

**HIGH NOON: WILL THE DISPARITY BETWEEN ARBITRATION FACTS,
ARBITRATION POLICY, AND ARBITRATION LAW FORCE A REEVALUATION OF
THE SUPREME COURT'S PRO-ARBITRATION BIAS?**

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Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
Under the direction of
Professor Daniel D. Barnhizer
Spring, 2011

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INTRODUCTION*

When it comes to arbitration, “[t]he Supreme Court has created a monster.”¹

Traditionally, contracting parties used arbitration as a method of decreasing the costs and uncertainty of litigation. However, arbitration now has many of the same characteristics as

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¹ Marcia Coyle, “Arbitration Showdown Looms Between Congress, Supreme Court,” THE NATIONAL LAW JOURNAL, June 14, 2010.

conventional litigation,² making it costly and time-consuming. Moreover, repeat players aggressively use arbitration to exploit opportunistic advantages from unsophisticated parties, further calling into question the value of the policies favoring arbitration. Despite these well-known problems, the Supreme Court has a strong pro-arbitration bias in favor of enforcing arbitration provisions regardless of context, often justifying its jurisprudence on a flawed understanding of the Federal Arbitration Act.³

Importantly, the ultimate goal for the arbitration doctrine is to create and enforce law that supports and effectuates national dispute resolution policy, which can only be accomplished by recognizing the facts on the ground associated with arbitration. Current arbitration jurisprudence, however, reflects a breakdown in the trichotomy between the facts, the law, and the policy. Though Congress's recent actions suggest that at least some members recognize this breakdown and hope to reform arbitration law and policy,⁴ the Supreme Court has yet to recognize the flaws in its application of the FAA.⁵

Part I of this paper examines the history and background of arbitration in the United States, looking especially at the initial judicial opposition toward arbitration agreements and the ways in which that resentment influenced congressional and judicial support over the past century. Part II discusses the current disparity between arbitration law, arbitration policy, and arbitration facts. Part III examines legislative and judicial efforts—at both the state and federal levels—that are aimed at reforming arbitration law and solving the problems in the current doctrine. The paper concludes by urging the Court to take action and alter its approach toward

² See discussion *infra* Subsection II.B.1. (discussing the changing costs and efficiency of arbitration).

³ See discussion *infra* Section II.A.

⁴ See discussion *infra* Section III.A.

⁵ See *infra* notes 176-185 and accompanying discussion.

arbitration to reflect the changing facts associated with arbitration and to redirect the law to more properly effectuate dispute resolution policy.

I. THE EVOLUTION OF ARBITRATION LAW IN THE UNITED STATES

Though arbitration today enjoys a favored position in Supreme Court jurisprudence, courts prior to 1925 were resentful toward alternative dispute resolution because it infringed on the courts' jurisdiction. This resentment was generally based in public policy as the courts distrusted an informal dispute resolution mechanism that lacked the same expertise and authority as the judiciary.⁶ The courts channeled this hostility by refusing to enforce arbitration agreements, regardless of the parties' intent.⁷

A. The History of Arbitration in the United States

Arbitration is not a new phenomenon. Instead, arbitration dates back to biblical times and ancient Rome.⁸ “Prior to the rise of nationalism in the seventeenth and eighteenth centuries, merchants from England, Europe, and elsewhere traversed the Mediterranean and Atlantic to conduct trade.”⁹ Rather than submitting disputes to the courts—as locating one court with authority over the numerous international parties would have been difficult or impossible—“[t]hese merchants resolved their commercial disputes by referring to business customs that had evolved within their trades. . . . [and these] customs came to be recognized as the *lex mercatoria* or the law merchant.”¹⁰ In response to merchants becoming more stationary, and in an effort to promote nationalist ideals, governments started taking a more active role in regulating trade after

⁶ See *infra* notes 8-22 and accompanying text.

⁷ See discussion *infra* Section I.A.

⁸ Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996).

⁹ Mark Garavaglia, *In Search of the Proper Law in Transnational Commercial Disputes*, 12 N.Y.L. SCH. J. INT'L & COMP.L. 29, 29 (1991).

¹⁰ *Id.*

the seventeenth century.¹¹ Accordingly, new attitudes toward arbitration included varying degrees of distrust and resentment.

Arbitration has been used in the United States as a private dispute resolution mechanism since the colonial era.¹² Despite its longstanding use, however, arbitration competed unsuccessfully with public judicial dispute resolution mechanisms—often because courts interfered with, or refused to enforce, alternative agreements.¹³ In the colonial era, for example, remnants from English law were the primary influences on arbitration in the United States,¹⁴ and the English courts' traditionally inhospitable treatment of arbitration agreements found its way into early American jurisprudence.¹⁵

This influence was evident in America during the eighteenth century, and "the frequent overturning of awards suggests . . . that the courts were willing to interpose themselves in the settlement process after the conclusion of an award."¹⁶ As a result, in both nineteenth-century Europe and the United States, arbitration was viewed as an illegitimate dispute resolution mechanism:

[Arbitration was] viewed as a process that functioned in derogation of legality. It was a bastard remedy, incapable of being integrated into the self-respecting family of adjudication. It had the right blood, but lacked official status and proper

¹¹ *Id.* ("During the seventeenth century, merchants became less transient and governments took a more dominant role in matters of trade. These and other sociological factors curtailed the use and growth of the law merchant as a means of resolving disputes among international merchants.").

¹² See Carbonneau, *supra* note 8, at 1948-49; see also Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1635 (2005) (noting that the use of arbitration predated the formation of the country).

¹³ See generally Eben Moglen, *Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law*, 93 YALE L. J. 135 (1983) (discussing judicial attitudes toward arbitration in the eighteenth century). However, some small communities did use and support arbitration for local disputes. 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, 70 (1997) ("[A]rbitration was a simple, democratic and neighborly way for equals to resolve their differences without relying on lawyers, legally-trained judges, or their arcane language and procedures.").

¹⁴ See Carbonneau, *supra* note 8, at 1948-49; see also Sternlight, *supra* note 12, at 1635.

¹⁵ Carbonneau, *supra* note 8, at 1948-49 (suggesting that arbitration provisions were considered to be the equivalent to "justice under a tree"). See also *supra* notes 16-22 and accompanying discussion.

¹⁶ Moglen, *supra* note 13, at 138.

standing. Arbitrators were caricatures of their judicial siblings—“pie-splitters,” who lacked requisite pedigree and cultivation.¹⁷

With this view of arbitration, courts often showed outright hostility toward arbitration agreements prior to 1925.¹⁸ For example, in the 1845 case of *Tobey v. County of Bristol*, Justice Story stated that “[c]ourts of equity do not refuse to interfere to compel a party specifically to perform an agreement to refer to arbitration, because they wish to discourage arbitrations, as against public policy.”¹⁹ Similarly, in discussing the court’s refusal to appoint a valuer, the court in *Paris v. Greig* noted that appointing a valuer “. . . would be equivalent to enforcing an agreement to refer to arbitration, which equity always declines to do, among other reasons, because it is against public policy to permit agreements to oust the courts of jurisdiction.”²⁰

Ultimately, judicial opposition toward arbitration in these early cases was generally grounded in two themes. First, many courts resisted arbitration because arbitration usurped the court’s authority and jurisdiction.²¹ Second, public policy seemed to weigh against permitting non-specialists to make their own law.²² Essentially, courts disapproved of arbitration because

¹⁷ Carbonneau, *supra* note 8, at 1947.

¹⁸ See discussion *supra* Section I.B. (discussing the enactment of the Federal Arbitration Act in 1925 and the shifting attitudes of the courts). See also *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984) (discussing the enactment of the Federal Arbitration Act in 1925 and noting that “[t]he problems Congress faced were . . . twofold: the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements”) (emphasis added).

¹⁹ *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) (No. 14,065) (“[I]t cannot be correctly said, that public policy, in our age, generally favors or encourages arbitrations, which are to be final and conclusive, to an extent beyond that which belongs to the ordinary operations of the common law. It is certainly the policy of the common law, not to compel men to submit their rights and interests to arbitration, or to enforce agreements for such a purpose.”).

²⁰ 12 Haw. 274; 1899 WL 1556, *5 (1899) (emphasis added). See also *American Cent. Ins. Co. v. Bass*, 38 S.W. 1119, 1119 (1897) (“It seems to be generally held that a stipulation that the question of liability shall be determined by arbitration is contrary to public policy and void. . .”).

²¹ Carbonneau, *supra* note 8, at 1947 (“Arbitrators could only pretend to be what they were not and never could be: real judges.”). Courts perceived arbitration as an illegitimate form of dispute resolution because arbitrators were acting as judges when, in fact, arbitrators did not have the same authority as judges. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974) (expressing the view that arbitration was seen as inferior to resolution of claims by the judiciary); *Paris v. Greig*, 12 Haw. 274; 1899 WL 1556, *5 (1899).

²² Carbonneau, *supra* note 8, at 1947. Arbitration allowed “ordinary citizens . . . [to] make their own law and disregard judicial process by the vehicle of contract arrangement.” *Id.*

arbitration invaded upon the Court's expertise in resolving disputes, but did not have the same legitimacy as judicial resolution.

B. The Golden Age - Congress's Attempt to Balance the Facts, the Law, and the Policy

Attitudes toward arbitration began shifting around the 1920s. This shift occurred because Congress wanted to distance the United States' treatment of arbitration from the hostile influences of English law.²³ Further, the facts concerning arbitration did not warrant the judiciary's refusal to enforce and approve of arbitration agreements. For example, three primary assumptions after the eighteenth century supported the enforcement of arbitration agreements—arbitration was a cheap, quick, and discrete method of dispute resolution;²⁴ arbitrators could be neutral;²⁵ and parties could bind themselves to contracts to which they expressly and rationally consent.²⁶ These factual assumptions suggested that arbitration could help effectuate several key dispute resolution policies—such as (1) promoting efficiency,²⁷ (2) providing access to justice,²⁸ (3) ensuring freedom of contract,²⁹ and (4) diminishing the burden on the courts.³⁰

²³ See H.R. REP. NO. 68-96, at 1 (1924) (“The need for the [the FAA] arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts.”).

²⁴ See generally H.R. REP. NO. 68-96, at 1 (1924) (discussing Congress's belief that “action should be taken at this time when there is so much agitation against the costliness and delays of litigation” and noting that these concerns “can be largely eliminated by agreements for arbitration”).

²⁵ *Id.* See also David J. Branson, *American Party-Appointed Arbitrators – Not the Three Monkeys*, 30 U. DAYTON L. REV. 1, 13 (2004) (“In the 19th century, American courts applied the same standards of impartiality to arbitrators that they applied to judges, often citing English decisions.”).

²⁶ See generally JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 87 (2001) (“Parties are rational in that they can rank their final ends consistently; they deliberate guided by such principles as: to adopt the most effective means to one's ends; to select the alternative most likely to advance those ends; to schedule activities so that, *ceteris paribus*, more rather than less of those ends can be fulfilled.”); see also Ige Omotayo Bolodeoku, *Contractarianism and Corporate Law: Alternative Explanations to the Law's Mandatory and Enabling/Default Contents*, 13 CARDOZO J. INT'L & COMP. L. 433, 452 (2005) (“Because contracting parties are rational, they are ascribed the capacity to negotiate and agree on terms they believe best serve their interests.”); CHARLES FRIED, CONTRACT AS PROMISE 2 (1981) (“The will theory of contract, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism.”).

²⁷ See H.R. REP. NO. 68-96, at 1 (1924) (discussing Congress's desire to promote efficiency).

²⁸ See generally Lawrence M. Friedman, *Access to Justice: Some Historical Comments*, 37 FORDHAM URB. L.J. 3, 5-6 (2010) (“Access to justice is not just a matter of courts in the basement of the house of justice. Many legal

Accordingly, at the beginning of the nineteenth century, arbitration facts and arbitration policy complemented and reflected each other. First, if arbitration was cheap, quick, and discrete, then allowing those agreements to be enforced would promote efficiency (policy 1). Second, if arbitrators were neutral, then enforcing arbitration agreements would provide parties with access to justice (policy 2). Third, if parties can bind themselves to contracts to which they consent, then allowing those parties to enter into agreements that would be enforced would promote freedom of contract (policy 3). Finally, arbitration, by its very nature, diminishes the burden on the courts by providing an alternative method of dispute resolution (policy 4). With the facts and the policy coinciding, the judiciary's refusal to enforce and support arbitration was unsustainable.

Congress took the first step to realign arbitration law when it enacted the Federal Arbitration Act (FAA) in 1925.³¹ The FAA created a federal statutory regime that sought to place arbitration agreements—when used in maritime transactions and in contracts “involving commerce”³²—“on equal footing with all other contracts” and to combat judicial hostility toward those agreements.³³ Essentially, the FAA “declared a national policy favoring arbitration and

developments in the late twentieth century had a real impact on access to justice. Laws were passed that opened the way into the legal system for the underdogs, or the lawyers who represented them.”).

²⁹ See Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall,”* 79 B.U. L. REV. 263, 305 n.162 (1999) (noting that “[freedom of contract] was still strong in 1905 when *Lochner v. New York* was decided, and some view this period as the ‘zenith’ of contract in the United States”); Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 8 (1986) (“By the nineteenth century, the sanctity of contracts entered into by individuals in the exercise of their common law rights had long been one of the central norms of Liberal social thought.”).

³⁰ See, e.g., Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 27 (noting that “[p]ublic policy favors the private settlement of disputes because settlements ease the burden on courts, conserve judicial resources, reduce the expense and risk of litigation for parties, and promote more lasting conciliation” and that “[i]f every case were litigated to the limit, the courts would collapse under the weight of their dockets”).

³¹ 9 U.S.C. §1-14 (2009). See generally *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (discussing that the FAA was intended to replace current hostility and opposition to the enforcement of arbitration agreements with a national policy favoring arbitration).

³² 9 U.S.C. § 2 (2009).

³³ H.R. REP. NO. 68-96, at 1 (1924).

withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”³⁴

The text of the FAA provides specific guidelines for appointing arbitrators,³⁵ compelling arbitration,³⁶ challenging and confirming awards,³⁷ and appealing arbitration decisions.³⁸ To ensure that parties to an arbitration agreement receive the benefits of their contracts, Section 3 of the FAA even provides that, “on application of one of the parties[,] [the court shall] stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.”³⁹ These provisions provide the substantive and procedural requirements—such as allowing parties to compel arbitration—that are necessary to ensure that the FAA can be properly effectuated by the courts, which are tasked with enforcing the agreements.

In the decades immediately following its enactment, the Supreme Court issued very few decisions referencing the FAA.⁴⁰ However, beginning with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* in 1967,⁴¹ the Supreme Court took a more active role in issuing decisions under the FAA.⁴² These decisions expanded arbitration law by broadly interpreting the individual sections of the FAA and by applying the FAA to new contractual contexts not

³⁴ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

³⁵ 9 U.S.C. § 5 (2009).

³⁶ 9 U.S.C. § 4 (2009). *See also* 9 U.S.C. § 7 (2009) (discussing the guidelines for compelling the attendance of witnesses).

³⁷ 9 U.S.C. § 9 (2009) (confirmation of awards); 9 U.S.C. § 10 (2009) (vacatur of awards); 9 U.S.C. § 11 (2009) (modification or correction of awards).

³⁸ 9 U.S.C. § 16 (2009).

³⁹ 9 U.S.C. § 3 (2009).

⁴⁰ A Westlaw search revealed only fifteen Supreme Court cases from 1925 to 1966 referencing the FAA. In contrast, since the Supreme Court decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* in 1967—which is considered to be a turning point in the Supreme Court’s FAA jurisprudence—there have been fifty-one cases specifically referencing the FAA.

⁴¹ 388 U.S. 395 (1967) (requiring the parties to arbitrate a claim for fraud in the inducement of the contract as a general matter—as opposed to fraud in the inducement of the arbitration agreement alone—when there was no evidence that the parties intended to withhold such a claim from arbitration).

⁴² *See infra* note 40.

originally anticipated by federal legislators when they passed the statute.⁴³ With this new pro-arbitration bias, the Supreme Court transformed arbitration from a contract term on equal footing with other provisions into a “super” contract term, essentially giving arbitration agreements more force and effect than traditional contract clauses.⁴⁴

II. THE BREAKDOWN BETWEEN ARBITRATION LAW, POLICY, AND FACTS

The Supreme Court’s application and expansion of the FAA—specifically the treatment of arbitration as a “super” contract term—made the inclusion of arbitration agreements attractive to contracting parties. Accordingly, with the availability of this new “super” contract term, many contracting parties began to employ suspect methods to obtain “consent” from—and to take advantage of—one-shot contracting parties.⁴⁵

A. Disconnecting the Law: The Supreme Court’s Expansion of Arbitration Law

In the decades immediately following the enactment of the FAA, arbitration law existed in a golden age because the FAA reflected the realities of arbitration and provided the necessary legal authority to support arbitration agreements—in the limited contexts envisioned by the statute.⁴⁶ However, this golden age was more in theory than in reality because the FAA, on its own, was largely ineffectual at changing contracting behaviors. However, beginning with *Prima Paint* in 1967, the Supreme Court began issuing “a series of decisions that permitted businesses to use arbitration in situations they had never previously thought permissible” and which gave

⁴³ See *id.* For example, prior to the enactment of the FAA, the areas where it was considered acceptable to use arbitration agreements was quite limited, and arbitration was largely restricted to “business-to-business or management/union” type contracts. Sternlight, *supra* note 12, at 1636. Arbitration agreements were conspicuously absent from employment contracts, commercial contracts, and in the resolution of statutory claims, and those who spoke on the passage of the FAA “made clear that they did not view such a use of arbitration as appropriate.” *Id.*

⁴⁴ See *AT&T v. Concepcion*, No. 09-893(S. Ct. Apr. 27, 2011) (limiting the ability of courts to invalidate arbitration agreements based on traditional contract challenges, such as unconscionability). *But see* H.R. REP. NO. 68-96, at 1 (1924) (noting that Congress intended only to place arbitration “upon the *same* footing as other contracts”) (emphasis added).

⁴⁵ See discussion *infra* Subsection II.B.2-II.B.3.

⁴⁶ See discussion *supra* Section I.B.

arbitrators greater authority in overseeing disputes.⁴⁷ As a result, the Supreme Court’s jurisprudence after *Prima Paint* created a “super” arbitration contract term in two ways: (1) by broadly interpreting the individual sections of the FAA and (2) by applying the FAA to new contractual contexts. With these decisions, the Supreme Court established a clear pro-arbitration bias that persists even into 2011 and gave contracting parties the “green-light” to employ the new “super” contract term in their agreements.

1. Broadly Interpreting the FAA’s Sections and the FAA’s Applicability

The Supreme Court’s first major expansion of the FAA’s reach occurred in the 1967 case of *Prima Paint* where the Supreme Court granted the arbitrator the authority to resolve legal issues as well as factual issues.⁴⁸ In *Prima Paint*, the Court examined the issue of “whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators.”⁴⁹ Ultimately, the Court held that, despite potential conflicts with state rules on severability, the FAA required that the claim be submitted to the power of the arbitrator—rather than the courts.⁵⁰ The dissent expressed concern over the majority’s decision to allow legal issues, such as fraud, “to be decided by persons designated to arbitrate factual controversies.”⁵¹ Further, the dissent argued that arbitrators, who are generally not lawyers, were “wholly unqualified to decide legal issues,” and that such an authority was never even anticipated by the framers of the FAA.⁵²

⁴⁷ Sternlight, *supra* note 12, at 1636.

⁴⁸ 388 U.S. 395 (1967).

⁴⁹ *Id.* at 402.

⁵⁰ *Id.*

⁵¹ *Id.* at 407 (Black, J., dissenting).

⁵² *Id.* (Black, J., dissenting) (“I am fully satisfied that a reasonable and fair reading of that Act’s language and history shows that both Congress and the framers of the Act were at great pains to emphasize that nonlawyers designated to adjust and arbitrate factual controversies arising out of valid contracts would not trespass upon the courts’ prerogative to decide the legal question of whether any legal contract exists upon which to base an arbitration.”).

In 1984, the Supreme Court further expanded the FAA's reach in *Southland Corp. v. Keating* by holding that the FAA applied to state courts as well as federal courts.⁵³ This highly-discussed decision proclaimed that the FAA preempted provisions in state laws that conflicted with the policies of the FAA and required state courts to apply FAA principles to determine whether those state laws were preempted.⁵⁴ Notably, however, there is nothing in the legislative history to suggest that the framers of the FAA intended that the Act be applied to state courts.⁵⁵ Instead, there is specific language in the Act referencing only the statute's application to federal courts; for example: (1) Section 1 specifically notes that the Act applies to contracts in interstate commerce, which suggests that the FAA should be applied in federal diversity cases, and (2) the statute makes numerous references throughout to the "United States district courts."⁵⁶ There is no mention of state courts or preemption in the statute.

Not surprisingly, many states were unhappy with the imposition of federal law into an area over which they had always exercised exclusive authority.⁵⁷ However, in the 1996 case of *Doctor's Associates v. Casarotto*, the Court reaffirmed the FAA's preemptive power, holding that state rules are preempted by federal law if they "undermine the goals and policies of the FAA" because conflicting state policies frustrated the intent of the FAA.⁵⁸

Along with decisions impacting the general use of the FAA, the Supreme Court has also issued several decisions examining the power and applicability of specific sections of the FAA. For example, Sections 9, 10 and 11 of the FAA set-forth the procedures for confirmation,

⁵³ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁵⁴ *Id.* at 16.

⁵⁵ *But see generally* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002) (arguing that the Supreme Court's decision in *Southland Corp. v. Keating* was a proper application of the FAA).

⁵⁶ 9 U.S.C. § 1-16 (2009).

⁵⁷ *See supra* notes 165-167 and accompanying text.

⁵⁸ 517 U.S. 681, 687 (1996).

vacatur, and modification of arbitration awards.⁵⁹ Importantly, though nothing in the text of the statute suggests that parties are unable to modify these requirements, the Supreme Court in *Hall Street Associates v. Mattel, Inc.* held that parties cannot contract for expanded judicial review under these sections.⁶⁰ In *Hall Street*, the Court examined a dispute between a lessor and lessee and held that FAA provided the “exclusive grounds for expedited vacatur and modification” of arbitration awards.⁶¹ The Court rejected the argument that “arbitration is a creature of contract” and so “the FAA is ‘motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered.’”⁶² Instead, the Supreme Court interpreted Sections 9, 10, and 11 of the FAA to supersede even the contractually-based desires of the parties.

Similarly, in *Arthur Andersen LLP v. Carlisle*, the Supreme Court expanded the protections afforded specifically by Section 3 of the FAA.⁶³ Though the enforcement of arbitration agreements, like most contractual provisions, was originally left to those who were actual parties to the contract, the decision in *Arthur Andersen* allows “a litigant who was not a party to the relevant arbitration agreement [to] invoke § 3 if the relevant state contract law allows him to enforce the agreement.”⁶⁴ Accordingly, as the applicable state law in *Arthur Andersen* allowed the petitioners, who were not party to the agreement, to enforce the contract against the signatory parties, the Court held that the relief provided by Section 3 for stays of litigation was

⁵⁹ See 9 U.S.C. § 9 (2009 (confirmation)); 9 U.S.C. § 10 (2009) (modification); 9 U.S.C. § 11 (2009) (vacatur).

⁶⁰ 552 U.S. 576 (2008).

⁶¹ *Id.* at 584. However, the Supreme Court did not address the issue of whether “the agreement [should] be treated as an exercise of the District Court’s authority to manage its cases under Federal Rule of Civil Procedure 16.” *Id.* at 591.

⁶² *Id.* at 585-86 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)).

⁶³ *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009).

⁶⁴ *Id.* at 1903.

also available to the petitioners.⁶⁵ This decision appears to misguidedly apply Section 3—which specifically states that a stay can be granted “on application of one of the parties”—because it allows a stay to be granted even on the application of a non-party.⁶⁶

In 2010, the Supreme Court revisited an issue similar to that discussed in *Prima Paint*—the authority of the arbitrator—when it decided *Rent-A-Center, West, Inc. v. Jackson*.⁶⁷ In *Rent-A-Center West*, the Supreme Court held that a provision delegating to an arbitrator the exclusive authority to resolve challenges made to the enforceability of the entire agreement was valid and enforceable.⁶⁸ With this delegation in place, the court was limited in its ability to review disputes, having the authority to review only challenges made specifically to the enforceability of the arbitration agreement alone.⁶⁹ Essentially, if a challenge is made to the validity of the whole agreement, the *Hall Street* decision allows courts to rubberstamp both the arbitration agreement and the delegation of authority to the arbitrator and then turn over responsibility for deciding the enforceability of the agreement to the arbitrator. This approach takes the court out of the decision-making process almost entirely, essentially allowing the court to wash its hands of the whole matter. Accordingly, even though the arbitration agreement was a part of the entire contract, the Court treated it as an agreement independent of, and separate from, the contract as a whole, greatly expanding the power and authority of the arbitrator.

With these interpretive decisions, the Supreme Court changed the role of the FAA. The Court’s interpretations expanded the reach of the statute both as a general matter—such as applying the FAA as a whole to state courts—and in specific matters—such as limiting the

⁶⁵ *Id.*

⁶⁶ 9 U.S.C. §3 (2009).

⁶⁷ 130 S. Ct. 2772 (2010).

⁶⁸ *Id.*

⁶⁹ *Id.*

parties ability to contract around Sections 9, 10, and 11 and applying the protections of Section 3 to non-signatories.

2. *Applying the FAA to New Contractual Contexts*

Along with broadly interpreting the FAA, the Supreme Court after *Prima Paint* also issued decisions that expanded the FAA to new contractual contexts, many of which were traditionally hostile to arbitration—such as employment and commercial contracts.⁷⁰ Notably, the application to the FAA to these additional contractual contexts appears contrary to the express language of the FAA, which states that the Act applies only to “maritime contract[s]” and in “contract[s] evidencing a transaction involving commerce.”⁷¹ Despite this language, the Supreme Court has upheld the use of arbitration agreements in almost all contractual contexts.

For example, in the 1983 case of *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, the Supreme Court decided a dispute between a contractor and a hospital regarding the arbitrability of their contract claims and upheld for the first time an arbitration clause in a commercial contract.⁷² Two years later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court examined the enforceability of arbitration in a statutory claim.⁷³ In deciding *Mitsubishi*, the Court expressly stated that there was nothing in the FAA that prohibited arbitration of statutory claims, and nothing prevented the parties from excluding statutory claims

⁷⁰ Sternlight, *supra* note 12, at 1636-38 (“With the approval and even encouragement of the Supreme Court, U.S. companies are increasingly using form contracts, envelope stuffers, and Web sites to require their consumers, patients, students, and employees to resolve future disputes through binding arbitration, rather than in court.”). See also Schwartz, *supra* note 13, at 53-54 (noting that arbitration clauses have been regularly employed in numerous fields of commerce over the past several decades, including the securities industry, health care industry, insurance industry, banking and finance industries, and even employment).

⁷¹ 9 U.S.C. § 2 (2009).

⁷² 460 U.S. 1 (1983). Importantly, despite there being no support for the Supreme Court’s expansion in either the text of the FAA or the legislative history of the statute, the Supreme Court commonly cites the FAA even when deviating from the text and intent of the statute. For example, in *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, the Supreme Court stated that “questions of arbitrability must be addressed with a *healthy regard* for the federal policy favoring arbitration” and that “[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” 460 U.S. 1, 24-25 (1983).

⁷³ 473 U.S. 614 (1985)

from the scope of their arbitration agreement if they so wished.⁷⁴ Instead, the Court noted that “[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.”⁷⁵ However, using that Court’s same reasoning, there was nothing in the statute that actually authorized the use of arbitration for statutory claims either.

In 1989, the Supreme Court also upheld arbitration agreements in securities contracts. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court examined the enforceability of an arbitration agreement in a contract between a brokerage firm and securities investors and upheld the enforceability of a pre-dispute arbitration agreement under the Securities Act.⁷⁶ In reaching this decision, the Court expressly overturned *Wilko v. Swan*, which had previously prohibited the use of arbitration agreements in this context. The Court stated that “[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.”⁷⁷

After upholding the use of arbitration agreements in commercial contracts, statutory claims, and securities contracts, the Supreme Court examined the enforceability of arbitration agreements in employment contracts in 1991.⁷⁸ In *Gilmer v. Interstate/Johnson Lane Corp.*, an employee filed an age discrimination suit against his employer under the Equal Employment

⁷⁴ *Id.* at 628.

⁷⁵ *Id.*

⁷⁶ 490 U.S. 477, 481 (1989) (“Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that § 14 is properly construed to bar any waiver of these provisions.”).

⁷⁷ *Id.* at 481.

⁷⁸ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Though the FAA provides only for maritime contracts and contracts in evidencing transactions in interstate commerce, the Supreme Court expressly relied on the federal policy supporting arbitration to find that “[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.” *Id.* at 26.

Opportunity Commission (EEOC) after he was fired at the age of sixty two.⁷⁹ In response, the employer filed to compel arbitration under the employment contract.⁸⁰ After granting certiorari to review the enforceability of an arbitration agreement under the Age Discrimination Employment Act (ADEA), the Court held that the agreement was enforceable because “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”⁸¹ Unable to show a congressional intent precluding the use of arbitration for such claims, the Court upheld the use of the arbitration agreement, thus approving the use of arbitration in the employment context.⁸²

These cases provide only a few specific examples of the Court’s express approval of new contractual contexts. Due to the continuous expansion into new contexts, the Supreme Court’s current arbitration jurisprudence supports the use of arbitration agreements in almost all areas. In fact, context today appears to be almost a non-issue in arbitration cases that come before the Court.

3. *The Result: A “Super” Contract Term*

The Supreme Court’s decisions since *Prima Paint* in 1967—both its broad interpretation of the FAA and its approval of arbitration into new contractual contexts—have greatly changed arbitration jurisprudence in the United States, and

[b]y the close of the 20th century[,] the United States Supreme Court in a series of ground breaking decisions had transformed the FAA from a mere procedural statute regulating the practice of arbitration in the federal courts into a substantive

⁷⁹ *Id.*

⁸⁰ *Id.* at 23.

⁸¹ *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

⁸² *Id.* at 35.

law of arbitration having wide ranging impact on contracts involving interstate commerce containing arbitration agreements.⁸³

Transforming the FAA from a procedural statute to a substantive statute benefited large-contracting parties hoping to limit their liability through arbitration provisions. But Congress did not anticipate such a transformation when it passed the FAA.⁸⁴ In discussing the new arbitration doctrine, one scholar noted that the Supreme Court's application of congressional arbitration policy is overreaching and problematic:

The Supreme Court has created a monster. With the Court's enthusiastic approval, pre-dispute arbitration clauses--agreements to submit future disputes to binding arbitration--have increasingly found their way into standard form contracts of adhesion. One would expect such agreements, which combine the "despotic" nature of arbitral decisionmaking with the "authoritarian" nature of adhesion contracts, to receive a good dose of what our profession likes to call "careful judicial scrutiny." Our legal sensibilities tell us that where waiver of so important a right as access to the courts is imposed through a contractual form infamous for the absence of real consent, courts should draw a protective line by holding the form term at least *presumptively unenforceable*.⁸⁵

Still, "[o]nce the Supreme Court began to issue decisions stating that commercial arbitration was 'favored' and that arbitration of employment claims could be permitted, businesses jumped on the opportunity to compel arbitration in contexts where they previously thought arbitration agreements would not be enforced."⁸⁶ With the Court treating arbitration as "super" contract terms, these repeat-contracting parties have benefited from the pro-arbitration bias in the law by using arbitration agreements more consistently and expansively than ever before.

B. Disconnecting the Facts: The Changing Assumptions on the Ground

The Supreme Court's decisions since *Prima Paint* have disconnected arbitration law from national dispute resolution policy by treating arbitration as a "super" contract term and giving

⁸³ John M. Townsend, "State Court Enforcement of Arbitration Agreements," U.S. Chamber Institute for Legal Reform (Oct. 2006), *available at* www.instituteforlegalreform.org/get_ilr_doc.php?docId=487.

⁸⁴ *See supra* notes 31-44 and accompanying discussion.

⁸⁵ Schwartz, *supra* note 13, at 36 (emphasis added).

⁸⁶ Sternlight, *supra* note 12, at 1638.

arbitration agreements more protection than other contract terms. Importantly, however, the facts on the ground associated with arbitration over this same time period suggest that many of the assumptions that Congress relied upon in enacting the FAA are no longer accurate. As such, these changing assumptions suggest that the Supreme Court’s arbitration jurisprudence lacks the necessary factual support to warrant the “super” contract term.

When enacting the FAA in 1925, Congress likely relied on the original assumptions in place during the late nineteenth and early twentieth centuries—(1) that arbitration is fast, cheap and discrete; (2) that arbitrators can be neutral; and (3) that parties can bind themselves to contracts to which they assent—to create a statutory regime that provided for the use of arbitration to effectuate national dispute resolution policies.⁸⁷ However, as Margaret Moss stated in her discussion of the current state of arbitration law,

[t]he Federal Arbitration Act (FAA) that Congress adopted in 1925 bears little resemblance to the Act as the Supreme Court of the United States has construed it. The original Act was intended to provide federal courts with procedural law that would permit the enforcement of arbitration agreements between merchants in diversity cases. The Supreme Court's construction of the statute, especially in the last twenty-five years, amounts to a judicially created legislative program, imposed without congressional input, that has vastly expanded the reach and focus of the original statute.⁸⁸

Accordingly, even though the Supreme Court’s arbitration jurisprudence on its own is sufficient to create a breakdown between arbitration law and arbitration policy, the disparity does not end there. The assumptions on which the original statute relied are no longer the same facts on the ground—arbitration is no longer fast, cheap, and discrete; arbitrators are not always neutral; and parties are not always able to give real assent to contracts. These new assumptions have caused a further breakdown in the arbitration trichotomy by removing the factual foundation that once supported pro-arbitration law.

⁸⁷ See *supra* notes 23-33 and accompanying text.

⁸⁸ Margaret L. Moss, *Arbitration Law: Who’s in Charge*, 40 SETON HALL L. REV. 147, 147 (2010).

1. Fact One: Arbitration is No Longer Fast, Cheap, and Discrete

One of the primary benefits of arbitration has always been that it is a creature of contract, which means that it is significantly more flexible than other forms of dispute resolution.⁸⁹ For example, unlike the legal system, arbitration procedures can be modified as desired by the contracting parties. The parties can dictate the time, the place, the arbitrator, the allocation of costs, and numerous other procedural issues simply by bargaining with the other party and codifying their final agreement in the contract. With this flexibility, arbitration is designed to promote efficiency because parties can bargain for the procedures and provisions that will benefit their individual needs.⁹⁰

However, rather than actually negotiating to create a custom-fit style of arbitration, most parties employ a “one-size-fits-all” style that is designed solely to benefit the more experienced, and more powerful, party.⁹¹ The more experienced party benefits by using efficient, standard-form arbitration agreements and by limiting liability with terms favoring the repeat-player.⁹² Using these “‘dedicated’ dispute resolution models” may be worthwhile to some businesses because “a repeatedly used contract template” may be the most cost-effective way to engage in “high-stakes commercial relationship[s].”⁹³ However, the benefits for these arbitration agreements are generally not shared between both the parties.⁹⁴ Due to the inexperienced contracting party’s inability to influence the terms of the agreement, the resulting arbitration

⁸⁹ Stipanowich, *supra* note 99, at 388.

⁹⁰ *Id.* at 388-89.

⁹¹ *Id.* at 400-06.

⁹² *Id.* at 403.

⁹³ *Id.*

⁹⁴ See Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 FORDHAM URB. L.J. 273, 279 (2010) (“The compulsory arbitration offered to customers, consumers, and employers has been aptly described as ‘quick and dirty.’ It is dominated by drafting party repeat players who impose it on an ill-informed and contractually powerless adhering population. It is used to control virtually all disputes between the ‘little guy’ and the large scale provider or employer. It frequently offers a sort of second-class justice.”).

agreements are often inefficient and one-sided—usually through provisions that make it too costly and time-consuming for the inexperienced party to pursue relief.⁹⁵ Being able to modify contracts according to the needs of the parties helps promote efficiency by allowing the parties to bargain for the terms that provide them with the greatest advantages.⁹⁶ With the increased use of standard-form agreements, however, arbitration often lacks the flexibility necessary to promote efficiency policies as well as it once did.

Still, arbitration can be attractive to parties seeking low-cost and efficient dispute resolution mechanisms to limit their potential liability. For example, business that deal with consumers can benefit from the lack of juries in arbitration because the absence of a jury is “commonly thought to reduce the likelihood of high damages awards against businesses.”⁹⁷ Similarly, limitations on discovery, the application of uniform procedures, restrictions on class actions, and other simplified procedures can lower costs for both parties and increase overall efficiency.⁹⁸ However, “[d]espite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American arbitration is at a crescendo. Much of this criticism stems from standard arbitration procedures that have taken on the trappings of litigation.”⁹⁹ With expansions in discovery, extensive motion practice, “highly contentious advocacy, long cycle time, and high cost,” arbitration is unable to provide the same benefits—or the same fair and equitable results—that it once did.¹⁰⁰ Accordingly, though arbitration has the potential to be a cost-saving, discrete, and efficient method of dispute

⁹⁵ See, e.g., *AT&T v. Concepcion*, No. 09-893, slip op. at 9 (S. Ct. Apr. 27, 2011) (Breyer, J., dissenting).

⁹⁶ *Id.*

⁹⁷ Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (2001).

⁹⁸ *Id.* at 90.

⁹⁹ Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* 7 DEPAUL BUS. & COM. L. J. 383, 384-85 (2009).

¹⁰⁰ *Id.*

resolution, many of the benefits disappear when parties actually get involved in the process.¹⁰¹ In their place, the parties often implement costly and inefficient procedures, such as allowances for class actions, caps on consumer fees, and requirements for substantial discovery.¹⁰²

As a result, arbitration is no longer a simplified replacement for civil litigation because it no longer provides procedures that ensure fast, cheap, and discrete resolution of claims. Instead, with the rise in similarities between the new procedures in arbitration and the traditional procedures associated with litigation, “[a]rbitration is . . . being criticized . . . for becoming ‘arbitration.’”¹⁰³ Accordingly, though arbitration still has the potential to provide benefits in theory, it often fails to promote efficiency because of the parties’ own tendencies to include inefficient procedures in the agreements.

2. *Fact Two: Arbitrators Are Not Always Neutral*

Along with changed costs and increased delays, arbitration may systematically favor repeat-players. Specifically, a significant body of scholarship suggests that arbitral outcomes more often favor sophisticated bargaining parties who repeatedly employ arbitrators.¹⁰⁴ As a result, arbitration firms often advertise to large, contracting parties for business and those companies often give repeat business to the arbitration firms that provide the best outcomes for them on a regular basis.¹⁰⁵

¹⁰¹ *Ware*, *supra* note 97, at 94-98.

¹⁰² *Id.*

¹⁰³ Donald R. Philbin, Jr. & Audrey Lynn Maness, *Still Litigating Arbitration in the Fifth Circuit, but Less Often*, 42 TEX. TECH. L. REV. 551, 552 (2010) (citing Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* 7 DEPAUL BUS. & COM. L. J. 383, 384-85 (2009)) (playing on a combination of the words “arbitration” and “litigation” to illustrate the growing parallels between the two doctrines).

¹⁰⁴ *See generally* Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998) (finding that repeat-players in arbitration contracts tend to do better in arbitration than one-time players).

¹⁰⁵ *See* Nancy A. Welsh, *What is “(Im)partial Enough” In a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 419-421 (2010) (noting that large-scale contracting parties tend to use the same arbitration firms unless those arbitrators begin issuing decisions against them).

For example, there have been claims that the National Arbitration Forum (NAF)—a for-profit arbitration firm that specializes in “resolving claims by banks, credit-card companies, and major retailers that contend consumers owe them money”—does not act as a neutral third-party.¹⁰⁶ NAF advertises “itself to lenders as an effective tool for collecting debts,” but it also provides promotional materials on its website indicating that is “a fair, efficient, and effective system for the resolution of commercial and civil disputes in America and worldwide.”¹⁰⁷ After conducting a study of arbitration in the credit card industry, a non-profit organization called Public Citizen issued a report that suggested that “arbitration firms and credit card companies enjoy a cozy, mutually beneficial relationship at the expense of consumers they force into binding mandatory arbitration.”¹⁰⁸ Relying on data from California, Public Citizen’s report detailed a 95% win rate for credit-card companies in mandatory arbitrations.¹⁰⁹

Some scholars have argued that such a disproportionate outcome is not as alarming as one might instinctually believe because “the consumer almost certainly owes the debt [in collection cases] and that this explains credit-card companies’ high win rates in both arbitrations and traditionally litigated cases.”¹¹⁰ Still, other scholars have expressed concern over NAF’s tendency to “fire” arbitrators that rule in favor of debtors.¹¹¹

Richard Neely, former justice on the West Virginia Supreme Court of Appeals, also served as an NAF arbitrator. Observing that NAF provided its arbitrators with a judgment form that was already completed and required consumers to pay arbitration fees that were substantially higher than court fees, Neely concluded

¹⁰⁶ Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BusinessWeek, June 16, 2008, at 72 (discussing the for-profit arbitration company called the National Arbitration Forum and describing it as company that caters to, and provides advantages to, large-contracting companies).

¹⁰⁷ *Id.* (“What consumers don’t know is that NAF, which dominates credit-card arbitration, operates a system in which it is exceedingly difficult for individuals to prevail.”).

¹⁰⁸ See Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), available at <http://www.citizen.org/publications/publicationredirect.cfm?ID=7545>.

¹⁰⁹ Welsh, *supra* note 105, at 419.

¹¹⁰ *Id.* at 419 n.143 (citing Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 DISP. RESOL. MAG., Fall 2008, at 30, 31).

¹¹¹ See *id.* at 419.

that “[g]odless bloodsucking banks have converted apparently neutral arbitration forums into collection agencies to exact the last drop of blood from desperate debtors.”¹¹²

With the proverbial axe hanging over their heads, arbitrators have a strong incentive to be biased in favor of repeat-contracting parties.

Other industries experience unequal outcomes in arbitration as well. In employment arbitration, for instance, there is evidence that “employees win less frequently than employers in arbitrations conducted pursuant to mandatory arbitration provisions inserted by employers in personnel manuals or handbooks.”¹¹³ And an “[e]mployees' likelihood of winning is even weaker when their employers are repeat players; their odds are worst of all when their employers have used the same arbitrator more than once.”¹¹⁴ Similarly, in securities arbitration, customers have also experienced disproportionate win-rates in comparison to large brokerage companies.¹¹⁵ This is often the result of the brokerage firms’ selection of “pro-industry” arbitrators that can be relied on to rule in favor of the brokerage companies.¹¹⁶

Though the disparate outcomes in these industries may cause some concern, these outcomes are likely due, at least in part, to the repeat-contracting party’s experience and use of standard-form agreements. Many of these repeat-players are in the business of contracting with parties, and it is no surprise that they are able to draft valid, enforceable agreements that

¹¹² *Id.* at 419 n.150 (citing Richard Neely, *Arbitration and the Godless Bloodsuckers*, W. VA. LAW., Sept.-Oct. 2006, at 12).

¹¹³ *Id.* at 421.

¹¹⁴ *Id.* (“Employees' likelihood of winning is even weaker when their employers are repeat players; their odds are worst of all when their employers have used the same arbitrator more than once.”)

¹¹⁵ *Id.* at 423.

¹¹⁶ *Id.* (citing Jill I. Gross & Barbara Black, *Perceptions of Fairness of Securities Arbitration: An Empirical Study 5* (University of Cincinnati College of Law, Pub. Law & Research Paper Series, No. 08-01, 2008). *See also* Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 126 (2005) (“The National Association of Securities Dealers (“NASD”) handles the vast majority of securities arbitrations in the United States today. While NASD insists that its arbitration forum is fair and functions smoothly, this claim is difficult to substantiate as NASD awards remain shrouded in relative mystery and anonymity. NASD has captured the market for securities arbitration and because the courts have largely abandoned any pretense of overseeing the arbitration process, one is left to wonder what is really happening in the trenches.”).

naturally favor their interests. Perhaps the biggest concern then is that the arbitrators in these industries are going into the arbitrations with preconceived ideas on who should win—even if that preconception is unnecessary because of a well-written arbitration agreement. Arbitration is not designed to ensure equal win-rates between parties, but it does rely on the legitimacy provided by a neutral decision-making process.¹¹⁷ This new fact, however—that arbitrators are not always neutral—further disturbs the factual foundation upon which Congress based the FAA and upon which the Supreme Court bases its pro-arbitration bias. If arbitration cannot provide parties with access to neutral arbitrators, then arbitration cannot provide parties with access to justice.

3. *Fact Three: Parties May Lack the Ability to Give Real Assent*

Along with decreased efficiency and concerns over the neutrality of arbitrators, the assumption that parties bind themselves to contracts to which they assent is also being called into question. As arbitration is a deviation from the default guarantee that injured parties may petition for judicial relief of their grievances, arbitration must demonstrate that it provides a benefit that parties cannot get with judicial resolution—such as cost, speed, fairness, expertise, etc.¹¹⁸ Further, as arbitration requires that parties give up—at least to some degree—their right to seek judicial relief, the consent of the parties is necessary to give legitimacy to alternative dispute resolution.¹¹⁹

Accordingly, if parties can dictate the terms of the own agreements, then enforcing those agreements would promote freedom of contract principles in national dispute resolution policies.

¹¹⁷ *Id.* at 422-24.

¹¹⁸ Christopher R. Drahozal, *Busting Arbitration Myths*, 56 KAN. L. REV. 663, 664 (2008).

¹¹⁹ Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1388 (1996) (“One can have both a judiciary meaningfully committed to consent jurisprudence and a set of regulations designed to achieve desired substantive policy for parties who consent to dispute via arbitration rather than litigation. The two concepts are inconsistent only if the nation adopts a public policy that prefers arbitration far more than it prefers consent.”).

However, when repeat-contracting parties use methods designed to take away a less-sophisticated party's ability to truly assent—for example, through adhesion contracts with hidden agreements and with signs on the doors of establishments—arbitration's ability to effectuate traditional notions of freedom of contract disappears.¹²⁰ This is especially important today because arbitration has expanded into contractual contexts where assent is often believed to be a “fiction”—such as consumer and employment contracts.¹²¹ Ultimately though, without assent, arbitration loses one of its most important legitimating factors.¹²²

Adhesion Contracts and Hidden Agreements: With greater use of arbitration agreements comes an increase in the number of challenges to those agreements.¹²³ However, many parties still believe that the benefits of arbitration tend to outweigh the costs incurred by these challenges.¹²⁴ As a result, many repeat-contracting parties still go to great lengths to ensure that arbitration agreements are incorporated in their contracts, often using standard-form adhesion contracts with boilerplate clauses.¹²⁵ As “courts [now] enforce mandatory arbitration clauses in a

¹²⁰ *Id.* at 1394 (“For the most part, contract is about consent. The concept of contract is best explained by notions of consent, and contract law is most legitimately supported by consent.”).

¹²¹ *See id.* at 1386 (“In its rush to empower arbitration, the Court has overlooked traditional bedrock values of our legal system: consent, unconscionability, disclosure, fairness and federalism. . . . and [the Court’s] inconsistent approach has, among other things, reduced consent to a mere legal fiction, a shadow of its former self.”). Arbitration prior to the enactment of the FAA was almost exclusively used between sophisticated commercial parties. With that sophistication, the parties were able to truly assent to contract terms. Arbitration today, however, is used in contractual contexts that often include unsophisticated parties, who—by their very nature—are less equipped to provide real assent.

¹²² *Id.* at 1396 (“If arbitration is to continue as a contract driven mode of ADR, it must be adjudicated with ample respect for the importance of consent in contract law.”).

¹²³ *See* Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L. J. 745 (2010); Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISPUTE RESOLUTION 1 (2009); Michael H. LeRoy, *Misguided Fairness? Regulating Arbitration by Statute: Empirical Evidence of Declining Award Finality*, 83 NOTRE DAME L. REV. 551 (2008).

¹²⁴ Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89-93 (2001) (“Relative to litigation, arbitration provides opportunities for . . . [businesses that deal with consumers] to save on its dispute-resolution costs.”).

¹²⁵ Sternlight, *supra* note 12, at 1640-42.

wide variety of boilerplate contracts,” concerns over assent call into question whether arbitration is actually promoting freedom of contract principles.¹²⁶

In *Carnival Cruise Lines, Inc. v. Shute*, the Supreme Court noted that “courts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power.”¹²⁷ The Court noted that some scholars have questioned whether adhesion contracts can ever be justified under traditional notions of contract law because there is a general consensus that signatories almost never read—and therefore cannot truly assent to—the terms of such contracts.¹²⁸ Though the Court rejected the argument that adhesion contracts can never be justified, it did hold that adhesion contracts must be reviewed with heightened scrutiny because of the potential imbalance in bargaining power.¹²⁹

In practice repeat-contracting parties employ standard-form adhesion contracts as a general rule. Given that one-shot contracting parties—such as consumers and most employees—rarely read such contracts,¹³⁰ the terms of the agreement do not always have the true assent of the adhering party. Despite this, courts continue to enforce such contracts as if the parties had truly consented.¹³¹ While a blanket assent like this might work as a justification for binding parties to many types of contract terms, the FAA is premised on a classical model of rational assent to

¹²⁶ Welsh, *supra* note 105, at 417 (“When consumers buy computers or cell phones, receive a credit card, or even enter into a contract to receive professional services, they will often find that any disputes that arise must be resolved through arbitration.”).

¹²⁷ 499 U.S. 585, 600 (1991).

¹²⁸ *Id.* (citing Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV.L.REV. 1173, 1179-80 (1983); K. LLEWELLYN, *THE COMMON LAW TRADITION* 370-371 (1960)).

¹²⁹ *Id.*

¹³⁰ Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 118 (“The non-drafting party often does not read the standardized agreement in full.”).

¹³¹ See Stempel, *supra* note 119, at 1386 (discussing the Court’s tendency to enforce arbitration agreements even when there is no clear assent).

arbitration. Where that assent is lacking, the justification for arbitration as a contractual dispute resolution mechanism disappears.

Signs on Doors: Though “[c]ourts have always supported the use of *voluntary* binding arbitration,” the growth in businesses employing arbitration agreements without requiring express consent is on the rise.¹³² Many businesses hoping to benefit from arbitration are finding new and innovative ways to essentially trap consumers and patrons into binding themselves to arbitration agreements.¹³³ For example, while home in Texas for the holidays, Christopher Anderson, a 1L student at Michigan State University College of Law, took a photograph of a sign taped to the door of a local burger franchise—a Whataburger restaurant.¹³⁴ The language on the notice included:

Arbitration Notice

By entering these premises, you hereby agree to resolve any and all disputes or claims of any kind whatsoever, which arise from the products, services or premises, by way of binding arbitration, not litigation. No suit or action may be filed in any state or federal court. Any arbitration shall be governed by the FEDERAL ARBITRATION ACT, and administered by the American Mediation Association.

Arbitration Notice¹³⁵

Whether or not this particular notice is enforceable is unknown. However, it is clear that businesses, spurred on by the pro-arbitration bias in law, are seeking to exploit contract

¹³² Sternlight, *supra* note 12, at 1636. The courts’ support for binding arbitration, however, was limited to post-dispute agreements rather than pre-dispute agreements. *Id.*

¹³³ “The Gates of Hell[ish Mandatory Arbitration]?” January 11, 2011, http://lawprofessors.typepad.com/contractsprof_blog/2011/01/the-gates-of-hellish-mandatory-arbitration.html. Once the photo and description were posted on the ContractsProf Blog site, the listserv exploded with discussions about the changing levels of formality in contracts.

¹³⁴ *Id.*

¹³⁵ *Id.*

formalities—which have been relaxed by the Court’s treatment of arbitration as a “super” contract term—when attempting to bind parties to arbitration agreements.¹³⁶

Ultimately, national dispute resolution policies remain the same; these policies still include promoting efficiency, providing access to justice, ensuring freedom of contract, and diminishing the burden on the courts. However, the facts that once allowed arbitration to support and effectuate those policies have changed. Instead, arbitration has lost much of its effectiveness: arbitration is not always cheap, quick, and discrete, so it does not really promote efficiency; arbitrators are not always neutral, so it does not always provide access to justice; and parties do not always rationally assent to the terms of the contracts, so it does not necessarily ensure freedom of contact. As a result, the facts do not support the universal use of arbitration to effectuate properly dispute resolution policies, and they especially do not support the Supreme Court’s extreme pro-arbitration bias—the “super” contract term—in applying the FAA.

III. SOLVING THE ARBITRATION PROBLEM

The Supreme Court’s approach to arbitration is unsustainable in light of the breakdown between arbitration facts, arbitration law, and arbitration policy. First, the current “super” contract term in arbitration law is overreaching and fails to effectuate congressional policy.¹³⁷ Second, the original assumptions upon which Congress based the FAA are no longer true, which makes the expansion of the doctrine even more untenable because those facts suggest that arbitration is no longer a viable method of effectuating dispute resolution policies.¹³⁸

Both federal and state legislatures have introduced arbitration reform to combat the problems in the arbitration doctrine. Similarly, courts at both the state and federal levels have

¹³⁶ In a tongue-in-cheek response to absurd liability waivers such as this, Ian Ayres proposes a LiabiliT-shirt, which would indicate express refusal to consent to waivers of liability on signs in or around establishments. “History of the LiabiliT,” <http://www.whynot.net/merchandise/history.php>.

¹³⁷ See discussion *supra* Section II.A.

¹³⁸ See discussion *supra* Section II.B.1-3.

also taken action to respond to the arbitration problem. To date, however, these efforts have all proven largely unsuccessful, and additional arbitration reform on a national level is still necessary.

A. Congress's Response

Congress has attempted to reform arbitration law by introducing proposals that “seek to exclude entire classes of claims (consumer, employee, franchise, and civil rights) from arbitration and to redraw the procedural line between decisions made by a court and decisions left to the arbitrator when the parties so provide.”¹³⁹ Though many of these bills ended up dying in committee, they provide evidence that federal legislators are beginning to recognize and attempt to solve the new arbitration problem.¹⁴⁰

1. *Congressional Acts—Proposed and Approved*

Congress recently amended arbitration law to regulate the use of arbitration in defense contracting and in the securities industry. First, the 2009 Department of Defense Appropriations Act included restrictions on arbitration terms in contracts awarded to Department of Defense suppliers. This bill—called the “Franken Amendment”—was a “response to Halliburton Co.'s efforts to require a former employee, Jamie Leigh Jones, to arbitrate rather than litigate claims related to her rape on company property by Halliburton employees.”¹⁴¹ Specifically, “[t]he amendment prohibits the award of Department of Defense funds to any federal contractor that forces its employees or independent contractors to submit to predispute binding arbitration of Title VII and sexual-assault tort claims.”¹⁴² The amendment essentially bars defense contractors

¹³⁹ *Id.*

¹⁴⁰ See discussion *infra* Subsection III.A.1-III.A.2.

¹⁴¹ Coyle, *supra* note 1. The amendment was named after Senator Al Franken of Minnesota. *Id.*

¹⁴² *Id.*

from requiring employees to seek arbitration in cases where they have been sexually assaulted while on the job and for discrimination claims.¹⁴³

Similarly, the 2009 Dodd-Frank Act mandated reform to arbitration practices in the securities industry.¹⁴⁴ In 1984, the Supreme Court set the stage for arbitration in the securities industry by enforcing pre-dispute arbitration agreements in brokerage contracts.¹⁴⁵ Since this decision, “the vast majority of disputes between investors and broker-dealers are handled pursuant to mandatory pre-dispute arbitration agreements.”¹⁴⁶ In fact, the National Association of Securities Dealers (NASD) requires that brokers submit to arbitration if their customers demand it, and “[e]mployees of member firms must also agree to arbitrate all disputes except those based upon claims of discrimination.”¹⁴⁷

Despite the prevalence of arbitration in the securities industry, the Dodd-Frank Act gives the Securities Exchange Commission (SEC) authority to restrict mandatory pre-dispute arbitration in order to protect claims by whistleblowers.¹⁴⁸ “This Act requires the SEC to conduct rulemaking prohibiting or limiting the use of mandatory arbitration pre-dispute agreements between customers and broker-dealers or investment advisers.”¹⁴⁹ In effect, the Act seeks to protect whistleblowers working in the securities industry by giving the SEC the authority to “prohibit or limit mandatory predispute arbitration provisions” for claims brought under the Sarbanes Oxley Act.¹⁵⁰

¹⁴³ Department of Defense Appropriations Act, H.R. 3326, 111th Cong. (2009).

¹⁴⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2009).

¹⁴⁵ Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 131 (2005).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 132.

¹⁴⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2009). *See also* Giselle M. Barth, *The Dodd-Frank Securitization Reforms, FDIC Safe Harbor Securitization Reforms and Rating Agency Reforms Panel: Rating Agency Reforms Material*, PLI Order No. 23048 (2010).

¹⁴⁹ Barth, *supra* note 148.

¹⁵⁰ *Id.*

2. *Congressional Acts—Proposed But Not Approved*

Along with bills aimed at reforming limited areas of arbitration law, federal legislators also proposed two bills to completely overhaul specific sections arbitration law.¹⁵¹ The most influential and recognizable of these proposals is the Arbitration Fairness Act of 2009, which proposed a prohibition on the use of predispute arbitration agreements in employment, consumer, and franchise disputes and in disputes arising out of statutes that are intended to protect civil rights.¹⁵² Further, the bill also declared that the courts, not the arbitrators, had the authority to decide the validity and enforceability of the both the contract as a whole and the arbitration agreement on its own.¹⁵³ Though the Arbitration Fairness Act stalled and died in committee, it provides evidence that federal legislators are beginning to recognize and respond to the disconnect between arbitration law and policy.¹⁵⁴

¹⁵¹ Along with these very well known proposals, there have also been several other, more narrowly focused, bills that have been introduced in Congress. For example, two acts recently introduced by Representative Linda Sanchez proposed limitations on the use of arbitration agreements for automobile purchase agreements and for nursing home admissions. First, the Automobile Arbitration Fairness Act set-forth a new policy for arbitration agreements in automobile purchase contracts. Automobile Arbitration Fairness Act, H.R. 5312, 110th Cong. (2008). Though the bill was voted out of the House Subcommittee on Commercial and Administrative Law on July 15th, 2008, the act would have prohibited pre-dispute binding mandatory arbitration in automobile purchase contracts. *Id.* Second, the Fairness in Nursing Home Arbitration Act of 2008, proposed a prohibition on mandatory, binding pre-dispute arbitration in nursing home admissions contracts. Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Cong. (2008). Though this bill was also voted out, it provides further evidence of legislative attempts to reconnect arbitration law with arbitration policy and the facts on the ground.

¹⁵² Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009-2010). *See also* Cong. Research Serv., *Bill Summary & Status 111th Congress (2009 - 2010) H.R.1020 CRS Summary*, THOMAS, (Feb. 12, 2009), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.1020:@@D&summ2=m&> (“Arbitration Fairness Act of 2009 - Declares that 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. Declares, further, that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an 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. Exempts from this Act arbitration provisions in collective bargaining agreements.”).

¹⁵³ *See supra* note 152.

¹⁵⁴ David S. Steuer, *A Litigator’s Perspective on the Drafting of Commercial Conflicts*, PLI Order No. 28797 (2011). It is important to recognize that this bill was introduced to a Democrat-controlled Congress, but still failed to get the necessary support to become law. If wide-scale reformation was going to occur at the federal level, it would likely have occurred with this bill. Accordingly, despite federal legislators’ recognition of the problem between arbitration law and policy, judicial action may be necessary to achieve the level of reform required to bring arbitration law back in line with arbitration policy. *See discussion infra* Section III.D.

The Consumer Fairness Act of 2009 also sought to reform arbitration on a wide-scale level, but unlike the Arbitration Fairness Act, this bill focused exclusively on reforming the use of arbitration in consumer contracts.¹⁵⁵ Specifically, this Act sought “[t]o treat arbitration clauses [that] are unilaterally imposed on consumers as an unfair and deceptive trade practice and prohibit their use in consumer transactions”¹⁵⁶ With the extensive use of arbitration in consumer contracts, the impact of this bill would have been to greatly limit the use of arbitration agreements on a national level. Notably, however, this bill also stalled and died in committee. Still, though neither of these bills became law, they do indicate recognition of the arbitration problem at the legislative level.

B. States’ Responses

Along with efforts at the federal level, states have also introduced recent arbitration reform legislation. Given federal preemption of most substantive arbitration law, state legislation is aimed less at changing arbitration law and more at impacting the realities of arbitration, such as arbitration inefficiency and arbitrator bias. To do this, the legislation is primarily designed to limit the costs of arbitration and to ensure that arbitrators remain neutral.

In New Jersey, for example, Governor Chris Christie signed state arbitration reform into law on December 21, 2010.¹⁵⁷ This new legislation is aimed at reforming arbitration in collective bargaining for public employees. This reform, which is “part of a wider set of proposals designed to get a grip on government costs and property taxes,” aims to create reform arbitration procedures for public employees by developing a “fast track arbitration process”¹⁵⁸

¹⁵⁵ Consumer Fairness Act of 2009, H.R. 991, 111th Cong. (2009-2010).

¹⁵⁶ *Id.*

¹⁵⁷ Tom Hester, “Christie signs New Jersey arbitration reform legislation,” NewJerseyNewsRoom.com.

¹⁵⁸ *Id.* To streamline the arbitration process, the bill requires that arbitrators issue a ruling within forty-five days or risk financial penalties. *Id.*

that caps arbitration awards,¹⁵⁹ “[c]aps arbitrators’ pay,”¹⁶⁰ “[i]ncreases ethical standards and training for interest arbitrators,” and “[r]andomizes the selection of arbitrators.”¹⁶¹

Similarly, on March 10, 2011, Oklahoma also enacted arbitration reform aimed at collective bargaining for public employees. The Oklahoma bill was designed “to create a system that is more fair and equitable for the taxpayers who bear the burden of its results.”¹⁶² The Oklahoma bill contains provisions (1) that “authoriz[e] the State Supreme Court to train Oklahoma arbitrators,” as opposed to bringing in out-of-state arbitrators to resolve contract disputes between municipalities and unions, and (2) that place restrictions on arbitrator’s awards.¹⁶³ Though state legislation will likely have little impact on Supreme Court jurisprudence, these state reform bills indicate a nationwide awareness of the disparity between current arbitration law and current arbitration policy.

C. Judicial Reforms

Along with arbitration reform in the state and federal legislatures, lower courts have also recognized the inconsistencies between arbitration law and arbitration policy.¹⁶⁴ In 1984, when the Supreme Court expanded FAA principles to state courts, “[t]he reaction of state courts varied, but many clung to their traditional hostility towards arbitration.”¹⁶⁵ For example, in the 1994 case of *Allied-Bruce Terminix Cos. v. Dobson*, “the attorneys general of twenty states filed

¹⁵⁹ Increases in pay that can be awarded by the arbitrators are capped at 2%. *Id.*

¹⁶⁰ Arbitrators’ pay is capped at \$7,500, and they face penalties of \$1,000 per day if they take more than 45 days to issue a decision. *Id.*

¹⁶¹ *Id.*

¹⁶² Press Release, Oklahoma State Senate, Senate Approves Binding Arbitration Reform Bill (March 10, 2011), http://www.oksenate.gov/news/press_releases/press_releases_2011/pr20110310c.html.

¹⁶³ *Id.*

¹⁶⁴ Coyle, *supra* note 1 (“Although the justices have divided narrowly on some issues, their decisions have generally been pro-arbitration, according to litigators and scholars. That trend is in contrast to the increasing skepticism shown by lower courts and lawmakers about arbitration’s claim to greater efficiency and less cost than court litigation.”). See also Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL’Y 477, 480 (2009) (arguing that “judicial support for arbitration in some contexts is waning”).

¹⁶⁵ Townsend, *supra* note 83.

amicus briefs asking the Supreme Court to overturn its 1984 decision [applying the FAA to the states] and to permit the states to enforce state anti-arbitration statutes.”¹⁶⁶ Clearly, the state courts were concerned about the new direction and expansion of arbitration law. In response to the state outcry, however, the Supreme Court reiterated its 1984 decision and held that state policies and rules that contradicted the purpose and intent of the FAA were preempted by the Act and thus unenforceable and invalid.¹⁶⁷

Still, some state jurisdictions continue to restrict the use of arbitration, especially in consumer and employment contracts.¹⁶⁸ As a report from the U.S. Chamber Institute for Legal Reform stated, “[s]tate courts frequently exhibit hostility to arbitration agreements in the consumer context that assign unilateral control over the process to the corporate party, or which allow only that party access to the courts.”¹⁶⁹ For example, “[r]ecent decisions in California state courts and the Ninth Circuit . . . show that the same judicial hostility ostensibly thwarted eighty years ago continues today, albeit in a more subtle—but equally hostile—form.”¹⁷⁰

Similarly, research conducted by the U.S. Chamber Institute for Legal Reform to determine “whether the mandate of the FAA and the Supreme Court decisions implementing it have now been fully accepted by the state courts” found that there were indications of lingering resistance toward arbitration in both Alabama and California.¹⁷¹ Alabama, for example, continues to resist the use of arbitration agreements in consumer contracts where one party has

¹⁶⁶ *Id.*

¹⁶⁷ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

¹⁶⁸ See Townsend, *supra* note 83. See also Michael G. McGuinness & Adam J. Karr, *California's “Unique” Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61 (2005) (discussing California’s treatment of arbitration).

¹⁶⁹ Townsend, *supra* note 83 (“Decisions from courts in California, Alabama, Wisconsin, and Tennessee illustrate varying degrees of hostility to arbitration agreements that provide for one-sided control of the dispute-resolution process.”).

¹⁷⁰ McGuinness & Karr, *supra* note 168, at 62.

¹⁷¹ Townsend, *supra* note 83

less bargaining power than the other, in contracts where one party controls the dispute-resolution process, and in contracts with class action waivers.¹⁷² Similarly, “courts in California translate their judicial hostility into seemingly innocuous pronouncements of ‘unconscionability’ and ‘unwaivable statutory protections.’”¹⁷³ That resentment toward arbitration is applied through California’s “new brand of unconscionability . . . [which] is far more demanding” and “unique to arbitration.”¹⁷⁴

D. The Supreme Court’s Response

Despite national recognition of the problems caused by the disparity between arbitration law and arbitration policy, the Supreme Court continues to maintain a pro-arbitration bias.¹⁷⁵ Over the past half century, “[t]he Supreme Court has undertaken the development of the law of arbitration with disregard for the text and the legislative history of the FAA, such that it amounts to pure judicial legislation.”¹⁷⁶ Even today, the Supreme Court continues to ignore the problems in the arbitration doctrine. For example, on April 27, 2011, the Supreme Court issued a decision in *AT&T Mobility LLC v. Concepcion* that upheld a class action waiver and enforced an agreement requiring the parties to arbitrate their disputes.¹⁷⁷ This decision expressly overturned the District Court’s and the Ninth Circuit’s holdings that the agreement requiring arbitration—but prohibiting class arbitration—was unconscionable.¹⁷⁸

¹⁷² *Id.*

¹⁷³ McGuinness & Karr, *supra* note 168, at 61.

¹⁷⁴ *Id.* at 62. “[I]n the context of arbitration, there has been very little that California courts have not found unconscionable.” *Id.* at 85.

¹⁷⁵ See discussion *supra* Section II.A.

¹⁷⁶ Moss, *supra* note 88, at 188-89.

¹⁷⁷ No. 09-893(S. Ct. Apr. 27, 2011).

¹⁷⁸ *Id.* slip op. at 3.

Prior to *Concepcion*, the right of lower courts to refuse to enforce arbitration agreements based on local contract law—such as unconscionability—was protected.¹⁷⁹ Section 2 of the FAA even specifically provides that arbitration agreements that meet the requirements under the statute “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁸⁰ By including the language at the end of Section 2—“save upon such grounds as exist at law”—the statute evidences an intent that arbitration agreements be placed only on equal footing as other contract provisions, which means that they can also be invalidated on the same grounds as other contractual terms. However, the Supreme Court’s decision in *Concepcion* essentially strips lower courts of their ability to issue any decision that frustrates the enforceability of an arbitration agreement, regardless of the grounds upon which the agreement is being challenged. This decision firmly establishes the arbitration “super” contract term that has been developing in Supreme Court jurisprudence since *Prima Paint*.

Along with taking even more authority from the lower courts to limit the reach of pro-arbitration law, the decision in *Concepcion* also evidences the Supreme Court’s failure to consider the changing facts on the ground associated with arbitration. For example, in deciding *Concepcion*, the Supreme Court stated that class arbitration would frustrate key benefits of arbitration, including its flexibility and its informality.¹⁸¹ However, as discussed earlier in this paper, evidence suggests that arbitration today includes many of the same characteristics as litigation, making it neither as flexible nor as informal as the Supreme Court presumes it to be.¹⁸²

¹⁷⁹ *Id.* slip op. at 8 (Breyer, J., dissenting) (noting that “even though contract defenses, e.g., duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States”). It was this protection that has allowed California and the Ninth Circuit to continue exhibiting hostility toward arbitration agreements. See discussion *supra* Section III.C.

¹⁸⁰ 9 U.S.C. § 2 (2009).

¹⁸¹ No.09-893, slip op. at. 14-15.

¹⁸² See discussion *supra* Subsection II.B.1.

As a result, the Court’s concerns over allowing class arbitration seem largely unfounded as a class approach would actually recognize the changing facts on the ground—that arbitration is behaving in much the same way as traditional litigation. At the very least, the Supreme Court’s unequivocal suggestion that arbitration is still flexible and informal fails to fully appreciate the changing facts on the ground.

Decisions like *Concepcion* motivate large-contracting parties to continue practices that are designed to take advantage of one-time players.¹⁸³ For example, in *Concepcion*, the plaintiffs wanted to consolidate their claim in a class action because they only sought \$30.22 in damage.¹⁸⁴ As Justice Breyer questions in the dissent, “[w]hat rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim?”¹⁸⁵ As a result, the arbitration agreement in this case operates as an almost impenetrable shield for the large-contracting party by eliminating—almost completely—the other party’s ability to seek relief. Accordingly, large-contracting parties have a strong incentive to include these types of arbitration agreements in their contracts, and they will continue to engage suspect contracting methods—including the use of hidden agreements in standard-form adhesion contracts and the absurd placement of arbitration agreements—to achieve that end.

Ultimately, the Supreme Court has two options to respond to the current arbitration problem. First, the Supreme Court can continue to apply arbitration law as it currently does and simply wait for legislation that will potentially invalidate years of legal decisions concerning arbitration by expressly countering decades of pro-arbitration jurisprudence. Or, second, the Supreme Court can begin responding to arbitration issues with an aim toward arbitration reform

¹⁸³ See discussion *supra* Subsection II.B.3.

¹⁸⁴ *Concepcion*, No.09-893, slip op. at. 9 (Breyer, J., dissenting).

¹⁸⁵ *Id.*

by acknowledging that the policy and facts upon which it once relied are no longer as unwavering as once believed.

As Congress's attempts at arbitration reform have been largely ineffectual at bringing arbitration law back in line with arbitration policy,¹⁸⁶ the first option will likely provide little relief toward correcting the disparity in the arbitration doctrine. Further, as Supreme Court jurisprudence caused much of the current arbitration problem,¹⁸⁷ the Court will likely be in the best position to redress the breakdown in the arbitration trichotomy. Accordingly, the Supreme Court should follow the second approach and act to address the disparity between arbitration law, arbitration policy, and arbitration facts. To do so, the Supreme Court should issue decisions that reflect the express language of the FAA and that do not conflict with the intent evidenced in the legislative history.

One option for the Court to achieve this end would be to return to traditional models of contractual consent and enforce only those arbitration agreements to which the parties have expressly consented.¹⁸⁸ Though this will not overcome concerns regarding increased costs in arbitration and arbitrator neutrality, it will at least require that repeat-contracting parties get true assent from parties.¹⁸⁹ Requiring such assent will help restore some of the legitimacy of the arbitration doctrine because it will force parties that do not traditionally read contracts to take special actions to demonstrate their consent to the arbitration agreement—such as by initialing or signing the agreement itself.¹⁹⁰ Such a requirement will help alert even unsophisticated parties to

¹⁸⁶ See discussion *supra* Subsection III.A.1 and III.A.2.

¹⁸⁷ See discussion *supra* Section II.A.1-3.

¹⁸⁸ See generally Stemple, *supra* note 119, at 1389 (discussing the importance of consent in the arbitration context and arguing that “[c]onsent offers several distinct benefits if meaningfully incorporated with modern arbitration jurisprudence”).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

the significance of the provision and perhaps, once the parties are made aware of the provision, such a requirement may even encourage the parties to actively bargain for the terms.

Even if the Supreme Court chooses an approach different from the consent requirement discussed above, the fact remains that the current state of arbitration law is largely untenable. The United States' relies considerably on alternative dispute resolution, and arbitration is used expansively throughout key industries—such as employment and commercial contracts. Accordingly, correcting the disparity in arbitration law and arbitration policy is simply too important an endeavor for the Supreme Court to simply “wait and see.”

CONCLUSION

The ultimate goal for the arbitration doctrine is to ensure that the facts, the law, and the policy coincide and complement one another. In the United States, the initial hostile treatment toward arbitration agreements caused a breakdown in this trichotomy. However, when Congress enacted the Federal Arbitration Act in 1925, these three elements were, theoretically, in harmony for nearly fifty years. However, when the Supreme Court began expanding arbitration law beginning with *Prima Paint*, it created a disparity between the law and the policy. As a result, arbitration law currently treats arbitration provisions as “super” contract terms, and this treatment encourages repeat-contracting parties to exploit the relaxed contract formalities that have resulted.

Despite the congressional and judicial efforts to bring arbitration law back in line with arbitration policy, the Supreme Court continues to issue decisions that expand arbitration law. The Court should instead focus on issuing decisions that reach a compromise between supporting the pro-arbitration policy in the FAA and recognizing the changing value of arbitration as a

dispute resolution mechanism. Such a compromise will realign arbitration law to properly reflect the facts on the ground and allow arbitration to truly effectuate dispute resolution policies.

Ultimately, “[a]rbitration remains under national klieg lights. It has ‘become a wide-ranging surrogate for civil litigation’ in a wider variety of contracts than at any time in our nation's history.”¹⁹¹ At the very least, the Court should avoid issuing decisions that will only make the problem worse. By making an active decision to begin considering arbitration policy now—rather than waiting until Congress issues legislation aimed at expressly curbing the Court’s arbitration jurisprudence—the Supreme Court can take an active stance in forging the new path for arbitration law.

¹⁹¹ Philbin & Maness, *supra* note 139, at 552.