the FAA during the most recent term, although it "won't heal all the wounds inflicted by" the Court's arbitration jurisprudence.[302] *Morgan v. Sundance* concerned an employee's Fair Labor Standards Act ("FLSA")[303] class action lawsuit against her employer, Taco Bell, in which she alleged wage theft.[304] Upon hiring, the employee, Robyn Morgan, had agreed to arbitrate any employment dispute, but she filed a nationwide class action alleging that Taco Bell violated federal law by denying its employees overtime payment. The employer initially litigated the employee's lawsuit, but eight months in, it moved to stay the litigation and compel arbitration. Morgan opposed the motion, arguing that the employer had waived its right to arbitration by litigating in court for so long. The lower court, the U.S. Court of Appeals for the Eighth Circuit, adopted an arbitration-specific waiver rule that conditioned the employer's waiver of the right to arbitrate on a showing of prejudice. The Supreme Court rejected this approach and reversed and remanded the Eighth Circuit's decision. Justice Kagan, writing for the majority, held that the FAA does not authorize federal courts to create an arbitration-specific procedural rule.[305] Likewise, in *Southwest Airlines Co. v. Saxon*,[306] a unanimous ruling, the Court reiterated that the FAA exempts a narrow class of employees: those "engaged in foreign or interstate commerce."[307]

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[301] Hugh Baran, *The Supreme Court Screwed Over Workers Again—but Not As Badly As It Could Have*, SLATE (June 17, 2022, 10:19 AM), https://slate.com/news-and-politics/2022/06/viking-river-cruises-supreme-court-arbitration-wage-theft.html [https://perma.cc/PUU3-TQ2N].

[302] Mark Joseph Stern, *SCOTUS Just Handed Workers Who Sue Their Employers a Surprising, Unanimous Win*, SLATE (May 24, 2022, 2:14 PM), https://slate.com/news-and-politics/2022/05/morgan-sundance-arbitration-supreme-court.html [https://perma.cc/VNZ8-89Z5].

[303] 29 U.S.C. § 201 (2018).

[304] Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022).

[305] *Id.* at 1710.

[306] Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022).

[307] *Id.* at 1788–90. To be sure, although the FAA purportedly exempts a broad swath of employees from the FAA's coverage, *see* 9 U.S.C. § 1, the Supreme Court's understanding of the relevant class of workers covered by section 1 is quite narrow. In *Saxon*, for example, the Court held that airplane employees who physically load and unload cargo on and off planes traveling in interstate commerce are "engaged in foreign or interstate commerce" under section 1 of the Act. But the Court rejected the employee's proposal to define the "class of workers" exempt from the FAA broadly to include other airline employees who carry out the "customary work" of the airline, not just cargo loaders. *Id.* at 1790–91. Given the broad reach of Congress's commerce power identified in the Court's constitutional jurisprudence, *see* United States v. Lopez, 514 U.S. 549, 555–56 (1995), it is peculiar that the Court construes the class of workers who are "engaged in foreign or interstate commerce" under the FAA so narrowly.

As discussed in Part I.A, *Swift* generated significant backlash. Defenders of states' rights characterized it "as an illegitimate doctrine of national power."[308] Professor Purcell observed that *Swift*'s "paramount political flaw was its elevation of the judiciary over the legislature."[309] In *Erie*, Justice Brandeis reasoned that *Swift* was "an unconstitutional assumption of powers"[310] by the federal courts. In the arbitration context, I believe the Court has done much the same. Beginning with *Bernhardt*[311] and *Prima Paint*,[312] through *Southland*,[313] as well as more recent cases like *Concepcion*[314] and *Italian Colors*,[315] I believe the Court has unilaterally transformed the Federal Arbitration Act from a procedural statute into a *Swift*-like substantive general law arbitration doctrine.

## III. "DEFECTS, POLITICAL AND SOCIAL": THE ADVENT OF A FEDERAL GENERAL COMMON LAW OF ARBITRATION

The Court's FAA's jurisprudence rests on three key problems, each of which stands in parallel to the defects of *Swift.* First, the Supreme Court has transformed the Federal Arbitration Act—a legal tool designed to resolve commercial disputes between sophisticated parties—and misread it in a way that has significantly expanded federal judicial power. As the *Swift* Court once did with the Rules of Decision Act,[316] the Court has yet again misemployed a federal statute and, absent congressional authorization, expanded the role of the federal judiciary.[317] Consider that Justice Story, who wrote the *Swift* opinion, explained that the federal courts, via *Swift*, could be "expositors of a national commercial law" that would "help immunize the national economy from provincial regulation."[318] Likewise, through its

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[308] PURCELL, BRANDEIS, *supra* note 20, at 67.

[309] *Id.* at 165.

[310] Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

[311] Bernhardt v. Polygraphic Co., 350 U.S. 189 (1956).

[312] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[313] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[314] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[315] American Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013).

[316] 28 U.S.C. § 1652 (2018) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.")

[317] Circuit City Stores v. Adams, 532 U.S. 105, 132 (2001) (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.")

[318] Marcus, *supra* note 19, at 1267. Many judges, including Justice Story had "faith in the federal courts as engines of economic development." *Id.* at 1266. As Professor Marcus has noted, this belief "rested on a venerable assumption that these judges appreciated that they had a certain role to play as

Article III powers, Congress enacted the FAA to make arbitration available as a procedural/remedial mechanism for sophisticated commercial parties to resolve business disputes. But just as the Supreme Court expanded the *Swift* doctrine beyond its commercial context and procedural purpose, the Supreme Court has dragged the FAA away from its historical, legislative, procedural, and textual context by declaring that it is federal substantive law backed by Congress's commerce powers. The Supreme Court believes the Federal Arbitration Act is federal substantive law[319] enacted pursuant to Congress's power under the Commerce Clause[320] that applies in federal *and* state courts.[321] Further, the Court has decided that the FAA preempts contrary state law via the Supremacy Clause.[322] But the Court's determination that the FAA possesses these attributes is belied by both the text[323] and legislative history[324] of the FAA. To start, the Act includes a "saving clause"[325] that expressly preserves generally applicable defenses under state contract law. But the Court has reduced that clause to a "fiction"[326]; state contract law principles and defenses cannot be used to invalidate arbitration clauses at all.[327] Further, the historical record makes clear that Congress enacted the FAA as a procedural/remedial device that put arbitration clauses on equal footing as other contracts—not a set of substantive rules of decision.[328] Consider, for example, that the Act does not independently confer federal question jurisdiction.[329]

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guarantors of a national free market." *Id.*

[319] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[320] U.S. CONST. art. I, § 8, cl. 3; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[321] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[322] U.S. CONST. art. VI; *Southland*, 465 U.S. at 16.

[323] *See* 9 U.S.C. § 2 (2018) ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, *save upon* such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.") (emphasis added).

[324] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 420 (1967) (Black, J., dissenting).

[325] 9 U.S.C. § 2 (2018).

[326] Stanford & Carrillo, *supra* note 244, at 1406.

[327] *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011) (holding that "nothing in [the saving clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives"); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

[328] *See* H.R. REP. NO. 68–96, at 2 (1924); Wilson, *supra* note 108, at 138.

[329] 28 U.S.C. § 1331 (2018) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *see* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 422 (1967) (Black, J., dissenting); *see* Stanford & Carrillo, *supra* note 244, at 1408 (describing the FAA as a "jurisdictional anomaly" because it "does not provide a basis for federal jurisdiction, so there is no substantive federal law claim for an FAA violation"); *see also* Stanford, *supra* note 221, at 943 ("The absence of an independent jurisdictional basis in the FAA poses significant federalism concerns--particularly those interests at issue in *Erie* . . . [which provides] that the federal

Second, the Court has subverted states' law-making power and regulatory autonomy in contract/arbitration law in violation of the statute and its context. Just as the *Swift* doctrine enabled federal courts to develop general law that covered subjects traditionally within the states' domain, the Court, in the context of the FAA has likewise upset the constitutional balance of federalism between state and federal courts. The Court's interpretation of the federal arbitration statute ensures that the FAA applies in both state and federal forums *and* preempts any contrary state law via the Supremacy Clause. In so doing, the Court has nullified the FAA's saving clause. All of these features obstruct the applicability of state contract law not only in federal diversity cases, but also in state courts adjudicating disputes based on state substantive law.

Third, the Court has created procedural and substantive litigation benefits for corporate actors and disadvantages for politically powerless groups. The Court has held that the FAA governs not only business agreements between sophisticated commercial actors, but also take-it-or-leave-it consumer contracts and employment agreements. Precedent in this area is exceedingly business-friendly: it protects corporate interests at the expense of politically powerless groups like workers and consumers, especially in the context of mandatory pre-dispute arbitration agreements.[330] But Congress never intended for the Act to cover agreements between parties with unequal bargaining power.[331] In this regard, the Court's arbitration law has generated an overwhelmingly negative response. In a 2019 survey, for example, 84% of Americans—"across the political spectrum"—"support ending forced arbitration in employment and consumer disputes."[332] The

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government cannot not use the accident of diversity jurisdiction as a basis for making substantive law."); *see also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) ("[t]he Arbitration Act is something of an anomaly in the field of federal-court jurisdiction" because "[i]t creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction . . . or otherwise"); Vaden v. Discover Bank, 556 U.S. 49, 59 (2009) ("Given the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate.").

[330] DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 67 (2015) (Ginsburg, J., dissenting) (lamenting that the Court has used the FAA to deny employees and consumers "effective relief against powerful economic entities that write no-class arbitration clauses into their form contracts"); Lamps Plus v. Varela, 139 S. Ct. 1407, 1421 (2019) (Ginsburg, J., dissenting) ("Propelled by the Court's decisions, mandatory arbitration clauses in employment and consumer contracts have proliferated.").

[331] *Prima Paint*, 388 U.S. at 414 (Black, J., dissenting) ("On several occasions [the members of Congress] expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power."); *Lamps Plus*, 139 S. Ct. at 1420 (2019) (Ginsburg, J., dissenting) ("emphasizing once again how treacherously the Court has strayed from the principle that arbitration is a matter of consent, not coercion") (internal quotation marks and citation omitted).

[332] 2022 House Report, *supra* note 92, at 10.

Court's FAA case law has also generated significant social and political backlash, just as the *Swift* doctrine did.[333]

### *A. Linking Swift to the FAA*

In *Swift*, the Court misread section 34 of the Judiciary Act of 1789 in a way that ultimately enhanced federal judicial power. Although the extent to which *Swift* misread the Rules of Decision Act is a subject for debate, there is no question that the Supreme Court went far beyond what Justice Story intended. The *Swift* doctrine (1) brought areas of law traditionally reserved to the states within the domain of general law, (2) upset federalism principles by encroaching on states' authority to make substantive state law, and (3) encouraged business-friendly legal outcomes in disputes between parties with unequal power. The Court's FAA jurisprudence is a kind of general law of arbitration that has done what *Swift* eventually did. In that sense, linking the *Swift* and FAA regimes is important: the Supreme Court has twice aggrandized power to support a policy that cannot be found in the statutes that supposedly give rise to that power.

With respect to the FAA, the case is even stronger. As explained in Part II, there is no historically sound argument to support the Court's "liberal federal policy" favoring arbitration.[334] Rather, in enacting the FAA, the Act's drafters and the Congress made the intent of the statute clear: the FAA is a procedural/remedial device, not substantive law.[335] There is no evidence that Congress intended for it to apply in state courts. Congress did not plan to intrude on states' ability to make contract law either, as evidenced in part by its choice to expressly say so in the saving clause.[336] Moreover, contrary to the Court's assessment, the Commerce Clause is not the FAA's foremost constitutional source. Rather, the FAA primarily "rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."[337] Congress intended for the Act to apply to "relatively evenly-matched commercial partners."[338] But the Act today

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[333] *See, e.g.*, Greenberg & Gebeloff, *supra* note 296.

[334] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[335] Cohen & Dayton, *supra* note 94, at 275–76 ("[W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought.").

[336] *Id.* at 276 ("It is [not an] infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure, whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made.").

[337] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 418 (1967) (Black, J., dissenting).

[338] Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration is Re-Shaping its Form and Blurring the Line between Private and Public Adjudication*, 18 NEV. L.J. 381, 393 (2018).

covers the disputes of "*unequal* employees and employers, consumers and corporations, and patients and health care providers."[339] Indeed, the FAA reaches take-it-or-leave-it contracts between employees/consumers and big businesses, not just arbitration agreements between evenly-situated merchants. The Court's FAA doctrine thus limits opportunities for parties with relatively little bargaining power to achieve judicial relief. All in all, what the Court has derived from the so-called national policy favoring arbitration[340] was created from whole cloth.

Some may argue that the Court's Federal Arbitration Act jurisprudence is more like the new *Lochner*[341] than it is the new *Swift*.[342] As mentioned in Part II.B, during the *Lochner* era—which spanned the 1900s to the 1930s—the Supreme Court led a judicial resistance to progressive legislation and insulated businesses from regulation."[343] The federal courts struck down progressive economic and social legislation (at both the state and federal levels), based on both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.

In my view, the FAA is much closer to *Swift* than it is to *Lochner*, although there are significant similarities. In both regimes, the Court's (1) vast expansion of federal judicial power, (2) subversion of states' law-making authority and regulatory autonomy, and (3) oppression of groups (workers and consumers) with less political power than corporations flows from the misreading of a federal statute.[344]

### *B. Federal Judicial Power in the Swift Doctrine and the Federal Arbitration Act*

There is some irony in the Supreme Court's federal arbitration jurisprudence. For instance, there is certainly some force to the argument that the Court's interpretation of the FAA has actually limited, not expanded, the law-making power of the federal courts because it has taken the power to adjudicate arbitration disputes out of the court system altogether. Indeed, what supporters of a robust interpretation of the FAA could say is that the Court's jurisprudence puts the power into the hands of those with freedom to contract. Thus, in contrast to the *Swift* regime—which lodged power in the

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[339] *Id.* (emphasis in original).

[340] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

[341] Lochner v. New York, 198 U.S. 45 (1905); Schwartz, *supra* note 173, at 21, 21 n.104.

[342] *See, e.g.*, Neuborne, *supra* note 126, at 183, 214.

[343] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

[344] In response to Justice Ginsburg's claim that the Court was trying to return "to the Lochner era when this Court regularly overrode legislative policy judgments," Justice Gorsuch retorted that "like most apocalyptic warnings, this one proves a false alarm." *Id.* at 1630

hands of federal judges because they could be trusted to support corporate interests—the FAA doctrine takes the power away from federal judges and puts it into the hands of arbitrators. Why would a pro-corporate Supreme Court take away the power of federal courts to decide cases? I believe the answer lies in the procedural and substantive litigation benefits that corporate defendants enjoy under the Supreme Court's current arbitration regime.

To be sure, I do not necessarily disagree that by expanding the FAA, the Court has expanded the domain of arbitration tribunals, which, in some ways, limits federal judicial power in the arbitration realm. At the same time, though, the Court has used a federal arbitration policy of its own creation to curb the power of states to legislate in the area of contract law. As mentioned, the FAA's "saving clause" was designed to preserve general state contract-law defenses to arbitration agreements, but this clause has lost significant legal force.[345] In the current environment, corporate defendants who impose mandatory arbitration agreements on consumers and employees enjoy the benefits of a federal arbitration doctrine that trumps any and all attempts by states to undermine adhesive arbitration agreements.

All of this reflects a *Swift*-like aggrandizement of federal judicial power. There is no question that the FAA's questionable applicability is traceable to the Court's reliance on its own judicial power, not the statutory text or any legislative command from Congress. I reject, therefore, the notion that the Supreme Court's federal arbitration regime takes the power out of federal courts. I believe the *Swift* doctrine and the Court's FAA jurisprudence have certainly affected federal judicial power differently, but the consequences of both doctrines are eerily similar: the Supreme Court, without any congressional authorization, has subordinated state law for the benefit of politically powerful corporate defendants.[346] Worse, the FAA's effects go beyond what *Swift* did because the *Swift* doctrine only applied in federal court.[347] In FAA cases, the outcomes do not vary "according to whether

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[345] Schwartz, *supra* note 173, at 15–16 ("Some state courts, made skittish by the federal preemption issue looming around them, have tended to apply federal law to resolve state-law contract questions such as unconscionability.").

[346] The Court's FAA jurisprudence may be part of a broader pattern of "hostility to litigation in a number of procedural areas." *See* Pamela K. Bookman, *The Arbitration- Litigation Paradox*, 72 VAND. L. REV. 1119, 1121, n.9, 1143–45 (2019) (citing Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1097 (2006)).

[347] In contrast, during the *Swift* era, "common law rules were formally state law," so "the Supreme Court could not impose its general common law on the state courts." PURCELL, LITIGATION, *supra* note 21, at 61. "Hence, there was no judicial authority in either the states or the nation capable of reconciling divergent views or compelling uniformity in the common law decisions of the federal and state courts." *Id.*

enforcement [is] sought in the state or in federal court."[348] Backed by the Commerce Clause and Supremacy Clause, the Court's arbitration doctrine forces the same outcome in both federal and state forums.

### *C. Constitutional Concerns with the Supreme Court's FAA*

The Court's FAA jurisprudence also presents constitutional problems that are reminiscent of the *Swift* regime.[349] The Court believes that the FAA authorizes the federal courts to annex state contract law – a subject that is outside of Congress's legislative authority – and to force the application of the FAA in state courts. I am not the first to suggest that the Court's constitutional errors—particularly in *Southland*—are comparable to the *Swift* doctrine.[350]

Some may argue that when it comes to the constitutionality of the Court's federal arbitration doctrine, the text of the statute is paramount.[351] But no interpretation of the statutory text supports the Court's arbitration regime. As mentioned, the FAA's saving clause in section 2 specifically preserved states' power to nullify arbitration agreements,[352] but the Supreme Court read that provision out of the statute.[353] There is no question that state contract law—including defenses against contract enforcement—is not an area "within national legislative power" where federal courts may fill "interstices" or "fashion federal law."[354]

With respect to legislative history, the FAA we see today would be unrecognizable to its drafters and the Congress that enacted it. The

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[348] *Id.* at 74–75.

[349] As a reminder, the *Erie* Court concluded that *Swift* was unconstitutional because the Court's interpretation of section 34 of the Judiciary Act of 1789 enabled the federal courts to make law in areas outside of Congress's legislative authority. *See* Schwartz, *supra* note 173, at 47.

[350] *Id.* at 16 ("[S]ome courts in FAA cases have simply ignored applicable state-law principles and applied a general federal contract law reminiscent of the era of Swift v. Tyson"). Professor Schwartz has written about how significantly *Southland* intruded on state sovereignty and "authorize[d] the creation of a body of federal common law" that "cuts deeper" into state law-making power than *Swift* because of its preemptive effects. *Id.* at 13, 54.

[351] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (reasoning that the FAA's "purpose is readily apparent from the FAA's text").

[352] 9 U.S.C. § 2 (2018).

[353] *See* Wilson, *supra* note 108, at 125 ("the Court's purpose analysis focused on the policy favoring arbitration and the presumed purpose of arbitration agreements" and the Court did not "consider the effect of the savings clause on the purpose of the statute"). "The conundrum here is that the Court identified an overarching purpose [of the statute] without considering the full text of section 2, specifically without considering the savings clause." *Id.* "Then, the Court refused to apply the savings clause because doing so would conflict with that statutory purpose." *Id.* "In effect, the Court wrote the savings clause out of the FAA for purposes of its preemption analysis." *Id.*

[354] Friendly, *supra* note 46, at 407 ("federal courts now conform to state decisions on issues properly for the states. . . ."). *See id.* at 421-22.

legislative record makes clear that the Court is not "in pursuit of the legitimate end of effectively utilizing a [congressionally] granted power."[355] There is no evidence whatsoever that via the FAA, "Congress, by virtue of the supremacy clause . . . completely oust[ed] the states from areas normally reserved to them."[356] Under the doctrine of preemption, which comes from the Supremacy Clause,[357] federal law displaces state law, even when they conflict. Moreover, as mentioned, the Congress that enacted the FAA considered it to be federal procedural law, which as a general matter, cannot preempt state law the way that federal substantive law can under the Supremacy Clause.[358] Perhaps the Court believed decisions like *Prima Paint* and *Southland* were necessary ones because they spoke more definitively on the FAA's constitutional status than *Bernhardt* did. At any rate, the Supreme Court elevated arbitration far beyond Congress's statutory objectives.[359]

All in all, there is no evidence that the "basic scheme of the Constitution . . . demands" the FAA jurisprudence we see today.[360] Essentially, the Supreme Court "establish[ed] a second legal system"* of "matters not otherwise of federal concern"[361] and, by doing so, impaired the states' power to apply their own contract law.[362] Thus, the Court's arbitration law "is not a legitimate end within the scope of the Constitution."[363] It "frustrate[s] the ability of the states to make their laws fully effective in areas generally reserved to them" and it is therefore "inconsistent with the constitutional plan."[364]

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[355] *Id.*

[356] *Id.*; *see* Southland Corp. v. Keating, 465 U.S. 1, 35 (1984) (O'Connor, J., dissenting) ("Apparently confident that state courts are not competent to devise their own procedures for protecting the newly discovered federal right [in FAA § 2], the Court summarily prescribes a specific procedure, found nowhere in § 2 or its common law origins, that the state courts are to follow.").

[357] U.S. CONST. art. VI.

[358] Dunham, *supra* note 259, at 208–09 ("the dissenting opinions of Justice Stevens, Justice Rehnquist and Justice O'Connor in Southland pointed out the fact that the FAA's history was purely procedural").

[359] Hensler & Khatam, *supra* note 338, at 389. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) ("the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so").

[360] *Id.* at 408 n.119, 421–22.

[361] Friendly, *supra* note 46, at 394.

[362] *Id.* at 397 n.68.

[363] *Id.*

[364] *Id.*

## IV. THE ROAD AHEAD: ABROGATING THE COURT'S FEDERAL GENERAL COMMON LAW OF ARBITRATION[365]

"Under our constitutional system," Justice Hugo Black wrote in *Chambers v. State of Florida*,[366] "courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, [or] outnumbered. . . ."[367] But the Court's FAA case law upsets our constitutional balance. It worries scholars, judges, and Supreme Court justices alike.[368] Indeed, several justices have expressed their discontent with the "destructive result[s]" of the Court's FAA jurisprudence.[369] "[A] number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration."[370] "In a sense, therefore, the Court is standing on its own shoulders[.]"[371] "There is little doubt that the Court's interpretation of the Act has given it a scope far beyond the expectations of the Congress that enacted it."[372] What can be done to abrogate the Supreme Court's unconstitutional federal general common law of arbitration?

Suppose an Illinois-based consumer, Plaintiff X, files a lawsuit in Illinois state court against a California business, Defendant Y. Plaintiff X asserts two claims: (1) a breach of contract claim and (2) a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act.[373] (Let's assume that Defendant Y is subject to specific personal jurisdiction in Illinois.) Because the amount in controversy exceeds $75,000 and the parties are diverse, Defendant Y files a motion to remove the case to federal district court. The case is then removed to the United States District Court for the Northern District of Illinois.

For purposes of this exercise, it is important to note that under the Supreme Court's current FAA regime, removal would technically make no difference. Because the Supreme Court held in *Southland* that the FAA

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[365] Justice Ginsburg described the Court's FAA case law as a "federal common law of arbitration contracts." Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1428 (2019) (Ginsburg, J., dissenting).

[366] Chambers v. State of Florida, 390 U.S. 227 (1940).

[367] *See id.* at 241.

[368] Resnik, *supra* note 143, at 2809–10 (suggesting that the Supreme Court's arbitration decisions have created an "unconstitutional system" "in which state-enforced dispute resolution is outsourced to hundreds of unregulated providers whose rules are hard to find, processes generally closed, and outcomes difficult to know").

[369] *See, e.g.*, Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1642–43 (2018) (Ginsburg, J., dissenting).

[370] Circuit City Stores v. Adams, 532 U.S. 105, 131–32 (2001) (Stevens, J., dissenting).

[371] *Id.* at 132.

[372] *Id.*

[373] 815 Ill. Comp. Stat. §§ 505/1–12.

applies in state courts and *Concepcion* stunted the saving clause, states have extremely limited power to work around the FAA. In other words, the Illinois courts are obliged to apply the FAA.

Next, Defendant Y files a motion requesting that the Court stay litigation and compel arbitration, pursuant to section 3 of the FAA.[374] In support of its motion, Defendant Y files a brief in which it argues that the dispute is covered by the FAA because Plaintiff X is bound by a mandatory pre-dispute arbitration agreement. Defendant Y cites *Southland* for the proposition that Illinois state law is inapplicable to the dispute.[375] Defendant Y also cites *Concepcion* and argues that no Illinois state contract law defense can save Plaintiff X's lawsuit.[376] In sum, Defendant Y urges the District Court to stay litigation and compel arbitration, pursuant to section 3 of the FAA, notwithstanding contrary state law.[377]

Plaintiff X opposes the motion. Plaintiff X invokes the *Erie* doctrine, arguing that there is a clash between federal law (the FAA) and Illinois state contract law. Because the dispute is in federal court on diversity grounds and involves state law claims, the District Court is obligated to apply Illinois contract law. Plaintiff X contends that Defendant Y's reliance on *Southland* and *Concepcion* is misguided because both cases constitute federal judge-made law.

First, Plaintiff X contends that *Southland*'s holding—that the FAA is federal substantive law that eclipses contrary state law—is a judge-made doctrine, belied by both the legislative history and statutory text of the Federal Arbitration Act. Plaintiff X also contends that *Southland* is inconsistent with *Bernhardt*, past FAA precedent that provides that arbitration "substantially affects the cause of action created by the state" and can be outcome-determinative.[378]

Next, Plaintiff X argues that the saving clause in section 2 of the FAA calls for the application of Illinois's judicial rule of unconscionability, which would invalidate the parties' mandatory pre-dispute arbitration agreement.

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[374] 9 U.S.C. § 3 (2018).

[375] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[376] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) ("Although § 2's savings clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.").

[377] 9 U.S.C. § 3 (2018).

[378] Bernhardt v. Polygraphic Co., 350 U.S. 198, 203-04 (1956) ("We agree with [the U.S. District Judge who decided the case in the federal district court] that if arbitration could not be compelled in the Vermont courts, it should not be compelled in the Federal District Court.") (quoting Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945)). In a later FAA decision, Justice O'Connor recalled that "*Bernhardt* held that the duty to arbitrate a contract dispute is outcome-determinative—*i.e.*, 'substantive'—and therefore a matter normally governed by state law in federal diversity cases." Southland Corp., 465 U.S. at 23 (O'Connor, J., dissenting).

Plaintiff X cites *Doctor's Associates, Inc. v. Casarotto*,[379] a case in which the Supreme Court held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."[380] As such, Plaintiff X contends that *Concepcion* is federal judge-made law that contravenes not only the text of the FAA, but also past FAA precedent, including the *Casarotto* case.[381] In sum, Plaintiff X characterizes the Court's arbitration doctrine as "an edifice of its own creation,"[382]—i.e., judge-made law—that is unsupported by the legislative record and the statutory text. Plaintiff X also borrows Justice Barrett's language and argues that the federal common law of arbitration we see today emerged from the "shadows" of the FAA and "advances a judicial policy choice."[383] This common law of arbitration, in Plaintiff X's view, does not fall within any designated enclave of federal common law.[384] In short, Plaintiff X urges the District Court to apply Illinois law and adjudicate the state law claims because federal common law cannot "survive *Hanna*'s modified outcome-determination test in a diversity case."[385]

Unfortunately, the District Court would most likely stay litigation and refer the case to arbitration pursuant to section 3 of the FAA.[386] Even if the judge is sympathetic to the argument that *Southland* and *Concepcion* constitute a sort of federal common law that is (1) unsupported by the Act's legislative history and text and (2) inconsistent with past FAA precedent, both *Southland* and *Concepcion* are nevertheless binding on the District Court. In the District Judge's view, if the Supreme Court held the FAA is substantive law that applies in federal *and* state courts, then it can never be the source of an *Erie* problem. Indeed, as mentioned, even if Defendant Y had not attempted to remove the case, Illinois state law would have never controlled the dispute because the Illinois court would have been obligated to apply the FAA, even though the lawsuit exclusively concerns state contract law and a state consumer protection statute.

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[379] Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996).

[380] *Id.* at 687.

[381] Stanford & Carrillo, *supra* note 244, at 1406.

[382] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

[383] Barrett, *supra* note 18, at 822; *Circuit City Stores v. Adams*, 532 U.S. 105, 133 (2001) (Stevens, J., dissenting) ("When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences.").

[384] *See id.*

[385] Burbank & Wolff, *supra* note 18, at 47; *see* Hanna v. Plumer, 380 U.S. 460, 471 (1965) (describing the clash between state law and judge-made law as the "typical, relatively unguided Erie Choice" under the Rules of Decision Act, as opposed to a clash between a Federal Rule and state law); *see* Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in Erie Cases*, 44 AKRON L. REV. 1067, 1069 (2011).

[386] 9 U.S.C. § 3 (2018).

Let's nevertheless presume that things go differently than expected. Suppose the District Judge agrees with the notion that the Supreme Court's arbitration jurisprudence—in this case, specifically the *Southland* and *Concepcion* decisions—are federal judge-made law. The District Judge concludes that applying *Southland–Concepcion* would obligate the District Court to stay litigation and compel arbitration. In contrast, application of Illinois state law would allow the lawsuit to proceed. Accordingly, there is an *Erie* problem.

The District Judge would then apply *Hanna*'s modified outcome-determinative test and resolve the *Erie* problem in the context of "the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[387] Recall that in *Bernhardt*, the Court determined that under *Guaranty Trust v. York*'s outcome-determinative test, the application of the FAA would result in a different outcome than the application of the state statute.[388]

The District Judge could reason that if it had not been for the *Southland* doctrine, then the FAA would have never applied in state courts or eclipsed contrary state law under the Supremacy Clause. And if it weren't for *Concepcion*, then state contract law defenses would, for the most part, remain applicable in an FAA dispute in federal court so long as they fall within the ambit of the saving clause in section 2. Together, the *Southland–Concepcion* doctrine forecloses the application of Illinois state law in state and federal forums. Admittedly, then, the *Southland–Concepcion* doctrine does not actually implicate any forum shopping problems because it forces the application of the FAA in federal and state courts alike.

Nevertheless, the District Judge may conclude that there is no doubt that the *Southland–Concepcion* doctrine results in the inequitable administration of the laws because it (1) blocks states from legislating to protect consumers and employees and (2) bars state tribunals from developing the common law of contract. Even so, the District Judge would likely conclude that they are bound by Supreme Court precedent in *Southland*, *Concepcion*, and so forth.

The sole source of the *Southland–Concepcion* doctrine is the Supreme Court, not Congress. Accordingly, I believe it would be defensible for the District Court to apply Illinois state law and reject *Southland–Concepcion* as judge-made law that offends *Erie*. If a ruling of that nature made its way to the Supreme Court, though, the Court would likely reject this analysis, given its favorable view of arbitration.

This exercise suggests that the test from *Hanna* is insufficient to dismantle the Supreme Court's federal general common law of arbitration.

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[387] *Hanna*, 380 U.S. at 468.

[388] Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956).

If that is the case, then perhaps we ought to rethink whether *Hanna*, and by extension, the *Erie* doctrine, have lost some force in subverting improper judge-made law. As mentioned, *Hanna*'s "central insight" is "that solutions to problems in the allocation of lawmaking power between the federal government and the states depend on the source of putative federal law."[389] "[I]t [is]…almost impossible for federal judge-made law to survive *Hanna*'s modified outcome-determination test in a diversity case.[390]

Even if we accept—based on the legislative history—that Congress invoked its power under Article III and the Necessary and Proper Clause[391] to "make rules governing the practice and pleading" in the federal courts[392] when it enacted the FAA, the FAA we see today cannot be rationally classified as procedural. As mentioned, under *Hanna*, as long as the FAA is rationally classifiable as procedural, then any *Erie* conflict between the FAA and state law would result in the application of the FAA.[393] *Bernhardt*, the Court's first encounter with an FAA–*Erie* problem, held that in a clash between FAA and state contract law, the FAA is substantive in nature because it substantially affects the cause of action created by the state. In the Court's current arbitration regime, there is no question that the FAA cannot be rationally classified as procedural.

To conclude otherwise would undermine *Hanna* and *Erie*, because *Hanna* does not allow the Supreme Court to go way beyond what the Congress thought it was doing when it enacted the FAA to essentially give itself a power that *Erie* sought to take away. *Hanna* emphasized "that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the

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[389] Burbank & Wolff, *supra* note 18, at 47.

[390] Stephen B. Burbank, *Interjurisdictional Preclusion Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 785 (1986) ("one asks whether the application of a federal rule, rather than the rule that would be applied by the courts of the state in which the federal court sits, would materially affect the character or result of the litigation—whether, in more familiar terms, the rule in question is outcome determinative."). "[I]f the answer to that question is affirmative, one asks the further questions whether the difference between the putative federal rule and the state rule would lead a litigant to choose a forum for that reason or whether application of a variant federal rule would lead to inequitable administration of the laws. *Id.*

[391] The Necessary and Proper Clause confers on Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. 1.

[392] *Id.*

[393] Hirshman, *supra* note 147, at 1345, n.266.

Constitution."[394] "[I]n such areas state law must govern because there can be no other law."[395]

In my view, the Court's federal arbitration regime undercuts all that *Erie* stands for. The kind of vertical uniformity that has come out of the Court's expansive interpretation of the FAA is antithetical to the progressive policy underpinnings of *Erie*. In fact, it stands *Erie* on its head to prize vertical uniformity in a way that prevents states from legislating to protect consumers and employees. Only an ignorance of the statutory text, relevant legislative intent, and historical foundation of the FAA could lead to this result.

To be sure, *Hanna* acknowledged that Congress has the authority to formulate rules of decision[396] as long as they are supported by a grant of federal authority in Article I or some other section of the Constitution.[397] Article I certainly empowers Congress to create federal substantive law that reaches contracts affecting interstate commerce. And we know that in the current constitutional scheme, the Court understands Congress's commerce powers to be extremely broad.[398] Accordingly, Congress could theoretically create federal substantive law that covers disputes between an Illinois consumer and a California business without causing any constitutional problems.

If Congress intended to enact the FAA as federal substantive law that governed agreements involving interstate commerce, then it probably would have ensured that the Act independently confers federal-question jurisdiction.[399] If that had been the case, I doubt that the FAA would have included a saving clause that preserves state contract law defenses. The inclusion of such a clause could subvert important federal interests. Moreover, under those circumstances there would never be an FAA–*Erie* problem, because the *Erie* doctrine only comes into play in diversity cases where state law clashes with either federal procedural rules or federal judge-made rules, not substantive federal statutes that independently confer federal

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[394] Hanna v. Plumer, 380 U.S. 460, 471 (1965).

[395] *Id.* at 471–72.

[396] *Id.*

[397] *Id.* at 471.

[398] *See* Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 549 (2012) ("Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time."); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.").

[399] *See* CHEMERINSKY, *supra* note 17, at 286 & n.2 (7th ed. 2016) ("[t]here . . . must be a federal statute authorizing jurisdiction" to "create federal court subject matter jurisdiction"); Vaden v. Discover Bank, 556 U.S. 49, 59 (2009) (holding that the FAA "bestows no federal jurisdiction but rather requires for access to a federal forum an independent jurisdictional basis over the parties' dispute") (internal quotation marks and citation omitted) (alterations accepted).

question jurisdiction. A congressionally-mandated substantive FAA backed by the Commerce Clause would create an independent federal cause of action. That sort of statute would also be valid under the RDA. In that scenario, the FAA could theoretically reach any contract, except for certain agreements between intrastate parties.[400] Under such a regime, states would only have the power to legislate to protect consumers and workers in extremely limited contexts: intrastate disputes. Of course, as explained in Part II, that is not what the Congress did when it enacted the FAA.

Our constitutional design would allow an expansive federal arbitration statute of this nature. Importantly, though, it would have to be implemented by the United States Congress, whose activities are governed by a political process, not an unelected Supreme Court.[401] In light of the Ending Forced Arbitration Act's bipartisan support, even during these politically divided times, I am doubtful that Congress would enact such a far-reaching federal arbitration statute, even if it technically has the constitutional authority to do so.

That makes it all the more troublesome that the Supreme Court's Federal Arbitration Act regime is "an edifice of [the Court's] own creation."[402] Like *Swift*, the Court has faced significant backlash for its arbitration regime. It is "as an illegitimate doctrine of national power."[403] I believe Professor Purcell would agree that the FAA's "paramount political flaw [is] its elevation of the judiciary over the legislature."[404] I imagine that Justice Brandeis would consider it "an unconstitutional assumption of powers"[405] by the Supreme Court that has resulted in significant *Swift* -like[406] "defects, political and social."[407] If *Erie* and *Hanna* are not effective tools to undo what the Court has done, then that leaves the abrogation of the federal general common law of arbitration in Congress's hands.

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[400] Stanford & Carrillo, *supra* note 244, at 1428.

[401] James Andrew Wynn, *When Judges and Justices Throw Out Tools: Judicial Activism in Rucho v. Common Cause*, 96 N.Y.U. L. REV. 607, 608 (2021) (citing J. Harvie Wilkinson III, *Madison Lecture: Toward One America: A Vision in Law*, 83 N.Y.U. L. REV. 323, 326 (2008) ("unelected judges serving for life should not lightly displace the will of the people's chosen representatives")).

[402] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

[403] PURCELL, BRANDEIS, *supra* note 20, at 67.

[404] *Id.* at 165. Moreover, the policy rationales that informed *Erie* rested on the idea that federalism is not "a rigid norm or a cynical excuse but as an evolving ideal to be tested by its social results." *Id.* at 308 (describing how Brandeis's "complex qualities," namely "faith in reason and democracy, determination to alleviate contingent social injustice, and a balanced, inclusive, tolerant, and pragmatic vision" necessarily "informed Erie" and its federalism policy).

[405] Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

[406] Swift v. Tyson, 41 U.S. 1 (1842), *overruled by* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

[407] *See Erie*, 304 U.S. at 74.

## CONCLUSION

It is obviously important to interrogate Congress's role in failing to rein in the Supreme Court's federal arbitration jurisprudence. What should we make of the fact that Congress has the power to repeal or amend the Federal Arbitration Act at any time, but it has largely declined to act? Notwithstanding the Ending Forced Arbitration Act, should Congress's silence on the Court's FAA doctrine be understood as a ratification of what the Court has done? I remain optimistic that the Congress does not endorse the Court's federal arbitration doctrine. Of course, many are rightfully less optimistic about Congress's commitment and ability to be productive in this regard or others.[408]

All in all, I believe the Ending Forced Arbitration Act reflects progress. It demonstrates Congress's disapproval of the Court's expansion of the FAA in the context of forced arbitration of sexual harassment/sexual assault claims. It aims to correct the grave social and political consequences of the Court's Federal Arbitration Act jurisprudence. As such, the Ending Forced Arbitration Act is a vigorous legislative response to the Supreme Court's aggrandizement of federal judicial power via its arbitration regime. It formally overturns Supreme Court case law that says sexual harassment and sexual assault claims must be submitted to arbitration pursuant to pre-dispute mandatory arbitration agreements. Furthermore, the Ending Forced Arbitration Act shows the power of social movements in undermining unjust law.

Perhaps the Ending Forced Arbitration Act, particularly in the context of its broad bipartisan support and swift passage, is a cautionary message from Congress to the Supreme Court. Maybe Congress is inviting the Court to correct its forced arbitration jurisprudence further and on its own. If that is the case, then I believe the Court should accept Congress's implicit invitation or risk being confronted with additional federal legislation that covers more than the sliver of forced arbitration clauses the Ending Forced Arbitration Act reaches.

Shortly after the Federal Arbitration Act was enacted in 1925, its foremost drafter, Julius Henry Cohen, observed that the Act's "scope" and "potential usefulness" were "too little known."[409] But Cohen made one thing clear: the FAA should be read "in the light of the situation which it was

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[408] *See generally* Norman Ornstein & Thomas E. Mann, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track*, BROOKINGS (June 27, 2006), https://www.brookings.edu/articles/the-broken-branch-how-congress-is-failing-america-and-how-to-get-it-back-on-track/ https://perma.cc/3QU4-KXRQ.

[409] Cohen & Dayton, *supra* note 94, at 266.

devised to correct and of the history of arbitration."[410] In 2025, we will reach the 100th anniversary of the Federal Arbitration Act. As judicial and legislative forces continue to shape the Act's future, they should be guided by the past.

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[410] *Id.*