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## Article

# The Federal Arbitration Act, Rules of Decision, and Congress' Exercise of Judicial Power

Anthony J. Meyer<sup>†</sup>

### INTRODUCTION

Long before this Article's germination, Professor David Schwartz quipped that the Federal Arbitration Act (FAA) "is unconstitutional . . . and no one has noticed."<sup>1</sup> The observation is both delightfully sardonic and—for a variety of reasons, including those expounded in this Article—true. Professor Schwartz asserts a brilliantly creative thesis regarding federal court decisional law as applied in state courts, arguing that though state courts are not bound by Congress' control, they nonetheless enforce the FAA as though they were.<sup>2</sup> Yet in the nearly two decades since Professor Schwartz put forth his thesis, it appears the argument has not caught on.

This Article asserts a different challenge to the FAA's

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1. David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 541 (2004). Of course, that "no one" has noticed is hyperbole, for many observers have levied cogent criticism against the FAA's constitutional foundation. See, e.g., Matthew J. Stanford, *Odd Man Out: A Comparative Critique of the Federal Arbitration Act's Article III Shortcomings*, 105 CAL. L. REV. 929 (2017); Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201 (2012).

2. See generally Schwartz, *supra* note 1.

constitutional validity concerning the separation of power between the judicial and legislative branches at the federal level, not the division between the states and the federal government. The thesis parallels that of Professor Schwartz, though, because it is largely theoretical rather than practical, for it is almost unthinkable that any court—let alone the Supreme Court of the United States—would suddenly conclude the FAA violates the United States Constitution. After all, the FAA has withstood constitutional challenges for decades, including some that were straightforward and (seemingly) meritorious, such as whether Congress has the power to preempt the states' contract laws.<sup>3</sup> The Court, furthermore, has emerged as an ardent supporter of the FAA and a broader policy favoring nonjudicial arbitration. The reasons for the FAA's longevity are complicated, and a full dissertation is beyond the scope of this Article. But there can be no doubt that policies favoring arbitration are so entrenched in the American economy and American jurisprudence that any uncertainty as to the enforceability of arbitration agreements would wreak chaos in both systems. Indeed, Supreme Court decisions broadly favoring arbitration reached a fever pitch around the turn of the twenty-first century, when a national, newly connected economy and stress on overloaded federal court dockets both reached an apogee.<sup>4</sup>

But the constitutional underpinnings of the Supreme Court's approach deserve attention, even skepticism. This Article argues the FAA violates the Constitution because it creates a prohibited rule of decision, whereby Congress directs courts to make a judicial finding when they are presented with a certain set of facts. For this reason, the FAA violates the separation of powers principles in the United States Constitution.<sup>5</sup>

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

4. See discussion *infra* Part I.C.

5. As much as there should be skepticism of arbitration agreements imposed in contracts of adhesion where there is unequal bargaining power between the parties, see generally, Burt Neuborne, *Ending Lochner Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 184–85 (2015) (characterizing the unequal bargaining power of many arbitration agreements), the principle motivating this Article is *not* the unconscionability of arbitration agreements for some employees and consumers. Arbitration—to paraphrase the great film *Shane*—is a tool for resolving disputes no better or no worse than any other, or the party who wields it. See *SHANE* (Paramount Pictures 1953). Indeed, there are also scenarios where arbitration is a disfavored process for those in power, as is the case for some insurance companies under agreements pursuant to MO. REV. STAT. § 537.065 in Missouri. See *Recent Bad Faith Litigation Decisions*, PLEBAN PETRUSKA LAW L.L.C. (Dec. 31, 2020), <https://plebanlaw.com/recent-bad-faith-litigation-decisions> [<https://perma.cc/89NA-9GXH>] (explaining that pursuant to statute, a plaintiff in a personal injury case may, prior to arbitration, agree with a defendant to collect an award only

Whether this legal proposition is correct is an open question. Based on the research underlying this Article, no reported case has presented this argument to the United States Supreme Court and only one United States Court of Appeals has addressed the argument (the Second Circuit, with abbreviated analysis).<sup>6</sup> Notably, this argument (or one substantially similar to it) has been presented to at least one United States District Court and two state high courts, but to no avail.<sup>7</sup>

Part I of this Article provides a critical history of the FAA. In recounting the social, economic, and judicial history of the FAA, the Article provides a review of the Supreme Court's decisional law interpreting the FAA, including recent decisions wherein the Roberts Court—with its changing personnel—has pared back some of the FAA's applicability.<sup>8</sup> Part II provides a primer on impermissible rules of decisions and the Supreme Court's separation of powers jurisprudence. The doctrine prohibiting rules of decision is not often invoked in litigation, so a comprehensive review is warranted. Part III argues the FAA creates an impermissible rule of decision. In short, because the Supreme Court has held the FAA creates a substantive contract remedy, a federal district court evaluating whether to award that remedy based upon the facts presented to it should retain the freedom to award any other substantive contract remedy warranted by the

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from a defendant's insurance company, resulting in insurance companies having to pay for judgments they did not have a chance to defend). Or when a defendant is forced to pay the entirety of the arbitrator's fee for each class member of a class action case. *See* AM. ARBIT. ASS'N, CONSUMER ARBITRATION RULES 20, 24, 37 (2016), <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> [<https://perma.cc/87QN-GRBB>] (emphasizing fairness in consumer arbitration proceedings). All in all, where knowledgeable parties mutually agree to be bound by an arbitrator's award—at any point in time—arbitration is a useful tool. The impetus of this Article is, rather, a belief in the constitutional authority of an independent judiciary. *See infra* Part IV.B.

6. This data comes from a Westlaw search of the United States Supreme Court, federal courts of appeals, federal district courts, state supreme courts, and law reviews. The search was limited by "FAA" and "separation of powers," "arbitration" and "separation of powers," "FAA" and "Article III," and "arbitration" and "Article III." This proposition reflects all relevant case law and secondary sources encompassed by these search terms and limitations.

7. *Katz v. Cellco Partnership*, No. 12-CV-9193, 2013 WL 6621022 (S.D.N.Y. Dec. 12, 2013) (presenting this argument to the Southern District of New York); *Firelock Inc. v. District Court*, 776 P.2d 1090 (Colo. 1989); *Atwater v. Commissioner of Education*, 957 N.E.2d 1060 (Mass. 2011) (presenting closely analogous arguments). These cases are discussed in depth below. *See infra* Part III.

8. *See* *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 534–35 (2019) (removing employer-employee contracts and contracts involving independent contractors from the FAA's coverage).

circumstances. Part IV discusses the implications of such an argument.

### I. A CRITICAL HISTORY OF THE FAA

The purpose of this history is two-fold. The first is to bear witness to the Supreme Court's conversion in its arbitration jurisprudence. Because of its effect on lower court dockets throughout the nation, the Court's radical about-face regarding the desirability of arbitration is as dramatic as almost any in the Court's history—on par with the famous “switch in time to save nine” during the Court's consideration of New Deal era laws<sup>9</sup> or the Court's evolving views of substantive due process.<sup>10</sup> Indeed, although the Court was once downright hostile to arbitration, in the 1990s and 2000s, it became almost completely deferential to the process.

The second purpose of this history is to establish the doctrinal background for the argument that the FAA is an impermissible rule of decision. Accordingly, this history recounts the Court's treatment of the law as a substantive contract remedy—a substantive, not procedural, rule. Because this error has been so compounded over the years, the constitutional underpinnings of the Court's FAA jurisprudence is now a hopeless thicket.

#### A. EARLY HISTORY

The FAA is a federal statute, passed under Congress' power to regulate interstate commerce.<sup>11</sup> It was enacted in 1925 and intended to put arbitration agreements on equal footing with all other contracts.<sup>12</sup> Just prior to the FAA's passage, the Supreme Court signaled its acquiescence to arbitration as an extra-judicial remedy. In *Red Cross Line v. Atlantic Fruit Co.*, the Court allowed a state to authorize arbitration, so long as common law remedies were preserved.<sup>13</sup> *Red Cross Line* essentially provided Congress an *ex ante* assurance the FAA

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9. See John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine,"* 73 OKLA. L. REV. 229, 230 (2021).

10. For example, *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965), expressly rejected economic freedom as a right protected by substantive due process as presented in *Lochner v. New York*, 198 U.S. 45 (1905).

11. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 265 (1994).

12. See Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 103, 110 (2002).

13. 264 U.S. 109 (1924). It is important to note, however, the Court's narrow reading of the right at issue—that litigants must be able to effectuate common law remedies.

would withstand the Court's judicial review.

The historical and legislative background of the FAA is well documented.<sup>14</sup> Notably, some commentators have suggested the FAA and Rules Enabling Act of 1934 were "part of the same movement to simplify court procedures, relieve overcrowded judicial dockets, and provide for improved, efficient methods of resolving disputes."<sup>15</sup> Congress intended to support a system of arbitration of contractual disputes among consenting merchants on co-equal footing with limited involvement from the federal courts.<sup>16</sup> Arbitration was, thus, meant as a "safety valve" for commercial disputes that needed to be resolved quickly.<sup>17</sup> This was fitting, for in 1925, it was not so easy to be a national business. Expanding businesses faced growing legal uncertainty directly proportional to their increasing geographic scope. And it would have been very costly for a business to be haled into court from across the county.<sup>18</sup> Accordingly, the FAA provided predictability and efficiency, particularly as businesses headquartered on the East Coast or in the industrial centers of the Great Lakes and Midwestern regions expanded throughout the country.<sup>19</sup>

The FAA contains the following provisions. Section 1 outlines the scope of the law, including maritime transactions and transactions involving commerce,<sup>20</sup> but it excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>21</sup> Section 2 is the heart of the law, requiring that arbitration agreements covered by the law "shall be

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14. See *Allied-Bruce Terminix*, 513 U.S. at 274, 279. See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (Oxford University Press 1992) (examining the history of American arbitration law).

15. Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History Symposium*, 2016 J. DISP. RESOL. 115, 119 (2016).

16. *Id.* at 122, 126.

17. *Id.* at 132.

18. It is likely not coincidental that the Court's personal jurisdiction doctrine developed shortly thereafter to allow for more predictability in litigation exposure for businesses. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

19. For information on this historical context, see Preston Douglas Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995). And largely in service of these national businesses, the American Arbitration Association was founded in 1926. See *Our Mission*, AM. ARB. ASS'N, <https://www.adr.org/mission> [<https://perma.cc/25PW-NMXF>].

20. This usage of "commerce" has been interpreted to be coextensive with Congress' authority under the commerce clause. See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 534 (2019).

21. 9 U.S.C. § 1.

valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity.”<sup>22</sup>

The remaining sections are largely procedural. For instance, sections 3 through 9 concern what happens before, during, and immediately after arbitration. Section 3 provides that courts must stay their proceedings upon application of one of the parties.<sup>23</sup> Section 4 outlines the procedure by which a party who is aggrieved by a failure to initiate arbitration may obtain an order for the same.<sup>24</sup> Section 5 provides guidelines for selecting an arbitrator should one not be named or there be a lapse.<sup>25</sup> Section 6 simply states an application to compel arbitration shall be heard as a motion.<sup>26</sup> Section 7 provides additional lawful procedures that may be employed during an arbitration itself.<sup>27</sup> Section 8 provides special procedures related to admiralty law.<sup>28</sup> Section 9 allows the arbitrator’s award to be entered as a judgment by a court.<sup>29</sup>

Sections 10 through 16 cover the remaining steps in the arbitration process, some special circumstances, and the right to appeal. Section 10 outlines grounds for vacating the arbitration award.<sup>30</sup> Section 11 outlines the modification powers granted to federal courts having jurisdiction of an award where a mistake was made in the award.<sup>31</sup> Section 12 provides for notice where a party to a lawsuit intends to invoke a right to arbitration.<sup>32</sup> Section 13 states what must be filed in court when a party seeks judicial enforcement of an award.<sup>33</sup> Section 14 provides a time limitation (likely now entirely irrelevant—prior to January 1, 1926) for the FAA’s scope.<sup>34</sup> Section 15 states the Act of State doctrine shall not apply to the FAA—meaning foreign sovereigns may submit to arbitration to be enforced by United States courts,

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22. *Id.* § 2.

23. *Id.* § 3.

24. *Id.* § 4.

25. *Id.* § 5.

26. *Id.* § 6.

27. *Id.* § 7.

28. *Id.* § 8.

29. *Id.* § 9.

30. *Id.* § 10. These include, *inter alia*, if the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption of the arbitrator or other misconduct; or where the arbitrator exceeded their powers. *Id.*

31. *Id.* § 11.

32. *Id.* § 12.

33. *Id.* § 13.

34. *Id.* § 14.

should they so choose.<sup>35</sup> Finally, Section 16 outlines the procedure for appeals.<sup>36</sup>

What to make of the FAA's text? By far the majority of sections are procedural in nature. But if there is a substantive right to be found, it is in Section 2, providing that arbitration agreements shall be valid and irrevocable.<sup>37</sup> Further, the intent of Congress in passing the FAA is fairly demonstrated from the plain language of the text—to encourage arbitration and bring legitimacy to those agreements in the eyes of the courts. Nevertheless, if Congress' intent in passing the FAA was to require courts to stay proceedings and refer a matter to arbitration, it took some time for courts to effectuate that intent.<sup>38</sup>

For instance, the Supreme Court demonstrated its base-line hostility in one pre-FAA case:

Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights . . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.<sup>39</sup>

And state courts were similarly hostile prior to the passage of the FAA. The Alabama Supreme Court, for example, held in 1918 that pre-dispute arbitration provisions were void as a violation of public policy.<sup>40</sup> The Virginia Supreme Court similarly held a party may freely withdraw from a pre-dispute arbitration agreement because a private agreement could not bar a person from seeking redress in the courts.<sup>41</sup>

Even after passage of the FAA, the Supreme Court remained skeptical. In *Bernhardt v. Polygraphic Co. of America*, the Court decried

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35. *Id.* § 15.

36. *Id.* § 16. This appellate procedure does not apply to the states. In Missouri, for example, the appellate process is a combination of writs and merits appeals. *See, e.g., State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. 2015) (en banc).

37. 9 U.S.C. § 2.

38. *See* Alison Brooke Overby, Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1139–42 (1986) (suggesting courts were historically hostile to arbitration both because arbitration was seen as an impermissible ouster of court jurisdiction and because courts would be deprived of the fees charged to hear a case).

39. *Ins. Co. of N.Y. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

40. *Headley v. Aetna Ins. Co.*, 80 So. 466, 467 (Ala. 1918).

41. *Rison v. Moon*, 22 S.E. 165, 166–67 (Va. 1895).



arbitration as an alternative to judicial dispute resolution:

Arbitration carries no right to trial by jury . . . . Arbitrators do not have the benefit of judicial instruction on the law [and] need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial.<sup>42</sup>

Taking the long view, however, the Court's skepticism was short-lived.

#### B. MID-CENTURY REVIVAL

The FAA and arbitration generally occupied a minimal role in both the Court's jurisprudence and society at large until the Court's 1967 decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>43</sup> There, Prima Paint purchased Flood & Conklin's (F&C) paint business, then entered into a six-year consulting agreement with F&C, whereby F&C's chair would personally provide advice to Prima Paint regarding the business.<sup>44</sup> The consulting agreement contained a broad arbitration clause encompassing "[a]ny controversy or claim arising out of or relating to [the] [a]greement."<sup>45</sup> Thereafter, Prima Paint alleged F&C was insolvent and unable to perform its contractual obligations, and, in fact, had filed for bankruptcy just a week after the agreement was signed.<sup>46</sup> F&C responded with a notice of intent to arbitrate, whereupon Prima Paint filed suit alleging fraud in the inducement and seeking an order enjoining the arbitration.<sup>47</sup> Following the district court's granting F&C's motion to stay the proceedings and enforce arbitration, Prima Paint appealed to the Second Circuit, which dismissed the appeal, and the Supreme Court granted certiorari.<sup>48</sup> The question presented was whether a claim for fraud in the inducement of an entire contract was to be resolved by an arbitrator or federal court sitting in diversity jurisdiction when the contract also contained an arbitration clause.<sup>49</sup>

In affirming the lower court's dismissal of Prima Paint's appeal, the Court held the case could proceed to arbitration, so long as Prima Paint had not alleged it was fraudulently induced to agree to

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42. 350 U.S. 198, 203 (1956); *accord* *Wilko v. Swan*, 346 U.S. 427, 435–36 (1953).

43. 388 U.S. 395 (1967).

44. *Id.* at 397.

45. *Id.* at 398.

46. *Id.* at 398.

47. *Id.*

48. *Id.* at 399.

49. *Id.* at 402.

arbitrate.<sup>50</sup> Importantly, because the case arose out of federal courts' diversity jurisdiction, the Court had to decide whether the FAA was a procedural or substantive rule under *Erie Railroad Co. v. Tompkins*.<sup>51</sup> The Court held that the FAA was substantive law and issued a broad holding in favor of arbitration.<sup>52</sup>

Justice Black, joined by Justices Douglas and Stewart, penned a short but thorough dissent.<sup>53</sup> He expressed exasperation with the Court's legal conclusion: "The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties."<sup>54</sup> He further stated,

[I]t is clear that Congress intended the Act to be applicable in diversity cases involving interstate commerce and maritime contracts, and to hold the Act inapplicable . . . would be severely to limit its impact. As to the second alternative, it is clear that Congress . . . relied primarily on its power to create general federal rules to govern federal courts.<sup>55</sup>

Finally, while also expressing his dissenting viewpoint regarding whether the FAA was enacted pursuant to Congress' full authority under the Commerce Clause, Justice Black argued the FAA was also contrary to ordinarily accepted principles of contract law: "And the Court approves a rule which is not only contrary to state law, but contrary to the intention of the parties and to accepted principles of contract law—a rule which indeed elevates arbitration provisions above all other contractual provisions. [T]hat result was clearly not intended by Congress."<sup>56</sup>

Following the majority's signaling of strong judicial support for arbitration agreements, though, use of those agreements only increased.<sup>57</sup> Notwithstanding, arbitration agreements remained primarily a business-to-business tool, as they had been in *Prima Paint*.<sup>58</sup> The exponential increase in the use of arbitration agreements in all contracts, but especially consumer contracts, came after the Court's

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50. *Id.* at 406.

51. *Id.* at 404–05 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

52. *Id.* at 405–06.

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

54. *Id.*

55. *Id.* at 417–18.

56. *Id.* at 411. For a discussion of how these contract principles are still relevant, see *infra* Part III.

57. See Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic> [<https://perma.cc/B64U-5EKL>].

58. See *id.*

next big arbitration case, *Southland Corp. v. Keating*.<sup>59</sup>

In that case, a putative class of 7-Eleven convenience franchisees filed suit in California state court against Southland Corporation, the owner and franchisor, alleging fraud, misrepresentation, and breach of contract arising out of a business dispute.<sup>60</sup> The California Superior Court refused to compel arbitration, but the California Court of Appeal reversed.<sup>61</sup> Southland appealed, and the California Supreme Court reversed the court of appeal, holding that claims under the state's Franchise Investment Law were not arbitrable.<sup>62</sup> The Supreme Court of the United States granted certiorari to answer the question of whether Congress could preempt contrary state statutes on arbitration.<sup>63</sup>

The Court answered the question in the affirmative, holding the FAA categorically foreclosed the provisions in the Franchise Investment Law purporting to govern arbitration agreements.<sup>64</sup> The Court's characterization of arbitration is integral to the *Southland* decision. The Court cited *Prima Paint* in reasoning that Congress has broad constitutional authority to "fashion substantive rules under the Commerce Clause."<sup>65</sup> Therefore, according to the Court, arbitration is a *remedy* authorized by Congress, not a procedure.

Justice O'Connor authored a pointed dissent, which Justice Rehnquist joined, arguing the FAA was a procedural statute.<sup>66</sup> Justice O'Connor characterized Chief Justice Burger's majority opinion as enforcing a "newly-discovered" federal right.<sup>67</sup> With brutal honesty, Justice O'Connor attacked the majority opinion as unreasoned, "unnecessary," "unfaithful to congressional intent," and motivated "by an understandable desire to encourage the use of arbitration."<sup>68</sup>

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59. 465 U.S. 1 (1984).

60. *Id.* at 3-4.

61. *Id.* at 4.

62. *Id.* at 5.

63. *Id.* at 7-8.

64. *Id.* at 16.

65. *Id.* at 11 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395, 400 (1967)).

66. *Southland*, 465 U.S. at 25 (O'Connor, J., dissenting). Justice Stevens authored a short concurrence, concluding that even though Congress originally intended the FAA as a procedural statute, "intervening developments" in the law supported the Court's conclusion. *Id.* at 17 (Stevens, J., concurring in part and dissenting in part).

67. *Id.* at 22 (O'Connor, J., dissenting).

68. *Id.* at 22, 24, 36. Subsequent commentators have provided support that the Court's statutory interpretation was erroneous. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101 (2006).

Nevertheless, because the *Southland* majority and not Justice O'Connor's dissenting opinion carried the day, the Court has conceptualized arbitration as a substantive contract remedy ever since. Of course, that is not to say the Court got it right; the balance of scholarship analyzing *Southland* suggests Justice O'Connor's view was the correct one.<sup>69</sup> Nonetheless, following *Southland*, arbitration agreements became ubiquitous in all types of contracts in the American legal landscape, including consumer contracts.<sup>70</sup>

### C. INTO THE TWENTY-FIRST CENTURY

Arbitration reached its zenith at the turn of the twenty-first century, a time of globalization marked by the rise of international corporations. At least three cases stand as cornerstones of the Supreme Court's arbitration jurisprudence of this era: *Doctor's Associates, Inc. v. Casarotto*; *Rent-A-Center, West, Inc. v. Jackson*; and *AT&T Mobility LLC v. Concepcion*.<sup>71</sup>

*Doctor's Associates* concerned a state law that provided arbitration agreements were enforceable only when the clause was typed in underlined capital letters on the first page of the contract.<sup>72</sup> When the franchisee of a Subway restaurant challenged a franchise agreement containing a putatively noncompliant arbitration provision, the franchisor sought to stay the suit pending arbitration.<sup>73</sup> The Supreme Court reversed, holding that the state law directly conflicted with Section 2 of the FAA and was, therefore, preempted.<sup>74</sup> This was the first blow (of several) to the notion that state legislatures could experiment with some of the procedural provisions of the FAA, or that state courts could somehow creep out of the FAA's long shadow.<sup>75</sup>

In *Rent-A-Center*, an employee who filed suit alleging race discrimination argued the arbitration agreement he signed was unconscionable under state contract law.<sup>76</sup> The arbitration agreement,

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69. Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1185 (2021) (citing Drahozal, *supra* note 12).

70. See Stone & Colvin, *supra* note 57.

71. 517 U.S. 681 (1996); 561 U.S. 63 (2010); 563 U.S. 333 (2011).

72. 517 U.S. at 683.

73. *Id.*

74. *Id.* at 686–87.

75. See Schwartz, *supra* note 1. But see Thomas E. Carbonneau, *The 'Sanctuary City' Syndrome Reaches Arbitration: State Supreme Courts Defy Federalization*, 11 PENN. ST. ARB. L. REV. 1 (2019) (analyzing how some courts have obstinately refused to enforce arbitration clauses).

76. 561 U.S. at 65–66.

however, contained a delegation provision, which purported to delegate exclusive authority to the arbitrator to resolve all disputes—including whether the contract as a whole was valid under the FAA.<sup>77</sup> The Supreme Court held that because the employee challenged the entire contract—as opposed to the delegation provision standing alone—the arbitrator would be the one to determine the contract’s enforceability.<sup>78</sup> The Court reasoned, “An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.”<sup>79</sup> Notably for the purposes of this Article, Justice Stevens remarked in his dissent how, ordinarily, courts must determine the enforceability of a contract.<sup>80</sup> And of course, so-called delegation provisions, operating as a further barrier to plaintiffs hoping to avoid arbitration, bloomed in the wake of *Rent-A-Center*.

Last, in *AT&T v. Concepcion*—a heated, 5–4 decision—the lower court refused to compel arbitration on a class level, relying on a state supreme court precedent holding class arbitration waivers were unconscionable in consumer contracts.<sup>81</sup> The Supreme Court reversed, holding the FAA preempted state common law rules on unconscionability in arbitration agreements.<sup>82</sup> Justice Scalia, writing for the majority, pointed out how state courts frequently used state common law to find arbitration provisions unconscionable.<sup>83</sup> The Court voiced both its strongest support of the FAA and, simultaneously, its greatest ex- coriation of state court decisions to the contrary:

Although § 2’s saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives. As we have said, a federal statute’s saving clause “cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.”<sup>84</sup>

Justice Breyer authored a dissent, arguing in part that the Court ordinarily did not hold that Congress intended to preempt the laws of the

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77. *Id.* at 66.

78. *Id.* at 70–72.

79. *Id.* at 70.

80. *Id.* at 80 (Stevens, J., dissenting).

81. 563 U.S. 333, 338 (2011).

82. *See id.* at 340, 352.

83. *Id.* at 340.

84. *Id.* at 343 (citations omitted).

sovereign states so “cavalierly.”<sup>85</sup>

All in all, the Court’s FAA jurisprudence of the 1990s and 2000s can only be characterized as expressing a strong preference in upholding arbitration agreements, even nearing total deference. Though commentators should rightly hesitate to profess an understanding of the Court’s motivations (especially respecting the Justices’ political ideologies), one reason seems obvious (and apolitical): arbitration considerably lessens the pressure on federal court dockets. Indeed, at the same time the Court seemingly expressed so much support for arbitration as a policy matter, there was also a proliferation of lawsuits filed in the federal courts.<sup>86</sup> While it might also be true that this phase of the Court’s jurisprudence corresponds to the rise of global companies and markets, this latter policy consideration might have been just as salient to the Court.

#### D. CONTEMPORARY DEVELOPMENTS

The Court’s contemporary arbitration jurisprudence does not lend itself to broad generalization. On the one hand, the Court seems to have retreated from the high-water mark favoring arbitration agreements and striking down state court decisions to the contrary, especially in the consumer and employment contexts. On the other, the Court seems to have returned to first principles of the FAA, which do not favor quite as expansive a reading.

In *New Prime Inc. v. Oliveira*, the Court considered whether the FAA applied to a truck driver classified as an independent contractor when a driver brought a class action for failing to comply with the Fair Labor Standards Act and other state labor laws.<sup>87</sup> The Court answered in the negative, holding courts should decide whether an exclusion to the FAA applies before compelling arbitration.<sup>88</sup> And, in this case, there was a valid exclusion because section 1 of the FAA expressly excludes “contracts of employment of . . . workers engaged in . . . interstate commerce.”<sup>89</sup> The Court reasoned the federal court itself had to consider this question before staying the litigation for arbitration.<sup>90</sup>

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85. *Id.* at 367 (Breyer, J., dissenting).

86. *See generally* *Federal Court Management Statistics*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/analysis-reports/federal-court-management-statistics> [<https://perma.cc/B8TB-8BBH>] (recording historical docket numbers).

87. 139 S. Ct. 532, 534 (2019).

88. *Id.* at 537.

89. *Id.*

90. *Id.*

The Court's decision in *New Prime* signals both a return to the original understanding of the FAA and perhaps some discomfort with the expansive reading the statute has received in the past. At least (and as a preview of the argument ahead) the Court has signaled a willingness to allow lower courts to answer threshold questions of arbitration.<sup>91</sup>

Even reading *New Prime* as signaling some discomfort from the Roberts Court with the Court's expansive arbitration jurisprudence, the Court remains a true believer in arbitration as a fair and valid non-judicial remedy. What is more, the Court's arbitration jurisprudence is decidedly settled, with all foundational questions answered by the time of the Rehnquist Court. Accordingly, it is critical to recognize the Court does not write on a blank slate in its arbitration jurisprudence.

## II. IMPERMISSIBLE RULES OF DECISIONS

A "rule of decision" is a legislative pronouncement that usurps a court's power to interpret and apply the law to the circumstances before it and thus requires a court to reach a predetermined result.<sup>92</sup> Because rules of decision necessarily involve one branch of government exercising the power of another, they are prohibited in the United States' tripartite system of government, with its three co-equal branches.<sup>93</sup> In the Court's most recent case discussing rules of decision, Justice Thomas summarized this doctrine:

The Constitution creates three branches of Government and vests each branch with a different type of power. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. By vesting each branch with an exclusive form of power, the Framers kept those powers separate. Each branch "exercise[s] . . . the powers appropriate to its own department," and no branch can "encroach upon the powers confided to the others." This system prevents

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91. Compare *id.*, with *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010) (upholding delegation provisions). The tension between the text of the FAA and the Court's doctrines is again at issue in one of the cases docketed for the Court's current term, *Badgerow v. Walters*, 975 F.3d 469 (5th Cir. 2020), *cert. granted*, 209 L. Ed. 2d 748 (U.S. May 17, 2021) (No. 20-1143). That case presents the question of "[w]hether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question." Petition for a Writ of Certiorari at I, *Badgerow v. Walters*, 209 L. Ed. 2d 748 (U.S. May 17, 2021) (No. 20-1143).

92. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322–23 (2016) (citing *Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 191 (2d Cir. 2014) and Brief of Amici Curiae Former Senior Officials of the Office of Legal Counsel in Support of Respondents at 3, 6, *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016) (No. 14-770)).

93. See *id.*

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“[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands”—an accumulation that would pose an inherent “threat to liberty.”<sup>94</sup>

The judicial power, as *Marbury v. Madison* emphatically makes clear, is the power to “say what the law is,” namely to “expound and interpret” a rule when applying that rule to particular cases.<sup>95</sup> The other branches accordingly may not intrude on this power, though they, of course, have powers of their own.<sup>96</sup> The executive branch, for instance, is prohibited from exercising the power of judicial review.<sup>97</sup> And Congress may not “require federal courts to exercise judicial power in a manner that Article III forbids.”<sup>98</sup> Congress prescribes an impermissible rule of decision when it takes from the court “the power to interpret and apply the law to the circumstances before it.”<sup>99</sup> Stating the issue slightly differently: “To distinguish between permissible exercises of the legislative power and impermissible infringements of the judicial power, this Court’s precedents establish the following rule: Congress violates Article III when it ‘compel[s] . . . findings or results under old law.’ But Congress does not violate Article III when it ‘changes the law.’”<sup>100</sup>

The Court infrequently invokes the doctrine prohibiting rules of decision. Likely, in most cases, there is no question as to Congress’ power to act relative to the judicial branch. But perhaps because of its infrequency in the Court’s opinions, the contours of the doctrine are not sharply defined. There do not seem to be “rules of decision” cases the same way there are “standing” cases. Most often when the Court opines on rules of decision, it does so by way of discussing the separation of powers principles. Nonetheless, the doctrine prohibiting rules of decision is fundamental to the Court’s constitutional jurisprudence, beginning with *Marbury v. Madison*—which in part held Congress could not expand the federal courts’ jurisdiction beyond the scope

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94. *Patchak v. Zinke*, 138 S. Ct. 897, 904–05 (2018) (citations omitted).

95. 5 U.S. (1 Cranch) 137, 177 (1803).

96. A full discussion of the separation of powers principle, including what powers are distributed to which branches, is necessarily beyond the scope of this Article. For a comprehensive discussion, see Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346 (2016), and 16 FRANCIS C. AMENDOLA ET AL., *CORPUS JURIS SECUNDUM CONSTITUTIONAL LAW* § 274 (Aug. 2021 update).

97. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113, (1948)).

98. *Plaut*, 514 U.S. at 218.

99. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016).

100. *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (citations omitted).



contemplated by the Constitution<sup>101</sup>—and continuing through a handful of doctrinal cases.<sup>102</sup>

*Plaut v. Spendthrift Farms, Inc.* was the first significant case in this recent line.<sup>103</sup> In *Plaut*, the Court considered whether Congress could require federal courts to reopen final judgments based on section 27 of the Securities and Exchange Act.<sup>104</sup> That section, in essence, was intended to institute a longer statute of limitations for cases that were dismissed under a judicially created statute of limitations.<sup>105</sup> After the district court and court of appeals both found the law to be unconstitutional, the Court granted certiorari.<sup>106</sup> The Court held this provision violated the separation of powers.<sup>107</sup> Justice Scalia first noted the historical importance of the separation of powers: “This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution . . . .”<sup>108</sup> Section 27 was unconstitutional because it required a federal court—which had previously adjudicated the statute of limitations—to “reverse a determination once made, in a particular case.”<sup>109</sup> The Court succinctly identified the nature of the problem: “Having achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.”<sup>110</sup>

Next, in *Bank Markazi v. Peterson*, the Court considered the doctrine in the fraught international relations context of the seized assets of the Central Bank of Iran.<sup>111</sup> The question presented was whether section 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012 violated the separation of powers principle.<sup>112</sup> As Justice Ginsburg remarked, section 8772 was an “unusual statute” because it went

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101. 5 U.S. (1 Cranch) 137, 177–78 (1803).

102. See, e.g., *Patchak*, 138 S. Ct. 897.

103. 514 U.S. 211 (1995).

104. *Id.* at 213.

105. *Id.* at 214–15.

106. *Id.* at 215.

107. *Id.* at 217–18.

108. *Id.* at 221; see also *id.* at 221–25 (collecting authorities).

109. *Id.* at 225 (quoting THE FEDERALIST NO. 81, at 545 (Alexander Hamilton)).

110. *Id.* at 227 (emphasis in original).

111. 136 S. Ct. 1310, 1316–17 (2016).

112. *Id.* at 1317.

so far as to state judgments in a pending case, identified by its docket number, could be satisfied by certain seized assets.<sup>113</sup> Nonetheless, the Court held that Congress was not exercising judicial power: “Congress, our decisions make clear, may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative.”<sup>114</sup> The Court did not view section 8772 as directing a judgment, however.<sup>115</sup> Instead, it viewed the statute as directing the Court to apply a “new legal standard to undisputed facts.”<sup>116</sup> In other words, Congress acted by amending the law applicable to a given case, which the courts were duty bound to apply.<sup>117</sup> The Court thus rejected the close-enough argument that section 8772 created a foregone conclusion in a certain case—there was still something left for “judicial determination.”<sup>118</sup>

Chief Justice Roberts, joined by Justice Sotomayor, authored a vigorous dissent.<sup>119</sup> He believed the law was unconstitutional because it was an example of Congress assuming “the role of judge and decid[ing] a particular pending case in the first instance.”<sup>120</sup> He further criticized the majority for its technical reading of the statute; he would have looked to the purpose of the statute and its obvious effect on adjudication in the federal courts.<sup>121</sup>

The Court’s most recent pronouncement on rules of decision came in 2018 in *Patchak v. Zinke*.<sup>122</sup> The petitioner in that case challenged the Secretary of the Interior’s authority to take a property, called the Bradley Property, into a trust.<sup>123</sup> During the pendency of the litigation below, Congress passed the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act), which expressly stated both that the Bradley Property could be taken into trust and that any case challenging that action should be dismissed.<sup>124</sup> When the Court was presented the question whether the Gun Lake Act was a prohibited rule of decision

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1325.

117. *Id.* at 1323.

118. *Id.* at 1326; *see also* *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438 (1992) (holding that a statute “compelled changes in law, not findings or results under old law” and, accordingly, was not a prohibited rule of decision).

119. *Bank Markazi*, 136 S. Ct. at 1329–38 (Roberts, C.J., dissenting).

120. *Id.* at 1332.

121. *Id.* at 1332, 1335.

122. 138 S. Ct. 897 (2018).

123. *Id.* at 902–03.

124. *Id.* at 904.

with respect to the petitioner's lawsuit, the Court held there was no separation of powers violation.<sup>125</sup> The Court reasoned that the statute was a jurisdiction-stripping statute, which the Court has held was well within Congress' authority by virtue of its constitutional control over the lower federal courts.<sup>126</sup> As Justice Thomas, writing for a plurality of Justice Breyer, Justice Alito, and Justice Kagan, stated:

Section 2(b) changes the law. Specifically, it strips federal courts of jurisdiction over actions "relating to" the Bradley Property. Before the Gun Lake Act, federal courts had jurisdiction to hear these actions. *See* 28 U.S.C. § 1331. Now they do not. This kind of legal change is well within Congress' authority and does not violate Article III . . . . Our conclusion that § 2(b) is jurisdictional is bolstered by the fact that it cannot plausibly be read as anything else. Section 2(b) is not one of the nonjurisdictional rules that this Court's precedents have identified as "important and mandatory" but not governing "a court's adjudicatory capacity." Section 2(b) does not identify "an element of [the] plaintiff's claim for relief" or otherwise define its "substantive adequacy." Nor is it a "claim-processing rule," like a filing deadline or an exhaustion requirement, that requires the parties to "take certain procedural steps at certain specified times."<sup>127</sup>

The Court disagreed with the petitioner's argument that mandatory language violated Article III, saying that language "simply impose[d] the consequences," rather than directing a decision.<sup>128</sup>

Chief Justice Roberts again dissented, this time joined by Justices Kennedy and Gorsuch.<sup>129</sup> He argued Congress exercised the judicial power in this case by manipulating jurisdiction to direct an individual outcome, announcing a rule of law particular to an individual case.<sup>130</sup>

What generalizations can be drawn from these cases? First, the Court's interpretation of the law at issue is critical to deciding whether a law is an impermissible rule of decision. If the purpose of the law is to limit federal court jurisdiction or to provide or amend the substantive law, the law is constitutional. But if the purpose of the law is to direct judicial action under existing law in a manner in which the judiciary ordinarily would not act, the law is unconstitutional. Indeed, the Court has remained steadfast that Congress "may not exercise [its authority] . . . in a way that requires a federal court to act unconstitutionally."<sup>131</sup> Second, what is clear from reading the Court's cases is

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125. *Id.*

126. *Id.* at 905.

127. *Id.* at 905-06 (citations omitted).

128. *Id.* at 908.

129. *Id.* at 914-22 (Roberts, C.J., dissenting).

130. *Id.* at 918.

131. *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 n.19 (2016).

that, while Congress plainly may strip courts of jurisdiction, override judicial interpretations, and amend its laws, even to the point of achieving a predetermined result when the judicial power is exercised, Congress may not compel the exercise of the judicial power in a certain manner in the first instance. After all, the judiciary is—and remains—a co-equal, independent branch.

### III. HOW THE FAA CREATES AN IMPERMISSIBLE RULE OF DECISION

As demonstrated, the Supreme Court has consistently held the FAA is a substantive—not procedural—law.<sup>132</sup> Arbitration is, thus, a coercive remedy courts may award an aggrieved litigant, to the detriment of another. The awarding of a remedy in a lawsuit, however, is inherently an exercise of judicial power, whereby a court makes a ruling as a matter of law when presented with a certain set of facts.<sup>133</sup> Accordingly, because the FAA directs judicial action—the awarding of a remedy—it is an unconstitutional rule of decision and violates the separation of powers principle.

At least two qualifying observations are in order, to be sure. The first is a return to the notion that the Court is not writing on a blank slate in its arbitration cases. Were the Court presented with this thesis without the precedents of *Prima Paint* and *Southland*, it seems likely the Court would conclude the FAA is a procedural statute, well within Congressional authority to adopt.<sup>134</sup> But the decisions holding the FAA to be a substantive remedy were plainly intended to keep arbitration agreements viable in diversity suits under the *Erie* doctrine.<sup>135</sup> As a result, the Court is now in a double bind. If *Southland* is correct that the FAA is a substantive and not procedural statute, it is also true that courts are not compelled to enforce the FAA as a contract remedy in all circumstances, though they may continue to do so at their option in adjudicating disputes.<sup>136</sup>

The second is that though this Article frames the FAA as creating a rule of decision, many rules of decision cases focus on individual matters or cases—not *all* arbitration cases throughout time. The

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132. See *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395, 400 (1967)).

133. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803).

134. For example, Congress enacted the Federal Rules of Civil Procedure within scattered sections of title 28 of the United State Code.

135. See *Prima Paint*, 388 U.S. at 404–05.

136. See *infra* Part IV for an expanded discussion of this point.

hypothetical statute “In *Smith v. Jones*, Smith wins” stands as a contrast to the FAA’s general pronouncements.<sup>137</sup> But this point is purely a semantic one, because this thesis could just as easily be stated as either that the FAA creates a standing rule of decision or that the FAA continuously creates a rule of decision. In either framing, however, the FAA directs an exercise of the judicial power by requiring courts to award a certain remedy whenever presented with a certain set of facts.

But that exercise of judicial power does not have to be so. Courts have made clear that arbitration agreements are mere contracts.<sup>138</sup> However, when a party files a lawsuit in the face of an existing arbitration agreement, that party has breached that agreement. When faced with any breach of contract case, a court has choices in the remedies it may award. The court may, for instance:

- Enter a judgment for specific performance;
- Enter a judgment awarding money damages;
- Order the return of property under the contract;
- Order equitable relief, including a constructive trust, an equitable lien, and subrogation; and
- Order cancellation or a reformation of the contract’s writing.<sup>139</sup>

In adjudicating a purported breach of contract, the court must ascertain how to remedy the breach; the court does not *ab initio* ask what law compels it to enter which remedy. Arbitration, instead, is one remedy a court (with requisite jurisdictional capacity) may order in the face of a breach of contract.

This conclusion is consistent with leading persuasive authority on contract law.<sup>140</sup> The Restatement, for instance, provides for several different judicial remedies, including the following: awarding a sum of money as damages or to prevent unjust enrichment, requiring specific performance, enjoining non-performance, ordering restoration to avoid unjust enrichment, and declaring the rights of the parties.<sup>141</sup> But because the FAA compels courts to enter one—and only one—remedy in contract cases when presented with certain facts, it is an impermissible exercise of the judicial power.

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137. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting).

138. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (“[A]rbitration is a matter of contract.”).

139. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.2 (4th ed. 2004).

140. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 345 (Am. Law Inst. 1981).

141. *Id.*

Importantly, the FAA differs from the laws found not to be rules of decisions in the Court's recent cases.<sup>142</sup> Remember the Court has made clear that the FAA provides a substantive remedy that courts must enforce.<sup>143</sup> The FAA is fundamentally unlike the law at issue in *Patchak* because it is not a jurisdiction-stripping statute.<sup>144</sup> And it is unlike the law in *Bank Markazi* because it does not apply to individual lawsuits, but all lawsuits.<sup>145</sup> It is, however, like the law at issue in *Plaut* because it directs a certain judicial action.<sup>146</sup>

As of this writing, only one federal district court in the country has addressed this Article's thesis and conclusion. The argument was briefed and argued before the Southern District of New York in *Katz v. Cellco Partnership*.<sup>147</sup> In *Katz*, customers alleged Verizon imposed a hidden rate increase in their service contracts.<sup>148</sup> Verizon moved to compel arbitration.<sup>149</sup> The customers argued the application of the FAA to state law claims violated Article III and was an unconstitutional rule of decision.<sup>150</sup> The court rejected these arguments, holding:

There is insufficient state action for plaintiff to maintain an action under Article III; applying the FAA to compel arbitration of these claims does not violate Article III both because the FAA is not an incursion on the separation of powers and because plaintiff waived his personal right to an Article III forum by agreeing to arbitrate; and the FAA does not impose an unconstitutional rule of decision.<sup>151</sup>

More so, the court found the case did not implicate the separation of powers in the first place: "[W]hen Congress encourages or merely enforces a private agreement to resolve disputes outside courts, no such concerns regarding the separation of powers are implicated because Congress is not withdrawing any matter from judicial cognizance."<sup>152</sup>

This *ipse dixit* raises more questions than it answers. Why and how, for instance, are arbitration cases not withdrawn from judicial

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142. It bears noting that the FAA is distinguishable from the laws at issue in *Bank Markazi*, *Seattle Audubon*, and *Plaut* because those cases dealt with Congress amending the law during a pending case. Nonetheless, it is still useful to draw a comparison to those laws because there are so few examples of "rules of decision" cases.

143. See *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

144. See *Patchak v. Zinke*, 138 S. Ct. 897, 905-06 (2018).

145. See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016).

146. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995).

147. No. 12-CV-9193, 2013 WL 6621022 (S.D.N.Y. Dec. 12, 2013).

148. *Id.*, at \*1.

149. *Id.*

150. *Id.*, at \*4.

151. *Id.*, at \*5.

152. *Id.*, at \*9.

cognizance? Cases holding courts must immediately transfer cases to arbitrators even without determining arbitrability suggest the contrary.<sup>153</sup> More so, if courts maintain their judicial cognizance, why and how are courts prevented from entering one of the other remedies available to them in ordinary contracts cases?<sup>154</sup>

The customers in *Katz* appealed to the Second Circuit. There, the court affirmed the district court's decision without further analysis.<sup>155</sup> Accordingly, the Southern District of New York's order remains the most extensive federal court treatment of the question presented in this article. But, of course, in considering the question and affirming without further analysis, the Second Circuit did not have the guidance of *Bank Markazi* and *Patchak*. What is more, the new and different composition of the Supreme Court, at least warrants speculation whether the Court might grant a petition for certiorari on the issue. Perhaps, as is sometimes the case, Chief Justice Roberts' dissents in *Bank Markazi* and *Patchak* could prove influential.

Outside the context of the federal courts, at least two state high courts have addressed the thesis of this Article. First, in *Firelock Inc. v. District Court*, the Colorado Supreme Court considered whether the state's Mandatory Arbitration Act violated the state's separation of powers doctrine.<sup>156</sup> The court held there was no separation of powers violation.<sup>157</sup> It reasoned that this was because the arbitration panel did not perform a judicial function<sup>158</sup> and—perhaps most importantly—because the arbitrator's decision was non-binding.<sup>159</sup> For this latter reason, the court concluded the arbitrator was not exercising the sovereign power of the state—the judicial power—because the arbitrator did not “possess the final authority to render and enforce a judgment.”<sup>160</sup> This is an important distinction from the FAA, whereby parties wholly agree to forego their right to a judicial forum and proceed to binding arbitration. Accordingly, *Firelock* does not cut against the argument that the FAA is an impermissible rule of decision.

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153. See generally *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010) (upholding the validity of clauses delegating authority to determine arbitrability of a dispute to an arbitrator).

154. See FARNSWORTH, *supra* note 139; RESTATEMENT (SECOND) OF CONTRACTS § 345 (Am. Law Inst. 1981).

155. *Katz v. Cellco P'ship*, 794 F.3d 341, 344 (2d Cir. 2015).

156. 776 P.2d 1090 (Colo. 1989).

157. *Id.* at 1099.

158. *Id.* at 1095.

159. *Id.* at 1094.

160. *Id.*

Second, in *Atwater v. Commissioner of Education*, the Massachusetts Supreme Judicial Court considered whether mandatory arbitration under the state's Education Reform Act of 1993 violated the state's separation of powers principle.<sup>161</sup> There, a teacher alleged wrongful dismissal but was required to arbitrate the claim.<sup>162</sup> The court held there was no separation of powers violation because there was no interference with the core judicial functions of the courts.<sup>163</sup> Specifically, the court noted that the arbitrator was acting in a very limited role: only reviewing dismissal decisions, of which there were expressly limited grounds.<sup>164</sup> The court concluded these were legislative decisions.<sup>165</sup> Of course, like *Firelock*, *Atwater* only draws attention to the FAA's all-encompassing reach, whereby parties may agree to arbitrate *all* their claims, not like the limited reach of the law at issue in that case. Thus, like *Firelock*, *Atwater* ultimately supports the thesis of this Article.

#### IV. IMPLICATIONS

Assuming this Article's thesis is correct as a matter of doctrine, the inquiry now becomes speculative. This Article concludes by postulating how courts might receive a fulsome challenge to the FAA under a rules of decision theory.

##### A. ANALOGOUS PAST CHALLENGES AND TREATMENT BY THE FEDERAL COURTS

The Supreme Court of the United States has not addressed whether the FAA constitutes an impermissible rule of decision. The Court has, however, addressed an analogous question for the Commodity Futures Trading Commission (CFTC). In *Commodity Futures Trading Commission v. Schor*, the Court addressed whether the CFTC violated Article III because Congress gave the CFTC jurisdiction to entertain state law counterclaims in reparations proceedings.<sup>166</sup> The Court considered whether the "essential attributes" of the judicial power were reserved to Article III courts alone and the extent to which Congress could permit adjudication of a right normally

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161. 957 N.E.2d 1060 (Mass. 2011).

162. *Id.* at 1062.

163. *Id.* at 1069.

164. *Id.*

165. *Id.*

166. 478 U.S. 833 (1986).



adjudicated in the federal courts by a different body.<sup>167</sup> But the Court held the CFTC did not violate separation of powers concerns:

Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected. In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.<sup>168</sup>

This result squares with the Court's FAA jurisprudence. Indeed, arbitration is often referred to simply as another means of forum selection.<sup>169</sup> The Court's decision in *Schor* suggests that Congress may encourage forum selection in a manner it sees fit, short of compelling judicial action, and the power vested in the federal courts via Article III does not suffer.

Because *Schor* found no Article III judicial actions present, that case provides a natural counter argument to this Article's thesis. Suppose the framing of this Article is off-base, and the FAA does not direct judicial action or compel certain results but instead merely provides what the law is—in other words, that arbitration is the exclusive contract remedy courts may award under a certain set of factual circumstances. Such a legislative action seems within Congress' power to enact. The problem, of course, is that this interpretation does not have a basis in the text of the FAA. This is notwithstanding the statute's description of arbitration agreements as "irrevocable"—a court still must determine and order the award of a remedy where a litigant purports to breach a supposedly irrevocable contract by filing suit.<sup>170</sup> Stated differently, if Congress intended the FAA to abrogate all other common law contract remedies, it would have said so. The notion that Congress intended arbitration to be the exclusive and only remedy in certain contract actions is further undermined by the FAA's allowance for arbitration agreements to be invalidated "upon such grounds as

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167. *Id.* at 851.

168. *Id.* at 855.

169. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.").

170. See 9 U.S.C. § 2; see also Note, *State Courts and the Federalization of Arbitration Law*, *supra* note 69.

exist at law or in equity for the revocation of any contract.”<sup>171</sup> The upshot here is that a challenge to the FAA as a rule of decision would have the potential to clarify not only the rule of decision doctrine but also the text and plain meaning of the FAA.

Setting aside decisional law, law reviews have been a welcome home for arguments related to this Article’s thesis. In a 2012 article, Professor Roger J. Perlstadt made a convincing case that under a literal reading of Article III, the FAA cannot pass constitutional muster.<sup>172</sup> A literal reading of Article III, he contends, would lead to the conclusion that arbitrators are exercising the judicial power by bindingly resolving disputes.<sup>173</sup> As he put it, “[d]etermining facts, applying the law to those facts, and ascertaining a remedy to be applied to the parties is precisely what arbitrators do.”<sup>174</sup> Of course, this power is reserved to the life-tenured judges of Article III courts and their counterparts among the state sovereigns.

More recently, in a 2017 note, Matthew J. Stanford expounded on the FAA’s shaky Article III underpinnings. He argues the law circumvents ordinary jurisdictional requirements because it directs judicial action prior to a litigant needing to demonstrate subject-matter jurisdiction, personal jurisdiction, or proper venue.<sup>175</sup> But, as with Professor Schwartz’s thesis regarding the FAA’s applicability to state courts, even if the thesis is correct as a matter of logic, that does not mean it is normatively true.<sup>176</sup>

#### B. THE POWER OF THE FEDERAL COURTS AND CONCLUDING REMARKS

If the argument that the FAA is an impermissible rule of decision is correct, then courts—both federal and state—may view the Act as *permitting* courts to award a certain remedy, but not requiring courts to do so. This conclusion is especially important as it relates to the federal courts. Even without considering the overlay of federalism and sovereignty principles that governs the federal government’s relationship with state courts, there is a patent separation of powers problem created by Congress’ exercise of the federal judicial power. If the FAA does create a rule of decision, then federal courts should enforce arbitration agreements only to the extent they find arbitration is the

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171. 9 U.S.C. § 2.

172. Perlstadt, *supra* note 1, at 201.

173. *Id.* at 223–27.

174. *Id.* at 224.

175. Stanford, *supra* note 1, at 983.

176. See *supra* notes 1–2 and accompanying text.

appropriate contract remedy to award.<sup>177</sup>

Suppose that is correct; what might change? The short answer is arbitration might be just as prevalent as it always has been. Where a movant seeks to compel arbitration based on a valid contract, in many (though certainly not all) cases, arbitration is likely the remedy a court should award against the litigant who breached that contract by filing suit. But perhaps courts could be honest about what they are doing—that is, they enforce arbitration agreements because arbitration is a *procedure* favored by Congress, not the only contractual remedy available to a party.<sup>178</sup> For that to be the case, though, the Supreme Court would seemingly have to overrule parts of *Prima Paint* and *Southland*. Nonetheless, the Constitution does not deal in trifles, and if that outcome is what is required to ensure the legitimacy of our tripartite system of government, so be it.

Indeed, the Court might consider that outcome preferable to stacking the *Southland* house of cards any higher. This is particularly true in light of the ubiquity of arbitration agreements and the fairness concerns they raise in many contracts of adhesion in employment and consumer contracts.<sup>179</sup> If it is true that the Court favors arbitration both because it lessens the docket of the federal courts and increases economic efficiency in the nation at large,<sup>180</sup> the Court can only increase its institutional standing by recognizing that arbitration is an allowable (and, indeed, favored) procedure for courts to apply to pending cases when presented with the appropriate motion—not a substantive contract remedy. Bolstering this conclusion is the canon of constitutional avoidance, which guides the Court in choosing a plausible constitutional reading of a statute as opposed to a plausible unconstitutional one.<sup>181</sup>

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177. And, of course, there could be no net change in the enforcement of arbitration agreements, for arbitration is favored as a forum as much by the Supreme Court as by Congress. *See supra* note 85 and accompanying text.

178. Though this Article analyzes the apparent problem from the perspective of the judiciary, it is also true that Congress could amend the FAA to provide greater clarity.

179. For instance, several years ago, a group of Harvard Law students, exercising their considerable bargaining power in one of the most rarified corners of the job market, organized a movement for law students not to sign mandatory arbitration agreements in their own employment contracts. *See* Stephanie Francis Ward, *A Group of Harvard Law Students Is Trying to Get Rid of Mandatory Arbitration Clauses*, ABA J. (Sept. 1, 2019), <https://www.abajournal.com/magazine/article/parity-to-the-people> [https://perma.cc/689D-BN6Y].

180. *See* discussion *supra* Part II.

181. *See* *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (explaining the constitutional

Ultimately, analysis of the rules of decision doctrine leads to the conclusion that the FAA may be applied by courts just like any other contract remedy. Through the FAA, Congress has made clear that arbitration contracts are on equal footing with other contracts. But the result of that intent should be—and should have always been—that a court retains the power to determine the appropriate remedy when a litigant purports to breach an arbitration agreement. Unless arbitration is a mandatory procedure, it is but one remedy the court may order to remedy that breach.