Mandatory Arbitration: Do-it-yourself Court Reform Becomes Do-it-yourself Tort Reform

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In 1995, Justice Sandra Day O'Connor wrote: "over the past decade, the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[1] Justice O'Connor was absolutely right. Starting in the mid-1980s, the Supreme Court dusted off the Federal Arbitration Act ("FAA")[2] – an obscure procedural statute that had been the subject of only half a dozen or so Supreme Court decisions in 60 years – and transformed it into something bearing little relation to the law considered and enacted by Congress in 1925. Concerned with the workload of the federal courts, the Supreme Court discovered that the FAA could be used as an extensive docket-clearing device to move large numbers of cases out of the court system and into a system of private dispute resolution. The cases cleared out of the court system under the judicially re-tooled FAA have been disproportionately the claims of consumers, employees and small-business owners.

The real winners under the modern system of FAA arbitration are large companies who decide to write arbitration clauses into their "take-it-or-leave-it" contracts. Also benefitting from the modern FAA are the arbitration-providers and individual arbitrators who find a huge increase

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

[2]9 U.S.C. § 1, et seq. The statute is also known as the "United States Arbitration Act."

in demand for their services. What is, for the courts, a system of "do-it-yourself court reform" has increasingly become a system of "do-it-yourself tort reform" for regulated business entities seeking to avoid liability for wrongs done to consumers, employees and small-business franchise owners. It is time for Congress to act by amending the FAA to make pre-dispute arbitration agreements unenforceable in consumer, employee and franchise contracts.

The testimony that follows is concerned with so-called "mandatory arbitration," a specific subcategory of arbitration covered by the FAA. "Mandatory arbitration" means arbitration pursuant to a pre-dispute arbitration agreement, which is entered into before a dispute arises. Mandatory arbitration is troublesome in the situations of consumers, employees and franchisees – I'll refer to these groups collectively as "consumers," because their situations are essentially similar – because the contracts in question inevitably involve large disparities of bargaining power and transactional knowledge, placing the consumer at a great disadvantage. The consumer typically has no say in whether the arbitration agreement will be part of the contract, which is presented on a "take-it-or-leave-it" basis. And it is significant that the relationship giving rise to the contract is highly regulated – by consumer protection, employment and franchise laws – precisely because businesses in those contract situations have a demonstrated history of taking undue advantage of their superior bargaining position.

I. Legal Background: Current Court Interpretations Violate the Original Intent of Congress

The Federal Arbitration Act was enacted in 1925 as an alternative forum to resolve

disputes "between businessmen."[3] Historically, courts had treated arbitration agreements as unenforceable; the FAA was intended to eliminate this targeted unfavorable treatment and "make[s] arbitration agreements as enforceable as other contracts but not more so."[4]

Employment disputes were expressly excluded from the act. It was also believed that statutory, "public policy" claims were not subject to so-called "mandatory" arbitration – compelled arbitration pursuant to a pre-dispute agreement. Therefore consumer claims were not within the intended coverage of the act.

For the next 60 years after the FAA's enactment, courts consistently held that statutory causes of action reflecting "important public policies," could not be sent into compelled arbitration under the FAA.[5] Cases applying this "public policy exception" to FAA enforcement were animated by a constellation of concerns that arbitration was an inadequate forum for public policy claims. Significantly, all of the "public policy" claims involved causes of action under a private attorney general model, in which injured plaintiffs are viewed as a vehicle for

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[3]*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, 73-81; Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N. C. L. Rev.931, 994 (1999). The history is described in detail at pp. 969-94.

[4]Prima Paint Corp. v. Flood & Conklin Mfg. Co. 88 U.S. 395, 404 n.12 (1967). With passage of the FAA, "an arbitration agreement is placed upon the same footing as other contracts, where it belongs." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)

[5]*See* Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (holding that a predispute agreement was ineffective to compel arbitration of claims under the 1933 Securities Act); American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) (Sherman Antitrust Act not suitable for resolution in arbitration); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 655-56 (1985) (Stevens, J., dissenting) (citing cases from seven circuits following *American Safety*). *See also* Alexander v. Gardner Denver Co., 415 U.S. 36 (1974) (pre-dispute arbitration agreement did not prevent party from litigating claim under Title VII of the Civil Rights Act of 1964); Schwartz, *Enforcing Small Print*, supra, at 92-94 & n. 242.

enforcement of important regulatory policies and are encouraged by attorneys fee-shifting. And the regulations under these statutes are, for the most part, efforts at redressing market failures resulting from power imbalances and overreaching by the stronger party in a contract setting. The public policy cases viewed pre-dispute arbitration agreements as another example of the stronger, drafting party to an adhesion contract attempting to extract a pre-dispute waiver of a "substantial" right – here, the right to a judicial forum. In that sense, pre-dispute arbitration clauses in "adhesion" or "take-it-or-leave-it" contracts were no different from pre-dispute rights waivers generally, a sort of contract term long disfavored by the courts.

But in a series of decision between 1985 and 1991, the Supreme Court reversed course and dismantled the public policy exception.[6] Under current doctrine, any statutory claim is subject to compelled arbitration, absent an express rejection of pre-dispute arbitration by Congress. The Court also misconstrued the FAA to apply to employment cases. In sweeping language, the Court went well beyond the intent of Congress to make arbitration agreements "as enforceable as other contracts" by claiming that the FAA creates "a national policy favoring arbitration agreements."[7] While states may regulate other contracts under consumer protection and other state laws, the Supreme Court has (mistakenly) held that the FAA preempts many state laws, despite clear legislative history that the FAA was never intended to preempt any state

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[6]In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 655-56 (1985), the Court overruled the *American Safety* doctrine by holding that antitrust claims were arbitrable, and in subsequent decisions, the Court overruled *Wilko* as to securities claims. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v McMahon, 482 U.S. 220 (1987). *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991) upheld mandatory arbitration of a federal age discrimination claim.

[7]Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

laws.[8] The Supreme Court has gone a long way toward suggesting that mandatory arbitration can be used as a form of immunity from state consumer protection laws. The Court has made arbitration agreements more enforceable than any other kind of contract.

Legal commentators and even dissenting Supreme Court justices have recognized that "the [Supreme] Court's interpretation of the Act has given it a scope far beyond the expectations of the Congress that enacted it."[9] What is the reason for Court's overly broad interpretations? Significantly, the judicial reinvention of the FAA coincided with the emergence of interest in "alternative dispute resolution" or ADR while at the same time the Chief Justices (Burger and later Rehnquist) began expressing alarm at the caseload of the federal judiciary. While no judicial opinions would admit this, the FAA offered the Supreme Court an opportunity to reduce its caseload through judicial fiat rather than awaiting Congressional action to heed the Chief Justice's call for more federal judges. Unfortuately, the price for this "do-it-yourself court reform" falls most heavily on consumers, employees and small businesses who lose their access to the courts.

II. How Arbitration Works Against Consumers, Employees and Small Businesses – and the Public

To understand how arbitration works against consumers, employees, small businesses, and the public, its important to distinguish between what I call "basic" and "remedy-stripping" arbitration agreements. "Basic" arbitration – a simple agreement to submit disputes to

[8]Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

[9]Circuit City Stores v. Adams, 535 U.S. 105, 132 (Stevens, J., dissenting).

arbitration rather than court – is by nature unfair in most pre-dispute consumer and employment agreements. "Remedy-stripping" arbitration agreements are even worse, and represent an express attempt by regulated businesses to avoid or undermine consumer protection laws and force consumers to waive remedies. Under the current legal interpretations of the FAA, consumers are faced with the problems of both basic and remedy-stripping agreements.

A. Basic arbitration agreements: putting consumers at a disadvantage

Arbitration can be a fast and efficient alternative to litigation. The advantage of traditional arbitration is that there are very few, if any, legally required rules and procedures, and the parties can make up their own. Where parties have relatively equal bargaining power in a pre-dispute contracting situation, or where a dispute has already arisen and both sides are represented by counsel, the parties can use arbitration as a tailor-made dispute resolution process to meet their needs. And because the procedural rules arise out of bargaining, they are likely to be fair to both sides.[10]

Problems with arbitration agreements arise in pre-dispute consumer situations: that is, contract situations where the contract is written by the business and presented on a "take-it-or-leave-it," non-negotiable basis to the consumer, employee or small-business franchisee. The business in these situations has a great disparity in bargaining power and transactional knowledge on its side, which is exactly why these transactions are regulated by consumer and employee protection laws. And under normal contracting behavior, the party with the stronger bargaining position will press for advantageous terms.

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[10]Arbitration under collective bargaining agreements falls into this category and is therefore sufficiently fair to be unobjectionable.

If arbitration is better for both parties – faster and cheaper – then why wouldn't parties agree to it after a dispute has arisen? The reason that business entities write arbitration clauses into their contracts is because they believe it places them at an advantage relative to litigation in their disputes with customers and employees. The two fundamental sources of advantage for employers are discovery limitations and market/repeat player effects. Additional procedural attributes of arbitration can discourage consumer claims, again, to the benefit of the would-be business defendant.

1. Discovery Restrictions

In the great majority of consumer and employment cases, the consumer or employee is the claimant and the law places the burden of proof on him or her. A claimant's failure to produce critical proof in the possession of the defendant can lead to a failure to meet the burden of proof, thereby resulting in the loss of the claim. At the same time, in most such cases, the defendant business entity possesses some or most of the information needed to prove the case. In litigation, this is not a huge problem for the consumer or employee plaintiff, because liberal discovery rules mandate full disclosure of relevant information by all parties and enable plaintiffs to conduct an adequate investigation of the witnesses and documents controlled by the corporate defendant.

But in traditional arbitration, there is no rule requiring pre-hearing disclosure of evidence and little if any ability of consumers to investigate their cases. Reform efforts by arbitration providers have changed this situation somewhat. Consumer arbitrations conducted by the American Arbitration Association, for instance, give the arbitrator discretion to order pre-hearing

discovery or disclosure that the arbitrator deems necessary.[11] But what is "necessary" disclosure is left entirely up to the discretion of the arbitrator, and there are no rules to protect the consumer if the arbitrator takes an unduly restrictive view of necessary disclosure.

Moreover, since one of the longstanding selling points of arbitration is that it cuts down on pre-trial litigation costs, which are primarily the costs of conducting discovery and investigation. This cultural norm of arbitration will tend to make arbitrators reluctant to give consumers leeway to conduct discovery of the defendant's information that is comparable to what would be available in a court case.

In sum, arbitration's limitations on discovery place consumers and employees – the parties with less information but a higher burden of proof – at a significant disadvantage.

2. Market and repeat player effects

Because arbitration is provided in the private marketplace, arbitrators and arbitration providers have a strong incentive to please their customers. The corporate defendant, as the drafter of the non-negotiable contract, has the sole right to decide whether to impose predispute arbitration or not; therefore, the corporate defendant is the "customers" of arbitration in this sense. In contrast, if consumer arbitrations were subject only to fully voluntary agreements made after the dispute arises, the market incentives for arbitrators and providers would be more even handed: arbitration would have to be an attractive choice to both parties.

This market effect is borne out by empirical research documenting a "repeat player

[11] "The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." American Arbitration Association, Employment Arbitration Rules § 9, available at www.adr.org.

effect" in the employment arbitration context, in which employers who have repeat arbitration cases win markedly better results than employees and small employers who do not regularly appear in arbitration.[12] Reliable empirical analysis comparing arbitration and litigation results remains sparse and hard to come by. Until recently, arbitration awards were not made public by arbitration providers, and difficulties in determining the "true value" of a plaintiff's claim to compare to the result in arbitration or litigation, plus difficulties in tracking results of cases that settle before judgment or arbitration award, make results analysis exceedingly complex.

It may be that the best empirical evidence we now have, and will ever have, about the fairness of arbitration is the behavior of the defendants who draft the clauses. It is fair to assume that large companies who adopt arbitration regimes and stick with them over a period of years are rational actors who have information about their costs. Sticking with arbitration is rational only if it saves money.

How is this money savings attained? Arbitration proponents claim that savings results because arbitration is procedurally faster and cheaper – the savings are all in procedural costs, that is to say, attorneys fees. But arbitration proponents will also tell you that arbitration's speed and procedural informality "helps the little guy," by making it easier for consumers and employees to bring claims. If this were true – if the costs of litigation were a deterrent to consumers and employees – then we would expect to see more consumer and employee claims brought against companies that used arbitration clauses. This would mean that the procedural cost savings to companies from choosing arbitration over litigation would be largely offset by

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[12]*See* Steven E. Abraham and Paula B. Voos, The Ramifications of the Gilmer Decision for Firm Profitability, 4 Employee Rights & Employment Policy Journal 341 (2000); Lisa B. Bingham, *Employment Arbitration: the Repeat Player Effect*, 1 Employee Rights & Employment Policy Journal 189 (1997); Schwartz, *Enforcing Small Print, supra*,1997 Wis. L. Rev. at 64-66.

paying out more claims – unless the payouts themselves were lower in arbitration than in litigation. In short, it would likely be irrational for companies to choose arbitration over litigation unless the liability awards were systematically lower than in litigation, to offset the larger number of claims. And that is indeed how arbitration is frequently marketed to businesses.[13]

3. Other procedural attributes

The notion that arbitration is faster and cheaper for consumers and employees is a myth in many cases. Compared to court filing fees of around $150, administrative filing fees in arbitration can be ten times that amount. And while judges are not paid by the hour by litigants, arbitrators are, commanding hourly rates comparable to those of well-paid attorneys and legal consultants. To be sure, litigants in court incur attorneys fees and costs, but in the majority of consumer and employment claims these are borne by the attorneys on a contingency fee ("no win/ no pay") contract, payable only out of a settlement or judgment; or, where pro-bono attorneys are representing the consumer, are not charged to the client. Thus, arbitration costs can be a significant deterrent compared to litigation in court, and in its only decision on the matter, the Supreme Court made it more difficult for consumers to prove that arbitration costs have a deterrent effect on their claims.[14]

A hallmark of arbitration is the exceedingly limited right to appeal the arbitrator's award.

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[13]Schwartz, *Enforcing Small Print, supra,*1997 Wis. L. Rev. at 63-64.

[14]In *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), the Supreme Court held that a consumer had to submit evidence the he himself was deterred from filing an arbitration due to excessive costs in his particular case. This creates a near impossible catch-22, since the consumer cannot prove that point without having a case and a lawyer representing him. Those who were deterred from filing claims will never be heard from in court.

Other than pretrial discovery, the other major contributor to the time and cost of litigation is the appeals process, and arbitration virtually cuts that out. In general, arbitration awards cannot be overturned for errors in applying substantive law, now matter how egregious.[15] The bases for appeal are limited to demonstrable bias on the part of the arbitrator and a handful other other narrow grounds.[16] By sacrificing the safety valve of an appeals process in order to gain speed and efficiency, arbitration places virtually unreviewable power in the hands of a private arbitrator. This can be a powerful deterrent to a risk averse consumer, who may fear the ruinous effect of a 4- or 5- figure arbitrator award against her in the event she loses her claim and the arbitrator awards fees and costs to the defendant – with no effective right to appeal that decision.

Finally, traditional arbitration makes no requirement that arbitrators provide written statements of reasons for their decisions. This requirement, which applies to judges in court cases, has beneficial effects for both the litigants and the public. It promotes fairness by forcing the judge to make a good faith effort to fairly confront and consider all the evidence and arguments presented. And it benefits the public by creating precedents that develop the law. These benefits are lost to cases sent into arbitration.

B. Remedy-stripping arbitration agreements

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[15]Schwartz, *Enforcing Small Print, supra,*1997 Wis. L. Rev. at notes 50-51. It is well-established that arbitration awards are not subject to judicial review for mere errors of law. They may be vacated for "manifest disregard" of the law, but only if it is clear from the face of the record that the arbitrator "recognized the applicable law - and then ignored it." Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990). Thus, if the arbitrator declines to make a written statement of reasons, even this narrow ground of appeal vanishes. An award will be upheld against a "manifest disregard" challenge if the arbitrator "even arguably" applied the applicable law. *See, e.g., id.,* at 9.

[16]FAA, 9 U.S.C. § 9.

1. In general

A classic example of an unfair consumer contract is one that forces the consumer to waive remedies as a condition of doing business. Contract clauses that to try to force consumers to waive their rights to compensatory and punitive damages, attorneys fees, class actions and other remedies to which they would be entitled by statute have long been held unenforceable under state consumer protection laws. So have contract terms that try to make it more difficult for consumers to bring claims: requirements that claims be filed in a distant and inconvenient location, or that drastically shorten the time in which a claim may be filed, are common examples. Contract terms that try to limit liability for one's own wrongful acts have traditionally been held "void as against public policy," and many consumer protection laws expressly state that contractual remedies waivers are prohibited and unenforceable.

Yet the magic of the "national policy favoring arbitration" threatens to change all that. With the courts' broad encouragement of arbitration clauses in general, many companies have aggressively experimented with arbitration clauses that add additional terms to the basic arbitration agreement to extract waivers of other remedies. While these "remedy stripping" terms would be plainly unenforceable under normal circumstances, many courts have enforced such terms when they are packaged in arbitration agreements.

2. Class Actions

Class actions are a vital remedy for consumer and employment claims. It is well known that "the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action

prosecuting his or her rights."[17] A systematic consumer fraud by a credit card company overbilling twenty thousand customers by $50 each might not result in even one lawsuit, since the amount is too small to justify the time and expense of filing a claim; the class action is essential to remedy and deter such abuse. Many consumer claims, as well as employee wage and hour violations, fall into this category.

Businesses have had some success in using arbitration clauses to rid themselves of class actions. They have argued that an arbitration agreement necessarily implies individual, not classwide, dispute resolution; and some business have written express class action prohibitions into their arbitration agreements. There is no doubt that many businesses find arbitration agreements attractive precisely because they creates the possibility of immunity from class action suits. Alan S. Kaplinsky, a leading mandatory arbitration spokesman and attorney representing financial services institutions, has claimed that "Arbitration is a powerful deterrent to class-action lawsuits against lenders ... . Stripped of the threat of a class action, plaintiffs' lawyers have much less incentive to sue."[18] Kaplinsky asserts that

> the "class action waiver" has matured into a commonplace feature of consumer arbitration agreements. Such waivers typically provide that neither party will have the right in court or in an arbitration proceeding to participate in a class action, either as a class representative or class member, act as a private attorney general or join or consolidate claims with claims of any other person. ***Once rare, class action waivers are today included in millions of credit card and other financial services agreements nationwide.*** They have been upheld by the vast majority of

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[17]Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997) (internal quotations omitted); see Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 Wm. & Mary L. Rev. 1, 28-33 (2000).

[18]Paul Wenske, Some Cardholders are Signing Away Their Right to Sue, Kan. City Star, April, 3, 2000, available at http://www.kcstar.com/projects/carddebt/2side.htm (last accessed Oct. 27, 2003).

federal courts and most (but not all) state courts.[19]

Not all courts have enforced class action bans, and the Supreme Court has not yet ruled on the issue.[20] However, it is fair to say that this possibility of using arbitration clauses to gain immunity from class actions represents the greatest threat posed by the FAA to the viability of consumer protection law.

III. FAA Preemption: A Violation of Federalism and a Threat to Consumer Protection

A. The problem of FAA preemption

Most consumer protection law is state law. State contract principles such as "unconscionability" together with state consumer protection statutes, provide the bulk of protections for consumers against overreaching by businesses.[21] The FAA, properly interpreted, should have no impact on those laws, because section 2 of the FAA recognizes that arbitration agreements may be held unenforceable "on such grounds as exist at law or in equity for the revocation of any contract,"[22] language that should include state consumer protection regulations. However, the FAA has been held by the Supreme Court to preempt at least some state law, and the decisions in this area have been sufficiently unclear to create widespread

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[19]Alan S. Kaplinsky, *Consumer Financial Services Law: Is Jams in a Jam over its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?*, The Business Lawyer, vol. 61, p. 923 (2006) (emphasis added).

[20]*See, e.g.*, Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) (holding class action ban was unenforceable). The Supreme Court considered, but declined to decide the issue, in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). Three justices argued that the arbitration agreement should have prohibited class actions.

[21]*See, e.g.*, Wisconsin Consumer Act Wisconsin Consumer Act, Wis. Stat. §§ 421.101 et seq.; California Business & Professions Code § 17200 (prohibiting unfair trade practices).

[22]FAA, 9 U.S.C. § 2.

confusion in the lower courts as to just how much state law is nullified by the FAA. Some corporate defendants have argued that an arbitration agreement can effectively immunize them from all state consumer protection laws.

In *Southland Corp v. Keating*,[23] Supreme Court held that the FAA preempted a state law that would have denied enforcement to an arbitration agreement in a 7-Eleven franchise contract. "In enacting § 2 of the [Federal Arbitration] Act, Congress declared a national policy favoring arbitration and 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."[24]

Southland was a poorly reasoned decision reaching the wrong result. As is well documented both in dissenting opinions and legal scholarship, Congress intended the FAA as a procedural rule to apply only in federal courts, not as substantive law binding on the states.[25] In reaching the decision, the Court ignored its own precedents and principles regarding federalism and the proper interpretation of statutes. The Supreme Court, in other cases, has long applied a "presumption against preemption," according to which an act of Congress will not be construed to preempt state law absent clear expression of congressional intent to displace state regulation.[26] Moreover, arbitration agreements are an aspect of contract law, and contracts are an area of

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[23]465 U.S. 1 (1984).

[24]465 U.S. at 10.

[25]*Southland,* 465 U.S. at 22-31 (O'Connor, J., dissenting); *Allied-Bruce,* 513 U.S. at 285-95 (Thomas, J., dissenting); *see* David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 Ore. L. Rev. 541 (2004); *id*. at 542 n. 7 (citing commentary criticizing *Southland*).

[26]"[W]here ... the field which congress is said to have preempted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest." English v. General Electric Co., 496 U.S. 72, 78-79 (1990).

traditional state regulation, which federal courts should be "reluctant to federalize."[27] *Southland* ignored these and other legal principles to reach a result aimed at expanding the scope of the FAA and the number of cases that could be subject to mandatory arbitration.

B. The uncertain scope of FAA preemption

How much state law is preempted by the FAA? Clearly, the FAA, as construed by *Southland* and later cases, preempts state laws that expressly "single out" arbitration clauses as subjects of restrictive or "hostile" regulation.[28] But whether FAA preemption extends further remains a subject of argument. The Supreme Court has made few efforts to clarify matters, and those few have been unhelpful: for example, the Court stated that "a state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" is preempted.[29]

The Supreme Court's confusing pronouncements on FAA preemption have given rise to sweeping arguments by corporate defendants suggesting that state consumer protection laws are voided by the FAA. The Supreme Court doctrine has filtered down to us with the ambiguous phrases that what the FAA saves from preemption is regulation of "contracts generally" or

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[27]Patterson v. McLean Credit Union, 491 U.S. 164, 183 (1989),.

[28]See, e.g., Doctor's Assocs., Inc. v. Casarotto, 517 U.S.681, 687 (1996) (stating that the FAA "precludes States from singling out arbitration provisions for suspect status"); Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (stating that the FAA preempts laws that are "hostile" to arbitration)

[29] *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995), which tells us:

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

"general contract law."[30] This has given rise to the argument that targeted contract laws, even though they do not specifically regulate arbitration clauses, are preempted as applied to arbitration clauses. Corporate defendants have also begun to argue that the FAA creates a substantive federal right to have one's arbitration agreement "enforced as written," notwithstanding any state law which may vary the effect or meaning of specified terms.[31]

These preemption arguments threaten to turn arbitration agreements into blanket exemptions from consumer protection and other statutes aimed at preventing contractual overreaching. A corporate drafter could write an arbitration agreement to mandate a waiver of injunctive relief, compensatory damages, or attorney fees guaranteed by a state consumer or antidiscrimination statute. As a defendant in litigation, that drafting party now has two arguments to defend the provision. First, the federal "enforce as written rule" arguably preempts any state law that would vary the written terms of an arbitration agreement. Second, because the regulatory statutes involve subcategories of contracts -- only consumer contracts -- they are not "general contract law" and are preempted by the FAA.[32]

Southland makes the FAA into one of the more extensive regimes of federal preemption,

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[30]*See, e.g.*, Perry v. Thomas, 482 U.S. 483, 492 n. 9 (1987) ("States may regulate contracts, including arbitration clauses, under general contract law principles").

[31]For a more detailed discussion and critique of the source of this argument, *see* Schwartz, *Power of Congress*, supra, at 563-68.

[32]See, for example, *Bradley v. Harris Research*, 275 F.3d 884 (9th Cir. 2001) (in which the court held that the California law barring unfair venue provisions in franchise agreements was preempted by the FAA because the franchise statue was not "general" contract law.

preempting dozens of state substantive and procedural laws.[33] This is problematic, not merely because of abstract federalism concerns, but very practical ones. By making the interpretation of every arbitration agreement at least arguably a question of federal law, the *Southland* doctrine of FAA preemption creates great confusion in the lower courts about when state law applies, multiplying the number of issues, and creating uncertainty about the vitality of state contract regulation. Worse, if state consumer protection laws are preempted on a large scale by judicial interpretation, then consumers will either be left without protection or else will have to rely on increased federal oversight for consumer regulation.

IV. The Unfairness of the FAA as "Do-it-yourself Court Reform" and the need for Congressional Action

A. Mandatory arbitration violates the fundamental principles of equal access to the federal courts

A fundamental feature of a fair justice system is that both sides to a dispute have equal access to that system. Since the beginning of the republic, Congress has embraced the fundamental principle that both the plaintiff and the defendant in a civil case have equal access to federal court. Where federal and state courts have concurrent jurisdiction, which is the rule for most civil actions in which federal district courts have original jurisdiction, the plaintiff has the option to file the case in federal court. If the plaintiff chooses to file in state court, that choice is not binding on the defendant: federal law has always given the defendant the right to "remove"

[33]Between January 2002 and April 2004, almost fifty state laws were held preempted. David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 Wash. U. J.L. & Pol'y 129, 154-59, app. A (2004)

the case to federal court.[34] Thus, removal jurisdiction ensures that both the plaintiff and defendant have the right of access to federal court.

The FAA – as applied to consumer, employee and franchisee cases – violates this fundamental principle by giving the defendant the sole right to determine whether a case will be heard in federal court. Large businesses that sell to consumers, employ a workforce, or franchise their brands to small business owners invariably do business through non-negotiable "adhesion" contracts, as stated above. The seller/employer/franchisor has the exclusive right to decide whether to include a pre-dispute arbitration clause among its "take-it-or-leave-it" contract terms. Because the FAA calls for rigorous enforcement of such pre-dispute arbitration agreements, the seller thereby gains the exclusive right to determine whether future disputes against it can be heard in court or not. This violates the fundamental principle of an equal right of access to federal court.

B. Can arbitration proceedings be made more fair?

Mandatory arbitration proponents argue that the problems raised above can all be solved by making arbitration more fair. They point to changes in arbitration procedural rules undertaken by arbitration providers like the American Arbitration Association that have already occurred, and argue that further procedural reforms could be made. The checklist of potential improvements includes: liberalized discovery rules providing more pre-hearing disclosure of

[34] *See* 28 U.S.C. § 1441(a), which provides: "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." The First Congress provided for removal in the Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (codified as amended in scattered sections of 28 U.S.C.); *see generally* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §, § 3721, at 288-89.

information, including depositions, document production demands, and other discovery tools used in litigation; a requirement of written statements of reasons for arbitrator's awards, and publication of awards; a requirement that corporate defendants pay the forum and arbitrator fees; increased rights to appeal arbitrators' decisions, including appeals for erroneous legal rulings; rules prohibiting "remedy-stripping" arbitration agreements; and more stringent regulations of arbitrators to ensure their neutrality and ethics.

Such proposals should be scrutinized with care. What is striking about them is that they all make mandatory arbitration more and more like going to court. They trade off the speed, efficiency and simplicity of classic arbitration to make it more expensive, time-consuming and rule-bound. In theory, these procedural improvements will promote fairness. But in practice, they may well serve primarily to make arbitration much less attractive to the businesses that now write arbitration agreements into their contracts, since those businesses are less concerned about fairness than about cost-containment. A better solution may be, not to make arbitration more like court, but rather to take the consumer, employment and franchise cases that would benefit from court-like procedures out of the mandatory arbitration system.

C. Is this any way to reform a court system?

The fixes proposed by arbitration supporters to the unfairness of mandatory arbitration all require increased regulation that makes it abundantly clear that mandatory is not a voluntary alternative to litigation, but rather an alternative court system: a system of public justice outsourced to private providers. What sort of way is this to bring about judicial reform?

The FAA's mandatory arbitration regime violates a fundamental principle of democratic government. As reinterpreted by the modern Supreme Court, the FAA diverts entire categories of

cases – consumer, employment and franchise cases – into a separate and private justice system with a different set of rules from those in the public court system. This represents a major reform of the court system. But reform of judicial procedure and the court system is a core function of the legislative branch. While the legislative process is not always perfect, it is nevertheless fundamental that Congress will hear from all interested parties before undertaking major judicial reform. That process has been entirely short-circuited in the case of the modern FAA. No consumer, employee or franchise interests were heard from in the hearings leading up to the enactment of the FAA because it was not contemplated that the statute would affect such groups. Instead, 60 years after enactment, the Supreme Court changed the coverage of the statute to include consumer, employment and franchise claims, thereby giving one set of interests – the corporate defendants in such disputes – the sole and exclusive right to determine whether to avail themselves of arbitration. The interests of consumers, employees and franchisees have thus been left out of this court reform process.

D. The Need for Congressional Action

It has become crystal clear that the courts cannot or will not correct their errors in interpreting the FAA; only Congress can do that now. Mandatory arbitration gets many cases out of the court system, and is therefore too attractive to judges for them to give it up voluntarily. The Supreme Court has reaffirmed its erroneous decisions too many times, and *stare decisis* – the rule that the Court will normally adhere to its precedents, particularly in statutory interpretation cases – is an important factor. Nor does the current Court majority see that an error has been made. The Supreme Court has repeatedly cited the lack of congressional action to

limit the reach of the FAA as a justification for declining to reconsider its position.[35] Justice O'Connor expressly observed, "It remains now for Congress to correct" the Supreme Court's interpretation of the FAA.[36]

The proper course is to amend the FAA to overrule the Supreme Court by removing consumer, employee and franchise contracts from the coverage of the statute and by providing that pre-dispute arbitration agreements in such contracts will not be enforced.

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

[36]Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 284 (1995) (O'Connor, J., concurring).