

IF YOU LOVE ARBITRATION, SET IT FREE: HOW “MANDATORY” UNDERMINES “ARBITRATION”

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INTRODUCTION

We are nearing the quarter-century mark in the Supreme Court’s misguided reinterpretation of the Federal Arbitration Act (“FAA”). The jurisprudence of mandatory arbitration¹ grows out of a “Second Arbitration Trilogy” decided in the early 1980s.² In 1983, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,³ the Court announced its newly minted view that the FAA created “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”⁴ The next year, in *Southland Corp. v. Keating*,⁵ the Court held that section 2 of the FAA is substantive federal law that preempts state law purporting to regulate arbitration agreements within the FAA’s purview. And the next year, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁶ the Court overruled

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¹ “Mandatory arbitration” refers to arbitration pursuant to an adhesive, pre-dispute arbitration agreement. For further elaboration of these concepts and the surrounding arguments, see, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631-32 & n.1 (2005). I hereby abandon my effort to relabel the term “compelled arbitration.” See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37 & n.10.

² See Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985). Professor Hirshman was one of the earliest academic commentators to begin to recognize the long-term significance of these cases, by referring to a “Second Arbitration Trilogy” of FAA cases to be compared in importance to the famous labor arbitration trilogy. See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

³ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

⁴ *Id.* at 24. In the years since, the first half of this phrase has been quoted in countless briefs and judicial opinions, expanding an assertion about federal preemption into a broad endorsement of arbitration as a preferred dispute resolution forum.

⁵ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Hirshman’s article focused on the federalization of private arbitration implicit in *Moses H. Cone*, *Southland*, and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). See Hirshman, *supra* note 2. With apologies to Professor Hirshman, I am identifying *Mitsubishi* as the third case of the Trilogy: To me, it has far greater importance than *Dean Witter* and might well have been the third case in Hirshman’s trilogy had her article not gone to press before *Mitsubishi* was announced.

the “public policy exception” to enforcement of pre-dispute arbitration agreements, holding for the first time that a statute regulating one-sided transactions could be subject to mandatory arbitration.⁷ Thus, by 1985, the Supreme Court had made the two fundamental errors in FAA interpretation that plague us to this day: (1) the FAA’s preemption of state law, and (2) the right of stronger parties in regulated transactions to compel arbitration as a condition of doing business. Everything that troubles critics of mandatory arbitration—everything—arises out of these two errors.

In this Article, I argue for congressional action to overrule the Second Trilogy through an overhaul of the FAA. The most compelling reasons for overruling the Second Trilogy arise from the unfairness of the FAA regime of mandatory arbitration compared to preserving a litigant’s right to choose a judicial forum. But the debate among legal commentators on that issue is now over a decade old, the debaters have long ago stopped listening to each other, and there is probably very little new to say along those lines anyway.⁸ Rather than addressing the fairness issues, I will address a new argument to a new audience: true believers in arbitration. By this intended audience, I do not mean corporate defendants who advocate mandatory arbitration to accomplish “do-it-yourself tort reform”;⁹ academic commentators who view mandatory arbitration as a laudable instance of economic efficiency,¹⁰ deregulation, or “freedom of contract”;¹¹ or financially-interested neutrals who identify themselves with true believers in arbitration but who at heart see mandatory arbitration as a cash cow. Instead, I mean those who genuinely view arbitration as a salutary (faster, cheaper, simpler) alternative to litigation.

I argue that mandatory arbitration tends to undermine the institution of arbitration by eroding what is valuable about it. Specifically, the forcing of employment and consumer cases into the mandatory arbitration system has created inexorable pressures to judicialize arbitration. A system originally designed as an alternative, not only to court, but also to the formality of law, has become increasingly ringed and infused with law. First, there is a large and rapidly-expanding body of judicial doctrine framing the arbitration procedure

⁷ Schwartz, *supra* note 1, at 89-104 (tracing the “public policy exception” and its demise starting with *Mitsubishi*).

⁸ An exception is Professor Sternlight’s recent fresh take on the well-worn debate. See Sternlight, *supra* note 1, at 1633-35. Sternlight argues that the fundamental policy question underlying the mandatory arbitration debate should not be resolved by empirically based arguments on which forum produces “better” outcomes for consumers and employees, but by returning to “first principles” of procedural fairness and constitutionalism. I attempt to put my own spin on that argument in a separate forthcoming article and will not address those issues here. See David S. Schwartz, Stop Waiting for the Social Scientists: Why Empirical Research Will Not Resolve the Mandatory Arbitration Debate (August 1, 2007) (unpublished manuscript, on file with author).

⁹ See, e.g., Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761 (2003).

¹⁰ See, e.g., Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549 (2003).

¹¹ See, e.g., Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 188 (2004); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with A Contractualist Reply To Carrington & Haagen)*, 29 McGEORGE L. REV. 195 (1998).

itself. What I call “external” arbitration law includes court decisions on sundry matters coming within the ambit of judicial interpretation of the FAA: enforceability of arbitration clauses, arbitrability of issues, and procedures for judicial enforcement of arbitration both before and after the award. Second, arbitration is becoming “internally” judicialized, as procedures for how a case will be arbitrated are increasingly formalized. There are more rules narrowing the differences between arbitration and court, rules that are imposed extra-contractually, by case law, statute, professional organizations, and the arbitration providers themselves.¹²

Moreover, as academic commentators we exacerbate this process of surrounding and infusing arbitration with formal law. Arbitration scholarship has proliferated since the Second Trilogy, and its continued proliferation tends to focus on increasingly specific doctrinal questions reflecting acceptance of or resignation to the mandatory arbitration regime. When we identify problems with the arbitration system, we tend to propose new formal rules to solve them. Whether or not our commentary actually fosters doctrine-creation by shining spotlights on potential doctrinal problems, it certainly ratifies the increase of legal complexity. Few, if any, commentators in the field say that there should be less arbitration “law.”

This judicialization of arbitration is all fallout from the Second Trilogy. “Broad form” pre-dispute arbitration agreements—those requiring arbitration of “all disputes” between the parties¹³—essentially transform the system of private arbitration into “a civil court of general jurisdiction.”¹⁴ Because consumers and employees are the protected parties in highly regulated contractual relationships, forcing their claims into the arbitration system creates a tremendous demand for “law” in the form of procedural regularity, substantive doctrine, and judicial scrutiny of the contractual mechanism putting them in this situation. In other words, contemporary arbitration law is largely how courts and commentators cope with the two big mistakes underlying the Supreme Court’s Second Trilogy.

I. ARBITRATION: THE CLASSIC MODEL

As conceived and advocated at the time the FAA was enacted, arbitration was not what it has become under the Second Trilogy: a private court system for public law disputes, and a widespread and lucrative employment opportunity for lawyers and retired judges.

The classic model of arbitration is a binding dispute resolution system that is faster, cheaper, and more user-friendly than court because it does away with formal “law.” The attraction of arbitration is based on the view that “law,”

¹² Other commentators have noted aspects of this trend. See, e.g., Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123 (2002) (arguing that increased judicial scrutiny has undermined the finality of arbitration, muddying the distinction between arbitration and trial-court decision making).

¹³ See, e.g., Dennis L. Sharp & John M. Seitman, *Write It Down*, L.A. DAILY J. EXTRA, Sept. 16, 2002, at 26.

¹⁴ Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997).

both in its substantive and procedural aspects, consumes time and money. Complex rules of pre-trial procedure—formerly arcane pleading requirements, and now discovery and motion practice—require intensive legal work and postpone the trial. Similarly, the non-intuitive rules of evidence make trials a complex matter. The appeals process adds months or years to the litigation process and undermines the finality of trial court judgments. The decisional law is difficult to discern without extensive background training and research into the problem at hand, often generating counter-intuitive results based on policies and concerns that are not readily apparent or explicable to a lay person.

Classic arbitration provides an alternative to “law” at every turn: Pre-hearing procedure is virtually eliminated, the rules of evidence are dispensed with—the arbitrator considers everything that’s arguably relevant—and the merits are decided based on equity, common sense, or business norms known and understood by the parties. Appeals are for all intents and purposes eliminated. No lawyers are needed to navigate the rules of procedure, evidence, and decisional precedent; no legally-trained judges (lawyers in robes and wigs) are required to interpret and apply “the law.” It is the lawyers and judges—who must take time to do their thing and who must be paid for their time—that inject cost and delay into dispute resolution. At bottom, the persistent appeal of arbitration is that it holds out the promise of providing justice *without lawyers*.

This view of arbitration is an idealization, but it is central to the debate over pre-dispute arbitration clauses in two related senses. First, the myth of do-it-yourself justice infuses the pro-arbitration ideology in this debate: The picture of fast, cheap, and lawyer-free dispute resolution continues to cast its rosy glow over the arguments of proponents of mandatory arbitration. Second, the idealized model of arbitration provides a useful reference point in evaluating the kind of arbitration we get under the Supreme Court’s Second Trilogy. We can ask where mandatory FAA arbitration fits on a spectrum with mythical lawyer-free arbitration at one end and litigation at the other. The closer mandatory arbitration is to court, the more we can and should question whether it is a valuable and valid alternative to the court system.

As a historical reality, the primary model of arbitration—and the primary impetus behind the FAA—was a mechanism to resolve disputes within communities of merchants. As Professor Stone has persuasively argued in her leading account of the history of pre-dispute arbitration agreements, “the FAA was enacted in response to the commercial community’s desire to strengthen the internal arbitration systems of trade associations.”¹⁵ Something like the classical model of arbitration served three closely-related goals of these trade associations. First, arbitration would control the costs of disputing and therefore the cost of doing business. Second, rules of decision would be supplied by industry insiders according to the standards and norms of the particular trade, rather than the general and arcane contract rules created by judges. Third, disputes could be kept “in the family” rather than put on expensive public display in the courts. While lawyers may well have been involved in drawing up the

¹⁵ Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 994 (1999). The history is described in detail at 969-94. See also Schwartz, *supra* note 1, at 70-73.

arbitration contracts, and perhaps in putting together arbitration cases, their presence was not essential and was frequently dispensed with; also the presence of legally trained arbitrators was the rare exception rather than the rule since the whole point was to have non-lawyerly decisions based on business norms rather than legal precedent.¹⁶

Business lawyers were instrumental in the passage of the FAA, but their role was limited to managing the point of contact between these arbitration systems and “the law,” in essence shielding the arbitration system from law and lawyers by making sure that arbitration agreements and awards would be enforced to prevent a disgruntled party from turning outside the self-regulating trade association for help.¹⁷

Pre-dispute arbitration under the FAA makes sense against this historical backdrop. As I have argued elsewhere:

[P]re-dispute clauses, if enforced, have an element of compulsion. Enforcement of the clause presupposes that at least one of the parties, with the dispute before her, has reconsidered the appropriateness of arbitration. The pre-dispute agreement now acts to restrict choice. Moreover, parties to the agreement may not have freely chosen the clause if it was a compulsory condition of membership in the commercial or social group. In the paradigm cases, however, equality and community of interest serve as a rough substitute for voluntariness. The imposition of a regime of arbitration of future disputes is not unduly oppressive if, *ex ante*, it appears that any member is equally likely to be a plaintiff or a defendant, and each member stands as good a chance of success in arbitration as any other. This is particularly so where the parties have some idea in advance what the nature of their disputes will be—a hallmark of the commercial paradigm. These assumptions mean that the burdens and benefits of pre-dispute arbitration are equally distributed.¹⁸

The FAA implicitly incorporates a classical view of arbitration. The FAA itself provides virtually no “internal” arbitration law—other than providing the arbitrator with subpoena power and implying that an arbitrator should be unbiased and should not unfairly restrict a party from presenting relevant evidence, the statute says almost nothing about how the arbitration is to be conducted. By implication, the default rules of how arbitration will be conducted are supplied by tradition. Absent an agreement to the contrary, the arbitrator need make no provision for discovery, create a record, or give reasons for his award.¹⁹

¹⁶ CLARENCE F. BIRDSEYE, *ARBITRATION AND BUSINESS ETHICS* 35 (1926); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 45-46 (2d ed. 1985); Reginald Alleyne, *Delawyerizing Labor Arbitration*, 50 OHIO ST. L.J. 93, 94 (1989); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 212; Philip G. Phillips, *Synthetic Courts—A General Introduction*, 83 U. PA. L. REV. 119, 126 (1934); Joseph Antonio Raffaele, *Lawyers in Labor Arbitration*, *ARB. J.*, Sept. 1982, at 14, 15; Schwartz, *supra* note 1, at 70-73; Van Wezel Stone, *supra* note 15, at 976-79; Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 144 (1934).

¹⁷ Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 258 (1928); Schwartz, *supra* note 1, at 70-71.

¹⁸ Schwartz, *supra* note 1, at 72.

¹⁹ See 9 U.S.C. § 5 (2000) (court may appoint arbitrator where parties fail to do so); § 7 (arbitrators' power to compel witness attendance); §§ 9-11 (confirmation and review of awards). See generally 2 THOMAS H. OEHMKE, *COMMERCIAL ARBITRATION* § 89-3 (3d ed.

On the other hand, classical arbitration pursuant to pre-dispute agreements does not fit nearly so well when the dispute is between parties who are not part of the “self-regulat[ing] . . . normative community” of a trade association. Under these circumstances there are fewer agreed-upon private norms to supply rules of decision, less mutual interest in keeping the dispute “within the family,” a greater likelihood of a public interest in the dispute, and a greater need to resort to the rules of decision created by public institutions. Moreover, while cheap and fast dispute resolution is all well in theory, the insider v. outsider dispute is more likely to involve disparities of wealth and knowledge for which the presence of lawyers—though more expensive—can make the playing field more level.

All of these limitations of traditional private arbitration were very much in the mind of the Supreme Court when it held, in *Wilko v. Swan*,²⁰ that arbitration was an unsuitable vehicle for the resolution of claims under public regulatory statutes. A painful illustration of this was the early experience with the first crop of employment discrimination cases within the securities industry, which had been compelled into arbitration under the securities exchange’s “trade association” pre-dispute arbitration clauses. The strong anecdotal impressions of plaintiffs and practitioners were that discrimination claims were routinely rejected or drastically undervalued by arbitrators, who were uniformly gray-haired white men drawn from the ranks of retired stockbrokers, the same arbitrators who resolved other securities industry disputes.²¹ In overruling *Wilko*, the Second Trilogy Supreme Court would say, not that classical arbitration was adequate for public law disputes after all, but rather that arbitration itself had changed. How? By the introduction of more lawyers.

Arbitration became adequate for public law claims because arbitrators would be lawyers or judges able to apply the law. The *Mitsubishi-Gilmer* line of cases is expressly premised on the idea that the relevant substantive law must be applied in arbitrations of statutory cases: “[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”²² The cases further imply a reliance on the influx of legally trained

2007) (arbitrator not required to permit discovery absent contractual requirement); Schwartz, *supra* note 1, at 40-53.

²⁰ *Wilko v. Swan*, 346 U.S. 427, 435 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *accord* *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (“Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in *Wilko v. Swan*.”).

²¹ A General Accounting Office survey showed that, as of December 31, 1992, the pool of New York Stock Exchange arbitrators based in New York was 89% male and 97% white; the average age of male arbitrators was sixty. U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 7-8 (1994); *see also* Robert R. Gregory, *Arbitration: It’s Mandatory But It Ain’t Fair*, 19 SEC. REG. L.J. 181, 183 (1991); Isaac C. Hunt, Jr., *Securities Arbitration: Issues of Interest*, 40 ARIZ. L. REV. 1095, 1100 (1998).

²² *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

arbitrators since the time when *Wilko* had expressed “concern[] that arbitrators must make legal determinations ‘without judicial instruction on the law.’”²³

II. THE SECOND ARBITRATION TRILOGY: THE SUPREME COURT’S TWO BIG MISTAKES

A. *The Demise of the Public Policy Exception*

Prior to 1985, it was generally held in the lower courts that statutory causes of action reflecting “important public policies,” could not be sent into mandatory arbitration under the FAA.²⁴ This so-called “public policy exception” to FAA enforcement was rooted in two precedents. Citing perceived inadequacies of arbitration to protect investors’ rights under the federal securities laws, the Supreme Court held in 1953 in *Wilko v. Swan*²⁵ that a pre-dispute agreement was ineffective to compel arbitration of claims under the 1933 Securities Act.²⁶ A Second Circuit decision in 1968, *American Safety Equipment Corp. v. J.P. Maguire & Co.*,²⁷ held the same for Sherman Antitrust Act claims, stating that “it hardly seems proper for [arbitrators] to determine these issues of great public interest.”²⁸ *American Safety* was uniformly followed by the other circuits for antitrust claims,²⁹ and the *Wilko*-*American Safety* “public policy exception” was extended to other statutory claims, including employment and civil rights claims.³⁰

The “public policy exception” cases were animated by concerns that arbitration was an inadequate forum for public policy claims.³¹ Significantly, all of the “public policy” claims involved causes of action under a private attorney general model, in which injured plaintiffs are viewed as a vehicle for the enforcement of important regulatory policies and are encouraged by attorneys’ fee-shifting. And the regulations under these statutes are, for the most part, efforts at redressing market failures resulting from power imbalances and overreaching by the stronger party in a contract setting. The public policy cases viewed pre-dispute arbitration agreements as another example of the stronger, drafting party to an adhesion contract attempting to extract a pre-dispute waiver of a “substantial” right—here, the right to a judicial forum. In that sense, pre-

²³ *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 231 (1987) (quoting *Wilko*, 346 U.S. at 436).

²⁴ See Schwartz, *supra* note 1, at 89-104.

²⁵ *Wilko*, 346 U.S. 427.

²⁶ Securities Act of 1933, ch. 38, 48 Stat. 74, (current version at 15 U.S.C. §§ 77a-77aa (2000)).

²⁷ *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

²⁸ *Id.* at 827.

²⁹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 655-56 (1985) (Stevens, J., dissenting) (citing cases from seven circuits).

³⁰ See, e.g., *McDonald v. City of W. Branch*, 466 U.S. 284 (1984) (42 U.S.C. § 1983); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII of the Civil Rights Act of 1964); Schwartz, *supra* note 1, at 92-94 & n.242.

³¹ *Wilko v. Swan*, 346 U.S. 427, 435 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *accord* *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956); see Schwartz, *supra* note 1, at 89-95.

dispute arbitration clauses in adhesion contracts were no different from pre-dispute rights waivers generally, a sort of contract term long disfavored by the courts.³²

But starting with its 1985 decision in *Mitsubishi*³³—the third case in the Second Trilogy—the Supreme Court dismantled the public policy exception. *Mitsubishi* overruled the *American Safety* doctrine by holding that antitrust claims were arbitrable, and in subsequent decisions, the Court overruled *Wilko* as to securities claims.³⁴ Finally, in 1991, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*³⁵ upheld a decision compelling arbitration of a statutory claim of age discrimination in employment, thus signaling to the lower courts that any and all civil rights claims may likewise be subject to mandatory arbitration. Under current doctrine, any statutory claim is subject to mandatory arbitration, absent a clear showing of a congressional intent to limit or prohibit waiver of a judicial forum. Although the Court in theory recognized that that intent could be inferred from legislative history or “an inherent conflict between arbitration and the statute’s underlying purposes,”³⁶ the Court has never inferred such an intent. There is no longer a public policy exception, and for all practical purposes, only an express rejection of pre-dispute arbitration by Congress will be effective.

The Court’s major analytical move in overruling the public policy exception was to reject the former skepticism about the adequacy of arbitration as a forum for vindicating rights. As Justice Kennedy wrote for the majority in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,³⁷ “To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.”³⁸ Put another way, a pre-dispute arbitration agreement does not involve a waiver of any “substantive” or even “substantial” rights,³⁹ but is merely “procedural” in nature.⁴⁰ As the Court’s modern cases have frequently stated:

By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather

³² Schwartz, *supra* note 1, at 110-21.

³³ *Mitsubishi*, 473 U.S. 614.

³⁴ *Rodriguez de Quijas*, 490 U.S. 477; *see also* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (holding RICO and Securities Exchange Act claims arbitrable).

³⁵ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

³⁶ *McMahon*, 482 U.S. at 227.

³⁷ *Rodriguez de Quijas*, 490 U.S. 477.

³⁸ *Id.* at 481; *accord Gilmer*, 500 U.S. at 30.

³⁹ The term “substantial” has been frequently used by the Supreme Court, particularly in the 1950s and 1960s, to indicate rights that may be formally “procedural” but whose advance waiver is considered non-neutral and therefore disfavored, such as the right to jury trial. *See Wilko v. Swan*, 346 U.S. 427, 438 (1953) (access to judicial forum rather than arbitration is a “substantial” right); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (jury trial held to be a “substantial” right); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 604 (2004).

⁴⁰ *Rodriguez de Quijas*, 490 U.S. at 481-82; *see* Schwartz, *supra* note 39, at 604-06.

than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.⁴¹

Without disturbing the general policy against prospective waivers of substantive rights, the Court has overruled the public policy exception by recharacterizing arbitration as a neutral procedural right rather than a substantive one.

The revisionist vision of arbitration as an adjunct court system with legally trained arbitrators applying statutory and decisional law—in contrast to the classic model with businessmen-arbitrators⁴²—may well have had some empirical basis by the mid-to-late 1980s. This would have rightly allayed some of the concerns stated in the public policy cases. But it would take no great seer to predict that *Mitsubishi* and its progeny would increase that trend. The dismantling of the public policy exception demands non-industry arbitrators simply to attain neutrality: When the claimants are all outsiders—consumers and employees whose disputing positions are adverse to the industry itself—you can't have a fair system where the judges are drawn from industry insiders. Further, to sustain the notion that arbitrators will apply governing statutory law, arbitrators have to be drawn from the ranks of the legally trained.

Finally, the kinds of disputes involved in public policy cases—those involving regulated relationships between parties with significant disparities in bargaining power—are highly correlated with disparities in access to facts relevant to the dispute. The placement of the burden of production on claimants means that most consumers and employees cannot carry their burden of proof with the information already in their possession. Hence, the tradition of arbitration free from “burdensome discovery” has to go out the window, or else claimants will be placed in a systematic disadvantage in proving their claims. In sum, the Court undoubtedly failed to perceive the tremendous pressures toward judicialization that its public policy rulings would place on the arbitration system.

B. Preemption of State Law

The other two cases in the trilogy greatly complicated arbitration law by federalizing it. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,⁴³ the defendant Mercury was sued in state court on a construction contract. Mercury then countersued with a diversity action in federal district court, petitioning for a stay of the state court case and an order compelling the hospital to arbitrate, pursuant to section 4 of the FAA. The district court stayed the federal case in deference to the preexisting state case, under the *Colorado River* abstention doctrine,⁴⁴ but the Supreme Court reversed. Although the main issue was the propriety of federal abstention—not FAA interpretation—the Court found it useful to support its anti-abstention ruling by inflating the fed-

⁴¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas*, 490 U.S. at 481; *McMahon*, 482 U.S. at 229-30.

⁴² See *supra* text accompanying notes 17-21.

⁴³ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

⁴⁴ See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (holding that the pendency of an action in state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction).

eral interests purportedly at stake: the importance of keeping the federal court open to hear a petition to compel arbitration.

The basic issue presented in Mercury's federal suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or federal court. Section 2 is the primary substantive provision of the Act Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.⁴⁵

This passage was arguably dicta since the opinion had already articulated a complete argument against abstention and threw in this point about the FAA as a "B-side" argument. And it was "ill considered" dicta at that: The Court issued these sweeping assertions about the FAA's intent to create substantive rules of decision for state courts—in essence, a broad assertion about federal preemption—without any of the statutory analysis normally applied to preemption rulings.⁴⁶

The next year, in *Southland Corp v. Keating*,⁴⁷ the issue of FAA preemption was squarely presented. The California courts had denied arbitration of a state-law franchisee-franchisor dispute under a provision in the state franchise statute that barred advance waiver of the right to bring claims in court. The U.S. Supreme Court reversed, holding that section 2 of the FAA created a substantive "national policy favoring arbitration" that applied in state court and preempted the state anti-arbitration rule.⁴⁸ Although *Moses H. Cone* had laid the groundwork for the *Southland* decision, it is in *Southland* that the Court clearly established FAA preemption.

I will not repeat the arguments I have made elsewhere, that the *Southland* decision was wrong as a matter of FAA statutory interpretation, and that it applies the FAA in an unconstitutional manner by dictating procedural rules to state courts.⁴⁹ Suffice it to say that *Southland* has made the FAA into one of the more extensive regimes of federal preemption, nullifying dozens of state substantive and procedural laws.⁵⁰ The result has indeed been the creation of a body of federal common law of contract as suggested by *Moses H. Cone*. This is problematic, not merely because of abstract federalism concerns, but very practical ones. By making the interpretation of every arbitration agreement at least arguably a question of federal law, the *Moses H. Cone/Southland* doctrine creates great confusion in the lower courts about determining when state law applies, multiplying the number of issues, and creating uncertainty about the vitality of state contract regulation.

⁴⁵ *Moses H. Cone*, 460 U.S. at 24.

⁴⁶ On this point, the Court relied entirely—and erroneously—on *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), a case which had said nothing about the FAA as substantive law or about federal preemption. See David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 36-38 (2004).

⁴⁷ *Southland Corp v. Keating*, 465 U.S. 1 (1984).

⁴⁸ *Id.* at 10.

⁴⁹ See Schwartz, *supra* note 39; Schwartz, *supra* note 46.

⁵⁰ Schwartz, *supra* note 39, at 549 n.29.

III. JUDICIALIZING ARBITRATION BY SURROUNDING IT WITH LAW

A. *The Excessive Increase of “External” Arbitration Doctrine*

The external or framing law of arbitration—questions concerning whether and what issues will be arbitrated and post-award judicial review—continues to grow. This is to be expected. The stakes for the plaintiffs appear sufficiently high for them to litigate these issues, and courts are at least somewhat sensitive to their duty to scrutinize adhesion contract terms by which regulated entities seek to lessen the impact of regulation. These two factors mean that mandatory arbitration puts pressure on courts to generate more framing law. And it appears that courts have done that: By my rough estimate, the number of judicial decisions involving the FAA has doubled relative to federal cases generally since 1992 and increased roughly sixfold since 1981.⁵¹

What accounts for this huge increase in arbitration cases relative to other cases? The spread of arbitration agreements is a possible cause, but that should not be overestimated. Lawyers—particularly plaintiffs’ lawyers representing employees and consumers typically on a contingency fee basis—are not in the business of filing slam-dunk losing motions, nor are courts in the business of publishing decisions on well-trodden, open-and-shut legal points. So if arbitration law were clear and settled, the number of judicial decisions relating to arbitration might be expected to level or decline even if the practice of mandatory arbitration were to spread. A major contributor to an increase in judicial decisions on arbitration law is likely to be the presence of arguable issues. That is to say, doctrinal uncertainty generates litigated issues and published decisions on them.

This hypothesis seems borne out by the growth of arbitration doctrine. The array of currently unresolved issues that frame mandatory arbitration is truly daunting. Professor Richard Bales, for example, has argued that the development of arbitration case law has been so rapid and extensive that the American Arbitration Association (“AAA”) Employment Due Process Protocol has fallen seriously out-of-date in only the first ten years of its existence.⁵² Bales usefully catalogues some twenty unresolved issues in current arbitration law, a count that I think is conservative.⁵³ For instance, Bales does not include

⁵¹ See Appendix A. As explained in the appendix, my methodology was far from rigorous, so the estimate is merely suggestive.

⁵² Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005).

⁵³ Bales’s list organizes the 20 issues under six main headings: (A) *Contract formation issues*: (1) notice requirements; (2) the employee’s opportunity to consider the agreement; (3) the employer’s right to modify the agreement unilaterally; (4) mutuality of obligation to arbitrate; (5) consideration; (6) whether pre-dispute agreements are enforceable. (B) *Barriers to access*: (7) shortened statutes of limitations to file arbitration claims; (8) imposition of arbitration filing fees on claimants; (9) awards shifting arbitrator fees onto claimants; (10) class action bans; (11) geographic forum selection clauses; (12) confidentiality of awards. (C) *Process issues*: (13) arbitrator selection; (14) availability of discovery. (D) *Remedies issues*: (15) remedy-stripping arbitration agreements; (16) discrepancies between arbitral and statutory attorneys’ fee-shifting. (E) *FAA issues*: (17) EEOC’s ability to pursue claims already brought by an employee in arbitration; (18) scope of “transportation workers” exclusion from FAA coverage; (19) power of a union to waive members’ right to a judicial forum

FAA preemption; the division of authority between the arbitrator and the court; severability of unconscionable terms; or the scope of judicial review of arbitration awards. In addition, there are multiple facets to the single issue of “remedy-stripping” arbitration clauses, and new issues relating to unconscionability continue to arise—for example, whether otherwise unconscionable clauses can be enforced if the agreement offers the consumer or employee an “opt-out” check box. These unsettled issues in arbitration law—perhaps as many as thirty—would each require at least several pages of treatise to explain in detail. More to the point, each of these subjects creates arguable issues for litigation.

B. Nagging Doctrinal Issues

The following are three significant areas of unsettled arbitration doctrine. Each illustrates both the continued generation of issues for litigation and the courts’ less-than-stellar performance in resolving them.

1. The Scope of Federal Preemption

Among its many failings, the *Southland* decision is ambiguous about the scope of FAA preemption and creates irreconcilable tensions with the so-called “savings clause” of section 2, which states that arbitration clauses are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁴ Making the best of a messed up doctrinal situation, the courts have generally understood the FAA to preempt laws that regulate arbitration agreements per se, while preserving from preemption those state contract laws that are not specific to arbitration. In other words, a state law providing that arbitration agreements must be in bold 9-point type or larger would be preempted, whereas a state law providing that advance waivers of rights must be in bold 9-point type or larger would not be.⁵⁵

Regrettably, the Supreme Court’s sporadic stabs at explaining when the FAA preempts state law have been largely a mess.⁵⁶ For instance, the Court has said that what the FAA saves from preemption is regulation of “contracts generally” or “general contract law.”⁵⁷ But after creating this ill-conceived distinction between “general” and arbitration-specific contract law, the Court has explained it badly.⁵⁸ Further, in *Bazzle*, the Court eschewed the opportunity to

for statutory claims. (F) *Conflicts of interest*: (20) Regulating arbitrators’ conflicts of interest. *Id.* at 184-96.

⁵⁴ 9 U.S.C. § 2 (2000).

⁵⁵ See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (stating that the FAA “preclude[s] States from singling out arbitration provisions for suspect status”); *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003) (stating that the FAA preempts laws that are “hostile” to arbitration); *Goff Group, Inc. v. Greenwich Ins. Co.*, 231 F. Supp. 2d 1147, 1150 (M.D. Ala. 2002) (same). But see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 409-10 (2004).

⁵⁶ See Schwartz, *supra* note 39, at 557-62.

⁵⁷ See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (“States may regulate contracts, including arbitration clauses, under general contract law principles . . .”).

⁵⁸ The Court stated in *Perry v. Thomas*, for example, that “[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue” is preempted. 482 U.S. 483, 492 n.9 (1987). This is a strange way of explaining that “general” state contract law is preserved from preemption, since any “general” contract principle must be applied to

clear up a related misconception that the FAA creates a federal “enforce as written” rule preempting any state law whose application would vary the terms of an arbitration agreement; instead, the three-justice dissent gave the argument credibility by embracing it, while the plurality opinion did not discuss it.⁵⁹ With this pattern of judicial inattention and ambiguity, the Court has inadvertently lent support to overly broad preemption arguments. Suppose the corporate defendant has drafted an arbitration agreement to compel a waiver of injunctive relief, compensatory damages, or attorney fees guaranteed by a state consumer or antidiscrimination statute. The defendant can now argue for enforcement of these terms—plainly unconscionable and against public policy—on two grounds. First, the purported federal “enforce as written rule” preempts any state law that would vary the written terms of an arbitration agreement.⁶⁰ Second, because state consumer protection statutes involve sub-categories of contracts—only consumer contracts—they are not “general contract law” and are preempted by the FAA.⁶¹

These arguments are plainly wrong—even farfetched—as I have argued elsewhere.⁶² Yet some courts have entertained them, injecting new uncertainty into the scope of FAA preemption. And the potential consequences are scary

an arbitration clause to determine its validity—and the general principle necessarily “takes meaning” from the specific application. The Court’s next attempt at clarification, in *Allied-Bruce* was even less helpful:

States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of *any* contract.” 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.

513 U.S. at 281. These pronouncements probably mean, as the Court stated in *Casarotto*, that the FAA preempts state laws that “singl[e] out arbitration provisions for suspect status.” 517 U.S. at 687.

⁵⁹ See Schwartz, *supra* note 39, at 564-68.

⁶⁰ In *Green Tree Financial Corp. v. Bazzle*, for example, the three dissenting justices accepted the defendant’s argument that a state law that would have allowed class actions despite a purported class action ban in an arbitration clause was preempted by the FAA, which required the arbitration agreement to be enforced “according to [its] terms.” 539 U.S. 444, 458-59 (2003) (Rehnquist, C.J., dissenting) (alteration in original) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995)). The majority did not address the issue.

⁶¹ *Bradley v. Harris Research Inc.*, 275 F.3d 884, 893 (9th Cir. 2001), held that a California statute barring unfair venue provisions in franchise agreements was preempted by the FAA because it was not “general contract law.” For cases making the same error, see *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (finding that the provision of the California consumer protection statute prohibiting contractual waiver of class action remedy is preempted because consumer protection statute is not “general contract law”); *KKW Enterprises, Inc. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50 (1st Cir. 1999) (holding that FAA preempts venue provision in state franchise law); *Doctor’s Associates, Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (same); and *Boynton v. ESC Medical System, Inc.*, 566 S.E.2d 730 (N.C. Ct. App. 2002). Legal scholars are also beginning to make this same error. See, e.g., Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469.

⁶² Schwartz, *supra* note 39, at 564-70.

for consumers and employees: If accepted, these arguments threaten to turn arbitration agreements into blanket exemptions from consumer protection and other statutes aimed at preventing contractual overreaching. The Supreme Court should have cleared up this issue by now.⁶³

2. Class Actions

Class actions are a significant component of legal enforcement of consumer protection laws and wage and hour laws.⁶⁴ It is well understood that, but for class actions, many kinds of legal violations committed on a large scale can go unremedied, if the damages caused by each individual violation is small enough to make the filing of individual lawsuits economically unfeasible.⁶⁵ Thus, for certain categories of potential corporate defendants, the most attractive feature of pre-dispute arbitration clauses is the possibility that it may eliminate class actions, and thereby gain de facto immunity from suit.⁶⁶

The problem of class actions and arbitrations could be resolved in a variety of ways, depending on the resolution of two basic questions: (1) whether, as a matter of public policy, arbitrators have the authority to issue class-wide relief; and (2) whether an arbitration provision can bar class actions. If arbitrators have the authority to issue class-wide awards, then presumably their power to do so will be a question of construing the arbitration agreement. But what if the agreement doesn't expressly grant, or expressly precludes, class action authority? Does this mean that the would-be class-action plaintiff has a ground to defeat a motion to compel arbitration and can file a class action in court? Or

⁶³ The Court has not even decided whether the FAA's indisputably procedural provisions apply in state court. When presented with the opportunity to resolve that question in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, the Court held that the arbitration agreement should be construed to have chosen state procedural law. 489 U.S. 468 (1989). In typical fashion in its arbitration jurisprudence, the Court used an idiosyncrasy in the arbitration agreement to make the larger legal issue disappear. *Id.* at 477-79. I have argued that the FAA is in fact entirely procedural, contrary to *Southland*. See Schwartz, *supra* note 39, at 547-54, 600-15. Although the Supreme Court considers FAA section 2 to be substantive, it recognizes that the rest of the statute is procedural. See *Volt*, 489 U.S. at 477 & n.6. The question should have been a fairly easy one.

⁶⁴ For purposes of this discussion, my use of the term "class action" should be understood to include "collective" actions for wage and hour violations under the Fair Labor Standards Act.

⁶⁵ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); see Myriam E. Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 28-33 (2000).

⁶⁶ Alan S. Kaplinsky, a leading mandatory arbitration spokesman and attorney representing financial services institutions, has claimed, "Arbitration is a powerful deterrent to class action lawsuits against lenders Stripped of the threat of a class action, plaintiffs' lawyers have much less incentive to sue." Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May-June 1998, at 24, 25-26, available at <http://www.abanet.org/buslaw/blt/7-5excu.html>; see also Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Law: Is JAMS in a Jam Over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?*, 61 BUS. LAW. 923 (2006).

does it mean that the drafting party can effectively prevent any class action suits from ever being filed against it? The same question arises if arbitrators lack the authority to award class-wide relief: If that is the rule, and the plaintiff is subject to mandatory arbitration, must he then go forward and lose the chance to bring a class action or does his class claim defeat a motion to compel arbitration?

The Supreme Court has maddeningly minced around all these questions, answering none of them definitively when the issues were squarely presented in *Green Tree Financial Corp. v. Bazzle*.⁶⁷ The defendant Green Tree appealed a \$27 million consumer class arbitration award, arguing that arbitration agreements did not expressly provide for class arbitrations and therefore impliedly withheld class-wide relief power from the arbitrator.⁶⁸ The South Carolina courts ruled that the arbitration agreements and state procedural law authorized class arbitrations. But a four-justice plurality decision by Justice Breyer—joined in the judgment by Justice Stevens—held that the issue of “whether the arbitration contracts forbid class arbitration” was a contract-interpretation question for the arbitrator, and not the courts.⁶⁹ By deciding that the arbitrator had to construe the arbitration agreement to determine whether it in fact barred class actions, the Court declined to decide whether an arbitration clause that *did* ban class actions would be enforceable. Technically, the Court did not even definitively tell us whether states can deny arbitrators the authority to issue class-wide relief or whether the FAA addresses that issue. Indeed, *Bazzle*’s holding may be nothing more than a statement that we need to hear from the arbitrator what the contract says about class arbitration before deciding any class arbitration issues. It is a decision that creates far more wiggle room than precedential guidance. As complex and important as this question of arbitration and class actions is, it remains very much adrift among conflicting lower court precedents.⁷⁰

3. *Unconscionability, Remedy-Stripping, and Severability*

By nature most unconscionability claims will be brought by non-drafting parties in adhesion contracting situations regulated by public laws. In the arbitration setting, then, the decision to overrule the public policy exception in *Mitsubishi* and its progeny is necessarily responsible for an influx of unconscionability cases. Overreaching is a predictable, almost natural phenomenon of contracting in a context of unequal bargaining power and regulated relationships, and development of unconscionability doctrine is a predictable judicial response to constrain contractual unfairness. Unconscionability is probably the most frequent basis for challenges to arbitration agreements.⁷¹

⁶⁷ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

⁶⁸ Brief of Petitioner, *Bazzle*, 539 U.S. 444 (No. 02-634).

⁶⁹ *Bazzle*, 539 U.S. at 452.

⁷⁰ *Compare* *Champ v. Siegel Trading Co.*, 55 F.3d 269, 277 (7th Cir. 1995) (class action waivable by arbitration clause under FAA), *with* *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (class action waiver unconscionable).

⁷¹ A successful challenge to a contract term as “unconscionable” typically requires a showing both that a contract term is unfair in its application and that it was created through an unfair—typically, adhesive—bargaining process. The unfair term is denoted “substantively”

Arbitration agreements have been found unconscionable for having either or both of two features: (1) “remedy-stripping” provisions, that is to say, terms purporting to deprive the adhering party of remedies;⁷² or (2) a skewed arbitration process that violates fundamental norms of procedural fairness.⁷³ While there is now a substantial body of case law deciding the enforceability of unconscionable arbitration clauses, the law is far from settled.

Remedy-stripping arbitration agreements typically withhold from the arbitrator the authority to grant particular remedies—such as compensatory or punitive damages, attorneys’ fees, or class-wide relief—to which the plaintiff would otherwise be entitled. It is a fundamental principle of arbitration law that the powers of the arbitrator are determined by the arbitration agreement between the parties; therefore, the notion of restricting arbitrable issues or arbitrator powers is not inherently offensive. It is only when the contract purports to restrict remedies while precluding resort to the courts that remedy-stripping clauses take on their problematic character. Although the arbitration requirement is clearly designed to work in tandem with the remedy-stripping provision to affect prospective waivers of remedies, it is also clear that the two goals of such a clause—arbitration and remedy-stripping—are separable as a matter of logic and policy. Thus, even if one were to accept the idea that the FAA declares “a liberal federal policy favoring arbitration agreements,”⁷⁴ it doesn’t follow that the FAA favors waivers of other rights—rights other than access to court—simply because they are added to an arbitration clause.

When the right in question involves compensatory damages or statutory attorneys’ fees, lower courts have usually rejected the prospective waiver of substantive rights, though the rationales have varied and not always been clear. Some courts find such remedy-stripping unconscionable or a significant contributor to unconscionability—while others have stated that the waiver “violates the statute” granting the remedy.⁷⁵

Courts have displayed the greatest inconsistency on the fundamental question of what to do when an arbitration agreement has been found unconscionable or otherwise unenforceable due to overreaching by the drafting party. The question—typically called “severability,” and less commonly, the “blue pencil rule”—is whether the remedy should be to refuse enforcement of the arbitration clause as a whole, or else to “sever” or “blue pencil” the offending provisions and enforce a judicially revised, fairer version of the arbitration agreement.

unconscionable, while the unfair bargaining process is called “procedural.” See, e.g., *Discover Bank*, 113 P.3d at 1109.

⁷² See David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49 (2003).

⁷³ See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (“[T]he promulgation of so many biased rules” created “a sham system unworthy even of the name of arbitration.”); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165 (Cal. 1981) (arbitration agreement allowing one party to choose arbitrator held unconscionable).

⁷⁴ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

⁷⁵ Compare *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 272 (3d Cir. 2003) (“unconscionable”), with *Graham Oil Co. v. Arco Prods. Co.*, 43 F.3d 1244, 1248-49 (9th Cir. 1994) (“ARCO violated the purpose as well as the specific terms of” the substantive statute.).

Courts have split on the appropriate remedy and made little effort to define when one course should be pursued over the other.⁷⁶

But for a judicial desire to force more cases into arbitration, the proper course seems fairly obvious. Remedy-stripping arbitration clauses are attempts to misuse the judicially favored arbitration vehicle to affect remedies waivers that violate public policy. If drafters know that the worst courts will do to them is simply to give them the arbitration clause they should have written in the first place, there will be no down-side to overdrafting, but a likely up-side: Many adhering parties may fail to challenge the oppressive contract term. Thus, as I have argued elsewhere, the surest deterrent to such overdrafting is a clear rule that a remedy-stripping arbitration clause will be held invalid as a whole: Overreaching arbitration clauses should never be blue-penciled.⁷⁷

The Court has issued three decisions in which it considered remedy-stripping arbitration agreements without ever resolving whether such agreements are enforceable, let alone giving guidance on the severability issue. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,⁷⁸ the defendant brokerage house contested an arbitrator's award of punitive damages on the argument that its customer arbitration agreement effectively barred punitive damages.⁷⁹ *PacifiCare Health Systems, Inc. v. Book*⁸⁰ squarely raised the issue of whether remedy-stripping arbitration clauses purporting to bar "extracontractual" and punitive damages were enforceable in a civil RICO case. And in *Green Tree Financial Corp. v. Bazzle*,⁸¹ the Court was asked to decide whether an arbitration agreement could bar class-wide relief.

In each case, the Court dodged the main issue—is a remedy-stripping arbitration agreement enforceable?—by finding the contracts ambiguous and questioning whether the contract language in fact barred the remedy in question. In *Mastrobuono*, despite affirming the punitive damage award and noting that punitive damages are "an important substantive right," the Court did not decide whether a prospective waiver of that right in an arbitration clause would be enforceable. Instead the Court construed the supposed ambiguity against the drafter, Shearson, and determined that the agreement permitted the arbitrator to award punitive damages.⁸² In both *Book* and *Bazzle*, decided in the span of two months in the Court's 2002-03 Term, the Court again trumped up some contractual ambiguities and, this time, remanded the case to the arbitrator to

⁷⁶ For cases striking down remedy-stripping clauses in their entirety, see, e.g., *Graham Oil Co.*, 43 F.3d at 1248-49, and *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669, 699 (Cal. 2000). For cases enforcing arbitration clauses after blue-penciling or severing unconscionable terms, see, e.g., *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), and *Scissor-Tail*, 623 P.2d 165.

⁷⁷ See Schwartz, *supra* note 72, at 66-69.

⁷⁸ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

⁷⁹ Specifically, the agreement incorporated New York decisional law, under which arbitrators had no authority to award punitive damages. See *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976). Shearson argued that its customer had thereby "lawfully agree[d] to . . . waiv[e] any claim for punitive damages." *Mastrobuono*, 514 U.S. at 58.

⁸⁰ *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

⁸¹ *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

⁸² *Mastrobuono*, 514 U.S. at 62-63.

decide whether the contract precluded the damages or class-wide remedies,⁸³ opining that it was “premature” to address the enforceability question.⁸⁴ Although remedy-stripping agreements have rarely, if ever, been enforced by lower courts, the Supreme Court’s treatment extends vague hopes for aggressive contract drafters that remedy-stripping provisions might be enforceable yet—either because arbitrators will get control of the question and decide to enforce such clauses in individual cases, or because of federal preemption.

Labeling the enforcement question “premature” is painfully ironic—whether one means “premature” in reference to the procedural posture of the *Bazzle* and *Book* cases, as the Court meant, or “premature” in the doctrinal history of the FAA. The enforcement question was ripe for decision without a remand to the arbitrator since the validity of an arbitration agreement has always been a threshold question for courts rather than arbitrators, and a remedy-stripping provision is a ground to refuse to enforce an arbitration agreement—though *Bazzle* and *Book* do their utmost to muck up that point. As for the broader doctrinal question of whether remedy-stripping agreements are valid, that issue has been kicking around for two decades. In *Mitsubishi* itself, the Court reassured us that a party compelled to arbitrate “does not forgo the substantive rights afforded by the statute”⁸⁵ and that “in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”⁸⁶ The Court has often reiterated this point—in dicta.⁸⁷ That the validity of remedy-stripping agreements even appears to be an open question after these reassurances and all these years is inexcusable.

IV. INTERNAL ARBITRATION LAW—THE INCREASINGLY JUDICIALIZED NATURE OF ARBITRATION

It is easy to see how an influx of what I have called “public policy” cases—disputes between parties with divergent interests of unequal bargaining power, whether making claims under regulatory statutes or the common law—puts pressure on the arbitration system to judicialize itself. Allowing the stronger contracting party to dictate the dispute resolution procedure is so manifestly unfair that even arbitration true-believers are not completely comfortable

⁸³ See *Bazzle*, 539 U.S. at 451 (“Under the terms of the parties’ contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide.”); *Book*, 538 U.S. at 405-07 (“Respondents insist, and the District Court agreed, that these provisions preclude an arbitrator from awarding treble damages under RICO. We think that neither our precedents nor the ambiguous terms of the contracts make this clear. . . . In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties’ agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. As in *Vimar*, the proper course is to compel arbitration.” (citation omitted)).

⁸⁴ *Book*, 538 U.S. at 404.

⁸⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

⁸⁶ *Id.* at 637 n.19.

⁸⁷ See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

with this aspect of mandatory arbitration. An obvious strategy for accommodating oneself to this unfairness is to reassert procedural safeguards in the arbitration itself. The moves have been consistent and predictable:⁸⁸ Mandatory arbitration has become increasingly judicialized to deal with the unfairness in imposing arbitration in the first place. Judicialization takes two forms—the increased insertion of law, in the form of more litigation-like procedures and substantive rules of decision, and increased pressure to make arbitrators more like judges.

The basic template for judicialized arbitration was set forth in *Cole v. Burns International Security Services*,⁸⁹ which construed the *Mitsubishi-Gilmer* guarantee of preservation of substantive statutory rights to include important procedural rights. According to the *Cole* opinion, “*Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes,” and an enforceable mandatory-arbitration agreement should provide at minimum for (1) a neutral arbitrator; (2) more than minimal discovery; (3) a reasoned, written award; (4) full statutory remedies that would otherwise be available in court; (5) no burden on the employee to pay either unreasonable costs or any arbitrators’ fees or expenses; and (6) meaningful judicial review.⁹⁰ A requirement that arbitrators adhere to the applicable substantive law—a feature departing somewhat from the arbitral tradition of legal informality—is implicit throughout *Cole*.

The two leading arbitration providers, AAA and Judicial Arbitration and Mediation Services (“JAMS”), have made moves in these directions. AAA has promulgated two separate “Due Process Protocols” for employment and consumer disputes, respectively, which call for an impartial arbitrator with legal training, application of substantive law, and pre-hearing access to information for the claimant.⁹¹ AAA and JAMS rules for arbitrating employment cases now require a written, reasoned award and make limited provision for discovery.⁹² The judicializing thrust of these moves should not be overstated. The providers recognize the tension between satisfying the demands of their corporate defendant customers to keep arbitration simple and cheap, and responding to pressure from the plaintiffs’ bar, courts, and external regulators for more

⁸⁸ See, e.g., Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. (forthcoming 2007).

⁸⁹ *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

⁹⁰ *Id.* at 1482.

⁹¹ AM. ARBITRATION ASS’N, RESOLVING EMPLOYMENT DISPUTES: A PRACTICAL GUIDE app. II, at 18-23 (2006), available at <http://www.adr.org/si.asp?id=4426>; AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL (1998), available at <http://www.adr.org/sp.asp?id=22019>. AAA states that it will decline to administer an arbitration under a contract whose procedural terms “substantially and materially deviate[] from at least the minimum of th[e] Protocol’s] standards.” RESOLVING EMPLOYMENT DISPUTES, *supra*, at 6.

⁹² AM. ARBITRATION ASS’N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES §§ 9, 39(c) (2005), available at <http://www.adr.org/sp.asp?id=28481>; JUDICIAL ARBITRATION & MEDIATION SERVS., JAMS EMPLOYMENT ARBITRATION RULES AND PROCEDURES R. 18, 24 (2007), available at http://www.jamsadr.com/rules/employment_arbitration_Rules.asp. The AAA’s provisions on these matters for consumer disputes are vague and aspirational. See AM. ARBITRATION ASS’N, CONSUMER-RELATED DISPUTES SUPPLEMENTARY PROCEDURES (2005), available at <http://www.adr.org/sp.asp?id=22014>; AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL.

procedural safeguards. Thus the providers' allowances for discovery remain somewhat grudging—the discovery provisions are highly discretionary with the arbitrator, raising an interesting empirical question as to how much discovery is permitted in arbitration practice.

But the pressure on arbitration providers to self-regulate by judicializing their processes is not likely to go away. Although *Cole* has been followed in only two other jurisdictions,⁹³ many of its concepts have begun to be taken up in legislative proposals.⁹⁴

Limited judicial review is—and arguably should continue to be—a defining feature of arbitration.⁹⁵ Arbitration providers recognize that this is a key feature of the appeal of arbitration, and even the highly-touted AAA Due Process Protocols resist increasing the scope of judicial review. But many accommodationist advocates of procedural reform are dissatisfied with the extremely limited scope of judicial review of arbitration awards.⁹⁶ Again, *Cole* makes expanded judicial review a cornerstone of mandatory arbitration in Title VII cases, and a pending Senate bill would amend the FAA to provide for expanded judicial review, allowing a district court to vacate an arbitration award for any non-harmless error shown by a “clear and convincing” standard.⁹⁷

Finally, we see an increasing number of regulations, both prescriptive and binding, of arbitrators themselves. Again, the arbitration providers increasingly require arbitrators with training or experience in particular areas of substantive law. The ABA has issued a canon of arbitrator ethics, parallel to its canon of judicial ethics, and legislative proposals regulating arbitrator ethics and ensuring arbitrator impartiality are on the rise.⁹⁸

It would be an overstatement to say that arbitration is moving toward a complete convergence with litigation. However, it is clear that forcing public policy into the mandatory arbitration system has created a much more judicialized system of arbitration than what was contemplated by the FAA in 1925. It is not unlikely that internal arbitration law will gain in density and complexity—both from external pressure and regulation, and from self-regulation by arbitrator providers—beyond the current picture.

⁹³ See *Armendariz v. Found. Health Psychare Servs., Inc.*, 6 P.3d 669 (Cal. 2000); *Rembert v. Ryan's Family Steak Houses, Inc.*, 596 N.W.2d 208 (Mich. Ct. App. 1999).

⁹⁴ The Fair Arbitration Act of 2007 proposed by Senator Jeff Sessions of Alabama would amend the FAA to codify similar requirements for written awards and prehearing discovery. Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007).

⁹⁵ Schmitz, *supra* note 12, at 125-26.

⁹⁶ See Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234 (2007).

⁹⁷ See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997); S. 1135.

⁹⁸ See CAL. CIV. PROC. CODE § 1281.85 (West 2007); CAL. CT. R., ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION (2002); S. 1135 § 2 (requiring that arbitrators be active members of a state bar subject to the ABA Code of Ethics for Arbitrators in Commercial Disputes); ABA, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004), available at <http://www.adr.org/si.asp?id=4582>; see also Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385 (2007); Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 456-58 (2004).

V. THE DISTORTING EFFECT OF LEGAL SCHOLARSHIP

The Arbitration Trilogy has reverberated within the legal academy, creating a new field of academic inquiry. As FAA case law has proliferated, so have scholarly publications on arbitration. An obscure area generating a small handful of published scholarly articles at the beginning of the 1980s, arbitration scholarship has boomed: The 300-400 articles on arbitration now published annually in the pages of the journals included within the Westlaw database represent a fivefold increase in arbitration articles relative to published legal scholarship generally.⁹⁹ There are now several casebooks—betokening the existence of numerous law school courses—devoted largely, or entirely, to FAA-type arbitration.¹⁰⁰ Having myself published five articles, thereby making my pre-tenure academic career by commenting on the FAA, I may be biting the hand that has fed me when I say that I question whether this body of scholarship has served the public well.

Legal scholarship might be said to have two functions: to increase our knowledge and understanding of the law and legal institutions, and to shape their development. I do not for a moment question the quality of the work produced by my colleagues in academia in increasing our knowledge and understanding of the doctrine and functioning of arbitration under the FAA. But I fear that our influence on the development of arbitration law—if we have had any influence¹⁰¹—is distorted by the prism of the legal academic enterprise itself. Scholarly careers are subject to strong path dependence: An academic who is moved to publish an initial commentary on a subject has a strong interest in publishing further commentary on the same subject since careers are made by “streams” of scholarship and the building of reputation and expertise within a field. A peculiarity about FAA scholarship seems to be that “big picture” questions are few. In fact, I believe there are only two big picture questions: Was the Supreme Court right or wrong in making its two fundamental choices in the arbitration trilogy that the FAA compels public policy claims into arbitration and preempts state law? Indeed, perhaps the only big question is whether one approves or disapproves of mandatory arbitration. Everything else is details and nuances.

This particular structure to FAA scholarship pushes academics in a single general direction, one in which we are—willingly and wittingly, or not—generally supportive of the institution of mandatory arbitration. Few of us who have weighed in on the big question—thumbs up or thumbs down (or some “nuanced” variant of that)—find that there is more than one or two articles worth to say on it. Instead, we turn to commentary on detailed applications and extensions of the FAA and arbitration law.¹⁰² What we cannot do as scholars is

⁹⁹ See Appendix A. Again, caveats are in order.

¹⁰⁰ See, e.g., ALAN SCOTT RAU, ET AL., *ARBITRATION* (3d ed. 2006); KATHERINE VAN WEZEL STONE, *ARBITRATION LAW* (2002); KATHERINE VAN WEZEL STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* (2000).

¹⁰¹ It is always open to question whether academic commentators have as much influence over the thinking of legal actors as we hope we do.

¹⁰² Alternatively, arbitration scholars are beginning to turn to empirical studies. While these hold out great potential for increasing our understanding of the real world of arbitration, I am

keep repeating our arguments on the big picture question—fundamental objections to the whole FAA enterprise, or fundamental approval—because doing so reduces us to irrelevance in the current array of court battles over the “small strokes” issues and makes us look foolish to our academic peers.

The problem is that writing about the “current” judicial controversies in arbitration doctrine, and teaching the doctrine as a stand-alone course, takes as its starting point that the Second Trilogy—right or wrong—is here to stay. Arbitration supporters, of course, think that is a good thing. The rest of us either reluctantly, or in many cases enthusiastically, accommodate ourselves to this “reality.” This accommodationist outlook may be reinforced by our interest as academics in perpetuating a field of teaching and scholarship. If, as I believe is right, the Supreme Court (inconceivably) or Congress (possibly) were to overrule the Second Trilogy, and thereby in one fell swoop throw out most of the FAA interpretive case law of the last quarter century, many of us would have to find something else to write and teach about.

CONCLUSION: TIME TO OVERRULE THE TRILOGY

For every issue that becomes settled in arbitration law, several questions crop up. And in fact very few issues in arbitration law ever become settled. Rather than building a dispute-resolution institution that is a fast and certain case-referral, the courts have created a complex web of doctrine surrounding the institution of arbitration, one that generates litigation before and after arbitration decisions.

As a law-clarifying institution, the Supreme Court has performed wretchedly since the mid-1980s on arbitration questions. Having created this long list of perplexing doctrinal questions with the Second Trilogy, the Court should by rights have asserted some leadership in clearing them up. But it has not. The Court has all too frequently dodged its opportunities to resolve a doctrinal problem when it comes to arbitration law, opting for case-by-case decisions providing little precedential guidance.¹⁰³ This represents a very poor record of judicial performance, even if one agrees with the Supreme Court’s embrace of compelled arbitration. The doctrinal uncertainty fostered by the Supreme Court generates a great deal of satellite litigation on enforcement of arbitration, con-

highly skeptical of their capacity to help much in resolving the big picture debate. *See* Schwartz, *supra* note 8.

¹⁰³ As seen above, the Court has sidestepped several pressing and squarely-presented issues by the tactic of construing—or remanding to the arbitrator to interpret—some specific bit of contract language. *See supra* text accompanying notes 62-63, 67-70, 82-87; *see also* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000) (opting for case-by-case adjudication of claims that high arbitration costs deter claimants from enforcing federal statutory rights); Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998) (construing collective bargaining agreement to avoid deciding the question presented, whether a union can waive its members right to take federal civil rights claims to court). Finally, the Court has never clarified the scope of judicial review of errors of law in arbitration awards: The controlling principle is “manifest disregard” of the law, a phrase from an overruled 1953 case, *Wilko v. Swan*, that has been strangely construed by the lower courts. 346 U.S. 427, 436 (1953). *See, e.g.*, *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990) (only if it is clear from the face of the record that the arbitrator “recognized the applicable law—and then ignored it,” will the award be vacated for “manifest disregard”); Drahozal, *supra* note 96.

trary to the Court's stated goals of promoting a speedy and efficient alternative to litigation.

It has become crystal clear that the courts cannot or will not correct their errors in interpreting the FAA; only Congress can do that now. Mandatory arbitration gets many cases out of the court system and is therefore too attractive to judges for them to give it up voluntarily. The Supreme Court has reaffirmed its erroneous decisions too many times, and *stare decisis*—the rule that the Court will normally adhere to its precedents, particularly in statutory interpretation cases—is an important factor.¹⁰⁴ Nor does the current Court majority see that an error has been made. The Supreme Court has repeatedly cited the lack of congressional action to limit the reach of the FAA as a justification for declining to reconsider its position.¹⁰⁵ Justice O'Connor expressly observed that “[i]t remains now for Congress to correct” the Supreme Court's interpretation of the FAA.¹⁰⁶

The proper course is to amend the FAA to overrule the Supreme Court by removing consumer and employee contracts from the coverage of the statute and by providing that pre-dispute arbitration agreements in such contracts will not be enforced.¹⁰⁷ The specialized body of unconscionability doctrine; the incoherent and constitutionally suspect preemption doctrine; the nagging doctrinal questions about class actions, remedy-stripping, and forum selection that the Supreme Court declines to answer year after year; the confused and confusing case-law about which issues are decided by the court and which by the arbitrator; questions regarding the legal status of arbitration providers, the AAA's “due process protocol,” and arbitrator ethics; and a host of other questions would all be much less important, if not fade into insignificance, if the FAA were amended to overrule *Moses H. Cone, Southland*, and *Mitsubishi*. In addition to the increased fairness to consumers and employees, the classical virtues of arbitration are much more likely to survive the judicializing impact of mandatory arbitration.

¹⁰⁴ See Schwartz, *supra* note 46, at 45.

¹⁰⁵ See, e.g., *Circuit City Stores v. Adams*, 535 U.S. 105, 122 (2001) (“Congress has not moved to overturn” the *Southland* decision); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

¹⁰⁶ *Dobson*, 513 U.S. at 284 (O'Connor, J., concurring).

¹⁰⁷ Pending House and Senate versions of the Arbitration Fairness Act of 2007 would amend the FAA, not only to overrule *Mitsubishi* and restore the public policy exception, but more broadly to make pre-dispute arbitration agreements unenforceable in consumer, employment, and franchise contracts. See Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4 (2007); H.R. 3010, 110th Cong. § 4 (2007). The bill explicitly rejects the judicially-developed notion that arbitration contracts are more enforceable than contracts generally. S. 1782 § 4. It would also overrule the “severability rule” of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), which enforce arbitration agreements in otherwise void contracts. S. 1782 § 4. To see how the FAA would look if these amendments were enacted, see Appendix B.

APPENDIX A
THE GROWTH OF ARBITRATION LAW

Figure 1: Arbitration Cases as a Percentage of Federal Cases

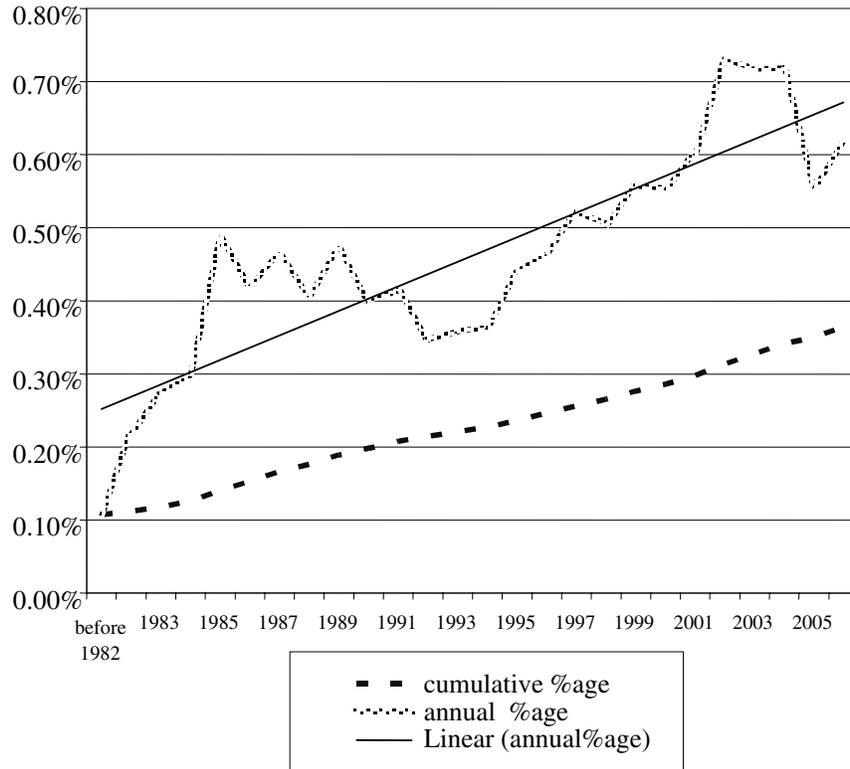


Figure 1 reflects the growth in the number of FAA-related cases in the federal courts since the *Moses H. Cone* decision. The hashmarked line charts arbitration cases as a year-by-year percentage of total federal decisions, and the dashed line charts the cumulative total of arbitration decisions as a percentage of the cumulative total of federal decisions. The latter data is pertinent insofar as the “size” of a body of decisional law is a cumulative rather than a yearly phenomenon.

There were 70 arbitration decisions in 1982 compared to 729 in 2006. Part of this tenfold increase would merely reflect the overall numerical growth of federal decisions, due both to increasing judicial activity and to editorial expansion of the Westlaw database. To eliminate that factor, I express the data as percentages of federal totals, rather than raw numbers of arbitration decisions.

The cases are those found through a Westlaw search for the terms “‘federal arbitration act’ or ‘united states arbitration act,’” the two alternative names for the statute. While this search may yield cases that merely mention the FAA tangentially, there is no reason to suppose that such cases have increased at a greater rate than cases in which the FAA supplies a rule of decision.

Figure 2: Arbitration Articles as a Percentage of All Law Review Articles

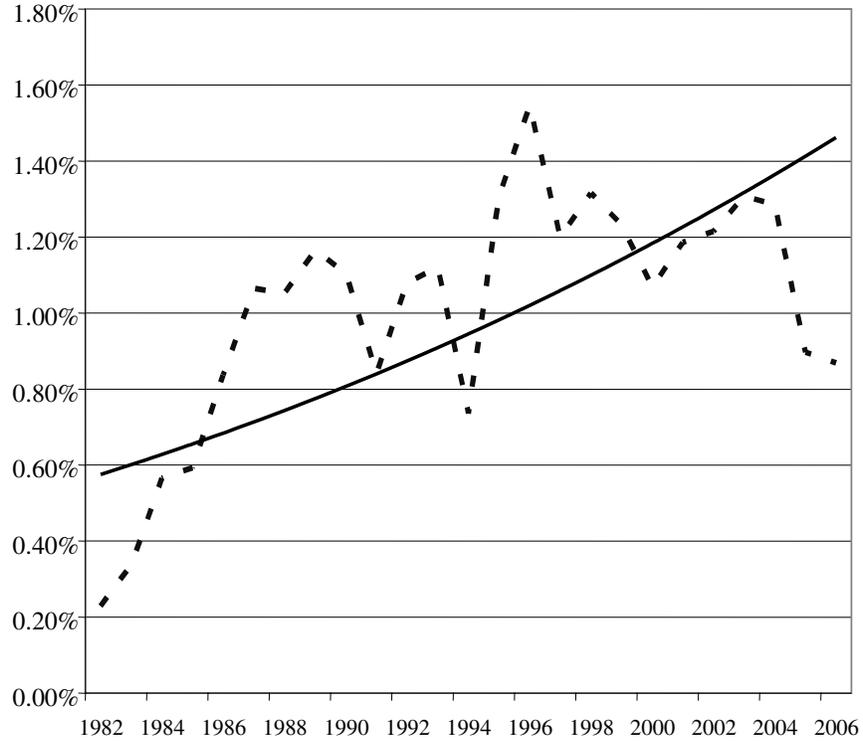


Figure 2 reflects the growth in the number of FAA-related articles in the Westlaw law review database since the *Moses H. Cone* decision. The dashed line charts arbitration articles as a year-by-year percentage of total articles. Again, since increases both in overall publication rates and in the scope of the Westlaw publication database would account for some increase in raw numbers of articles (5 in 1982 compared to 445 in 2002), I express the data in terms of percentage rather than raw numbers.

The numbers were generated by searching the same text string, “‘federal arbitration act’ or ‘united states arbitration act,’” in the Westlaw law review database. The search was limited to the title and abstract segments, to exclude articles that merely mention the FAA tangentially.

APPENDIX B
SECTIONS 1 AND 2 OF THE FEDERAL ARBITRATION ACT, AS
AMENDED BY THE ARBITRATION
FAIRNESS ACT OF 2007

(Deletions are in strikeout; additions are in bold.)

§ 1. **Definitions** ~~“Maritime transactions” and “commerce” defined;~~
~~exceptions to operation of title~~

As used in this chapter—

(1) **“maritime transactions,”** as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction;

(2) **“commerce,”** as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, ~~but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce;~~

(3) **“employment dispute,”** as herein defined, means a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act;

(4) **“consumer dispute,”** as herein defined, means a dispute between a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit;

(5) **“franchise dispute,”** as herein defined, means a dispute between a franchisor and franchisee arising out of or relating to contract or agreement by which—

(A) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

(B) the operation of the franchisee’s business pursuant to such plan or system is substantially associated with the franchisor’s trademark, service mark, trade name, logo-type, advertising, or other commercial symbol designating the franchisor or its affiliate; and

(C) the franchisee is required to pay, directly or indirectly, a franchise fee; and

(6) “pre-dispute arbitration agreement,” as herein defined, means any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate and enforceability

(a) A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, ~~save upon such grounds as exist at law or in equity for the revocation of any contract~~ **to the same extent as contracts generally, except as otherwise provided in this title.**

(b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of—

(1) an employment, consumer, or franchise dispute; or

(2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.

(c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

(d) Nothing in this chapter shall apply to any arbitration provision in a collective bargaining agreement.