

**Rhetoric versus Reality in
Arbitration Jurisprudence:
How The Supreme Court
Flaunts and Flunks Contracts
(and Why Contracts Teachers
Need Not Teach the Cases)**

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Rhetoric versus Reality in Arbitration Jurisprudence: How The Supreme Court Flaunts and Flunks Contracts (and Why Contracts Teachers Need Not Teach the Cases)

*Lawrence A. Cunningham**

Supreme Court rhetoric about the role of contracts and contract law in arbitration jurisprudence differs sharply from the reality of its applications. In the name of contracts, the Court administers a self-declared national policy favoring arbitration, a policy directly benefiting the judicial branch of government. This often puts the Court's preferences ahead of those of contracting parties while declaring its mission as solely to enforce contracts in accordance with contract law. The Court thus cloaks in the rhetoric of volition a policy in tension with constitutionally-pedigreed access to justice and venerable principles of federalism.

This Article documents the rhetoric-reality gap and explores why it exists and why it matters. The rhetoric-reality gap is attributable in part to a dilemma the Court created for itself: its national policy favoring arbitration is constitutionally-suspect unless people assent, yet letting people make what contracts they wish would prevent implementing the national policy. The jurisprudence diminishes the Court's legitimacy, tempts defiance, creates doctrinal incoherence, and poses other costs. This Article calls for reconciling these conflicting positions rather than sustaining the status quo: the Court should either give up its national policy favoring arbitration and truly respect freedom of contract or come clean about its national policy's real implications and acknowledge its narrow conception of contract and contract law.

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INTRODUCTION

In contract law, what parties intend is more important than what judges think, no less true concerning arbitration clauses than any other. Yet many nineteenth century judges disfavored arbitration, often refusing to enforce clauses agreeing to that means of dispute resolution.¹ Congress reversed that hostility in a 1925 statute, now called the Federal Arbitration Act (FAA).² It directed judges to enforce arbitration agreements, as they enforce other contracts,³ allowing that they could be unenforceable on such grounds as any other contract. That reversal succeeded,⁴ boosted by dozens of Supreme Court opinions since 1983 expanding the statute's sweep.⁵ After arbitration won legitimacy, with nearly all states adopting the Uniform Arbitration Act,⁶ some judges became hostile to litigation⁷ and many are enamored of arbitration.⁸ The truth remains, however, that what judges believe should matter less than what people intend, since arbitration has long been recognized as a contractual route to private dispute resolution.⁹

¹ See KATHERINE V.W. STONE & RICHARD A. BALES, *ARBITRATION LAW* 22-41 (2d ed. 2010); STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 1-14 (2d ed. 2006); CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* §1.06 (2d ed. 2006); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377 (1991); U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915) (review); German-American Ins. Co. v. Etherton, 41 N.W. 406 (Neb. 1889) (example); Tobey v. County of Bristol, 23 Fed. Cas. 1313 (D. Mass. 1845) (classic statement by Justice Story).

² 9 U.S.C. §§ 1 et seq. New York adopted a state arbitration act in 1920, on which the FAA is based. See STONE & BALES, *supra* note 1, at 30. The federal statute was originally called the United States Arbitration Act, 43 Stat. 883.

³ Actually, the FAA directs specific performance of arbitration agreements, recognizing that money damages would generally be inadequate to protect aggrieved parties on breach. In contract law, specific performance is an extraordinary remedy, available only when money would be inadequate to put an aggrieved party in the position performance would. Given that difference at the foundation of the FAA, it is impossible ever to achieve its ambition of putting arbitration clauses on an "equal footing" with all other contracts.

⁴ E.g., Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647 (S.C. 1977); Berkeley County v. W. Harley Miller, Inc., 221 S.E.2d 882 (W.V. 1975); Kodak Min. Co. v. Carrs Fork Corp., 669 S.W.2d 917 (Ky. 1984).

⁵ See Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996).

⁶ See STONE & BALES, *supra* note 1, at 764 (35 states have adopted 1955's Uniform Arbitration Act and 14 its successor, the Revised Uniform Arbitration Act, quoting the latter).

⁷ See Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme of the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1139-46 (2006).

⁸ See Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148 (4th Cir. 1993).

⁹ Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448 (1957); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). As Judge Benjamin Cardozo wrote during the period just after the FAA was passed:

The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness.

Reflecting that contractual basis of arbitration, the FAA declares simply that “any written provision” in any “contract evidencing a transaction involving commerce” to resolve designated disputes by arbitration is “enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁰ The statute was enacted when commercial actors often reneged on signed arbitration agreements and targeted that group,¹¹ as well as similar commitments made in non-commercial arbitration agreements.¹² Despite that clarity and context, the Supreme Court heralds the FAA as stating a sweeping national policy favoring arbitration.¹³

True, in some older cases, the Court rightly stressed that the FAA’s primary purpose was reversing judicial hostility to arbitration¹⁴ and enforcing contractual commitments to arbitrate.¹⁵ Although some detect continued judicial aversion to arbitration,¹⁶ pervasive hostility died generations ago, yet the Court often speaks as if it were a daily threat to civil society.¹⁷ While championing this national policy, the Court has insisted that it is only enforcing contracts in accordance with contract law. Though the Court’s holdings since the 1980s have likewise shown greater fidelity to contracts than previously,¹⁸ there is a discernable gap between its rhetoric about that fidelity to contracts and what the Court really does. This Article documents that gap and explores its causes and consequences.

Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929).

¹⁰ 9 U.S.C. § 2.

¹¹ See Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007).

¹² See Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 L. & CONTEMP. PROBS. 167 (2004).

¹³ E.g., *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), discussed *infra* text accompanying notes 69-72; *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) (discussing how purpose of FAA included streamlining dispute resolution).

¹⁴ E.g., *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989).

¹⁵ See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

¹⁶ See Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469; Stephen A. Broome, *An Unconscionable Application Of The Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach To Arbitration: Why This Road Less Traveled Will Make All The Difference On The Issue Of Preemption Under The Federal Arbitration Act*, 2005 J. DISP. RESOL. 61 (2005); Susan Randall, *Judicial Attitudes Towards Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).

¹⁷ See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of the Federal Arbitration Act*, 83 NYU L. REV. 1420, 1435 (2008) (Supreme Court’s talk “of combating hostility to arbitration is today largely anachronistic in that it has come unmoored from the conditions that provided it”).

¹⁸ See, e.g., *infra* note 61 (noting decisions enforcing arbitration contracts despite federal statutory protections previously seen to require litigation rather than arbitration).

The Court's arbitration jurisprudence stimulates intense debate in a vast literature on many interrelated subjects. Critics object to the lack of judicial attention given to the limits of arbitration¹⁹ while proponents stress its virtues.²⁰ Discourse examines comparative advantages of the systems by classifying one as public dispute resolution, the other as private.²¹ Some scholars applaud the Court's emphasis on contracts and contract law in its arbitration jurisprudence²² while others object to applying standard contract law principles, developed for arms'-length bargaining, to consumer and employee arbitration clauses.²³ Some lament formulaic application of contract law principles and urge instead a contextual application of them in the arbitration setting.²⁴ Experts debate specific federal doctrines in arbitration jurisprudence as related to contract law.²⁵ They moot the role of freedom of contract and assent in choosing forums for dispute resolution.²⁶ The contending positions produce some common ground.²⁷ Yet enduring

¹⁹ E.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Barbara Black, *Is Securities Arbitration Fair to Investors?*, 25 PACE L. REV. 1 (2004); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992); Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 PACE L. REV. 73 (2005); Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55 (2004); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROB. 75 (2004); 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; David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2010).

²⁰ E.g., Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006).

²¹ See Michael E. Solimine, *Forum Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L. J. 51 (1992).

²² E.g., Stephen J. Ware, *Arbitration and Unconscionability after Doctor's Associates*, 31 WAKE FOREST L. REV. 1001 (1996).

²³ E.g., Stempel, *Arbitration, Unconscionability, and Equilibrium*, *supra* note 19; Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 675-677 (1996).

²⁴ E.g., Amy J. Schmitz, *Dangers of Deference to Form Arbitration Provisions*, 8 NEV. L. J. 37, 47-57 (2008) (notably also concentrating on the context of consumer contracts, not contracts generally).

²⁵ E.g., Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 29, 32, 34 (2003) [hereinafter Rau, *Seventeen Propositions*]; Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing*, 8 NEV. L. J. 107 (2007) [hereinafter Ware, *Separability Doctrine*].

²⁶ See Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245 (1993); Richard Speidel, *Contract Theory and Securities Arbitration: Wither Consent?*, 62 BROOK. L. REV. 1335, 1337 (1996); Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381 (1996); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998).

sources of disagreement include differences between the theoretical appeal of arbitration compared to litigation and the practice in fact.²⁸ Scholars continue to debate the FAA's constitutionality,²⁹ the Supreme Court's fidelity to legislative history,³⁰ and federalism aspects of both³¹ (also a subject on which the Justices disagree, often sharply³²).

This Article contributes a different review and criticism by addressing the rhetoric-reality gap: the difference between the Court's incantations about arbitration as contract, and purported application of contract law, versus the reality that its jurisprudence imposes on private parties, impinges on both freedom of contract and freedom from contract, intrudes upon state contract law, and changes and distorts actual contract law doctrine.³³ This review is agnostic about whether arbitration or litigation is superior, systemically or in particular contexts. Nor does it join debate over applying contract law principles formulaically or applying principles suitable in business settings to non-business settings. It assumes that people should be free to choose, as the rhetoric advertises, with courts faithfully applying contract law principles to evaluate choice, not putting a thumb on the scale favoring arbitration while feigning contractual neutrality.

Part I of this Article documents the rhetoric-reality gap through a detailed descriptive and critical account of a dozen leading Supreme Court cases. The Court's oft-repeated rhetorical

²⁷ EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006).

²⁸ STEPHEN B. GOLDBERG, ET AL. *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 214 (5th ed. 2007).

²⁹ See David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OREGON L. REV. 541 (2004).

³⁰ E.g., IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* §10.53 (1994) (calling it a "pillar of sand"); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. L. REV. 99 (2006); Jonathan R. Nelson, *Judge-Made Law and the Presumption of Arbitrability*, 58 BROOK. L. REV. 279, 328 (1992) ("The Supreme Court has no clear expression of congressional policy upon which to base its own program of promoting commercial arbitration."); Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 389 (1992).

³¹ See Pierre H. Bergeron, *At the Crossroads of Federalism and Arbitration: The Application of Prima Paint to Purportedly Void Contracts*, 93 KY. L. J. 423 (2005); Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L. J. 326 (2007); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability*, 56 SMU L. REV. 819 (2003); Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L. J. 385 (2007).

³² For example, though many opinions and Justices have forged headlong into federal preemption of state law in this field, Justice Thomas, devotee of federalism, steadfastly dissents from preemption; Justice Scalia often echoes the objection but has retreated somewhat; Justice O'Connor once steadfastly opposed preemption but eventually relented. Chief Justice Rehnquist steered colleagues toward federalism. See *infra* text accompanying notes 188-202.

³³ Professor David Horton also has detected fundamental problems with the contractual basis of much of prevailing federal arbitration jurisprudence as well. See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 665-66 (2010) (showing how assertions that unilateral amendments to arbitration clauses are valid under Court's federal arbitration jurisprudence are invalid under basic contract law).

statements include: “arbitration is a matter of consent, not coercion;”³⁴ contract interpretation is a matter of state contract law;³⁵ the FAA’s purpose is to make arbitration clauses enforceable according to their terms;³⁶ arbitration procedures can be freely designed because arbitration is a consensual matter;³⁷ and the purpose of contractual interpretation of arbitration clauses is always “to give effect to the intent of the parties.”³⁸

Despite all that, the Court’s applications include: presuming parties intend arbitration when expressions are ambiguous;³⁹ diminishing party autonomy to choose law other than the FAA;⁴⁰ ignoring party contemplations about the scope of private bargains in favor of federal declarations;⁴¹ insisting that arbitration clauses be severed from contracts challenged as invalid and then enforced, without regard to party intent;⁴² and limiting freedom *from* contract by liberally allowing strangers to enforce contracts⁴³ while limiting freedom *of* contract by refusing to let parties specify the scope of power their chosen arbitrators possess.⁴⁴

Part II tries to explain the gap, finding doctrinal explanations least satisfactory, legalistic explanations most robust, and institutional factors playing a supplementary role. Exploration of doctrinal explanations supposes alternative portrayals of what the Article presents as a rhetoric-reality gap. For example, gaps between what courts say and do may be pervasive, particularly in

³⁴ *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989).

³⁵ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

³⁶ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 58, (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996).

³⁷ *Volt*, 489 U.S. 468, 479; *First Options*, 414 U.S. 938, 944; *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).

³⁸ *Stolt-Neilsen S.A. v. Animal Feeds*, 130 S. Ct. 1758 (2010).

³⁹ *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), discussed *infra* text accompanying notes 69-76.

⁴⁰ *Compare Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), discussed *infra* text accompanying notes 77-78, *with Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), discussed *infra* text accompanying notes 79-89.

⁴¹ *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), discussed *infra* text accompanying notes 90-95.

⁴² *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), discussed *infra* text accompanying notes 114-117; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), discussed *infra* text accompanying notes 118-121; *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), discussed *infra* text accompanying notes 122-125.

⁴³ *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009), discussed *infra* text accompanying notes 142-147.

⁴⁴ *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), discussed *infra* text accompanying notes 148-150.

contract law, where stern exhortations of principle are accompanied by contrary results, making the Court's kindred style normal not anomalous.⁴⁵ Alternatively, the Court's arbitration jurisprudence could be explained as a matter of modern contractual default rule theory, where the Court simply has set rules that apply unless parties agree otherwise.⁴⁶

Though these doctrinal explanations slightly narrow or redefine the gap between the Court's rhetoric and the reality, they are incomplete and unsatisfactory. The rhetoric-reality gap in the Court's arbitration jurisprudence differs qualitatively and quantitatively from that found in general contract law and elsewhere; rationalizing all the Court's opinions in terms of default rule theory requires a conception of default rules that is so expansive, and so immersed in tensions between freedom of contract and national policy, as simply to reframe the rhetoric-reality gap. Rather, in doctrinal terms, the gap is best appreciated as rhetoric from venerable 19th century classical contract theory yoked to a caricature of late 20th century post-realist contract law that includes a substantial mandatory element. The latter is what Grant Gilmore called "contorts", something more familiar in tort law than in classical contract law. The question remains why.

Exploration turns to legalistic accounts, which are found to be considerably more robust. These attribute the Court's rhetoric-reality gap to tension between citizen access to courts and states' rights on the one hand and the Court's national policy favoring arbitration on the other: rhetoric about contract and contract law pays lip service to citizens' and states' rights while the national policy requires departures from both in reality. In other words, a national policy favoring arbitration over litigation and federal law over state law is constitutionally-suspect unless based on voluntary assent of people, meaning a basis in contract; but contracts that choose state law or channel disputes into litigation instead of arbitration are incongruent with that policy, and disfavored. The rhetoric of contracts is a device to portray the national policy as legitimate even while departures from the rhetoric in practice are necessary to implement it.

The perceived national policy, in turn, arises from institutional factors. This includes a strong dose of judicial parochialism that prefers to push disputes away from the court house. This perspective differs slightly from common beliefs about judicial appetites, warranting a preliminary explanation.⁴⁷ In earlier history, when judges wanted the business of litigation brought to their courthouses, it was easy to understand judicial hostility to arbitration, simply on anti-competition grounds. Today, and for several decades, there is no shortage of legal disputes to go around, and many judges, perhaps especially federal judges and Supreme Court justices, would prefer to reduce court dockets, not jealously hoard them.⁴⁸ Even if it were true that some courts, perhaps especially state courts, still seek to maximize caseloads, the Supreme Court's efforts to curtail that appetite is equally parochial. Either way, it is a fight about how best to

⁴⁵ See *infra* text accompanying notes 154-161.

⁴⁶ See *infra* text accompanying notes 162-170.

⁴⁷ See *infra* text accompanying notes 185-187.

⁴⁸ See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. REV. 1 (1993).

direct resolution of legal disputes, between courts and arbitrators, not about contracts and contract law. That helps to explain the rhetoric-reality gap.⁴⁹

The Article also considers but discounts the role of ideology of the Justices in explaining the rhetoric-reality gap. All the Justices exhibit the gap, though ideology influences its exact shape.⁵⁰ It tends to be narrowest when Justices care more about contract law and state law than when they embrace federal power and law in arbitration jurisprudence.⁵¹ The Justices do often trade barbs along ideological lines in arbitration cases producing multiple opinions. Liberal Justices dissenting call out conservative-majority writers for favoring big business against consumers and employees or vice versa.⁵² But neither side as a group does any better job than the other in handling contract law; all demonstrate the propensity to exuberantly proclaim freedom of contract in rhetoric while impinging on it in application.

The Article ultimately explores why the rhetoric-reality gap matters. The gap imposes costs in the abstract terms of the Court's legitimacy and doctrinal coherence. In a conclusion, the piece notes my inspiration for writing it, which comes as a teacher of Contracts (and related transactional subjects such as Corporations) rather than as a scholar of Arbitration. Widespread talk in the arbitration cases and literature makes it look as if a teacher of Contracts should know more and teach more about arbitration than I knew before writing this or have ever shared with my Contracts classes in twenty years of teaching. But on closer inspection that appearance turns out to be misleading and the conclusion false. Arbitration law today does not warrant significant treatment in a Contracts course. The Court's arbitration jurisprudence flaunts contract rhetoric but its applications flunk the Contracts course.

I. DOCUMENTING THE RHETORIC/REALITY GAP

It is well-known that the Supreme Court's interpretation of the early 20th century FAA in pivotal cases from the late 20th century rendered virtually all arbitration agreements in most contracts governed by federal law.⁵³ In 1967's *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,⁵⁴

⁴⁹ This institutional account also includes a moderate dose of simple Court indifference to the prosaic subject of contract law.

⁵⁰ See *infra* text accompanying notes 188-202.

⁵¹ See *infra* text accompanying notes 106-112 (comparing Justice Thomas's concurring opinion with the majority opinion in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)).

⁵² A good example is Justice Ginsburg dissenting from an opinion written by Justice Alito in *Stolt-Neilsen S.A. v. Animal Feeds*, 130 S. Ct. 1758 (2010)).

⁵³ Earlier Court opinions addressing the FAA took a narrower view of the statute's purposes, a literal approach to its language, and limited its scope to procedural aspects of federal jurisdiction. See Sternlight, *supra* note 23, at 644-653 (reviewing and so classifying Supreme Court FAA cases from 1925 to 1966). For an account of the justifications for the later position, see Stephen J. Ware, *Punitive Damages in Arbitration: Contracting out of Government's Role in Punishment and Federal Preemption of State Law*, 63 *FORDHAM L. REV.* 529 (1994).

⁵⁴ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Substantive aspects of *Prima Paint* are discussed *infra* text accompanying notes 114-117.

the Court held that Congress enacted the FAA by reference not to its relatively narrow Article III authority over federal courts but its plenary power to regulate interstate commerce.⁵⁵ The result of that momentous opinion, by Justice Fortas, is that the statute applies not only in federal courts exercising federal question jurisdiction, but to federal courts in diversity cases applying state law. In 1984's *Southland Corp v Keating*,⁵⁶ the Court found that the FAA was a substantive statute establishing federal law, also applicable in state courts,⁵⁷ and preempts any state law that obstructs the FAA's objectives,⁵⁸ which the Court said announced "a national policy favoring arbitration."⁵⁹ That policy discovery paved the way for huge expansion of federal authority over arbitration law into state territory⁶⁰ and throughout federal law.⁶¹ The comprehensive scope of

⁵⁵ Justice Black wrote a scathing dissent that continues to attract devotees.

⁵⁶ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁵⁷ This amounted to a functional overruling of *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), cited *supra* note 9, which viewed the FAA as procedural, not substantive.

⁵⁸ *Southland*, 465 U.S. at _____. In *Southland*, franchisees filed a class action lawsuit against a franchisor asserting various theories, including violations of state franchise statutes. The company invoked an arbitration clause in each of the contracts. California courts debated whether arbitration applied to the statutory violation claim because a related state statute rendered invalid any contract term that might waive statutory protections of franchisees. The Supreme Court declared that the FAA applied and preempted the California law because it "undercut the enforceability of arbitration agreements." *Id.*

⁵⁹ The Court began making such bold statements in *Moses H. Cone Memorial Hospital*, 460 U.S. 1 (1983), discussed *infra* text accompanying notes 69-72, and has exuberantly repeated them for decades. Only two limitations appear: the contract must be within the statute's scope, principally involving commerce, and an agreement to arbitrate is subject to any grounds in law or equity as would invalidate any contract. The Court wrote: this "broad principle of enforceability" of agreements to arbitrate should not be "subject to any additional limitations under state law." *Southland*, 465 U.S. at _____. The Court claimed to find support for its sweeping expansion in the legislative history of the FAA, but scholars challenge its accuracy. See MACNEIL, ET AL., FEDERAL ARBITRATION LAW, *supra* note 30, §10.53 (calling it a "pillar of sand"). Justice O'Connor dissented, objecting to federalizing this field of law. She stressed that the FAA and kindred state statutes had long been understood by contracts law scholars as procedural, not substantive, leaving contract law intact. *Southland Corp. v. Keating*, 465 U.S. 1, 27, at n. 13 (O'Connor, J., dissenting) (citing 6 S. WILLISTON & G. THOMPSON, LAW OF CONTRACTS § 368 (rev. ed. 1938)). Though O'Connor ultimately capitulated to the Court's persistence, citing *stare decisis*, *Allied-Bruce*, discussed *infra*, the results continue to be debated. Compare Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (opining that *Southland* was fundamentally erroneous and has caused extensive damage to arbitration law and practice) with Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002).

⁶⁰ *Perry v. Thomas*, 482 U.S. 483 (1987).

⁶¹ The so-called national policy enabled the Court to expand the scope of arbitration to include an infinite variety of claims, including those arising under federal statutes that prior rulings had insulated. *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust claims under the Sherman Act); *Shearson American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987) (given national policy favoring arbitration agreements, claims under the Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act can be arbitrated, distinguishing *Wilko v. Swan*, 346 U.S. 427 (1953)); *Rodriguez de Quijas v. Shearson American Exp., Inc.*, 490 U.S. 477 (1989) ("agreement to arbitrate claims under the Securities Act of 1933 is enforceable and resolution of the claims only in a judicial forum is not required", overruling *Wilko v. Swan*, 346 U.S. 427 (1953)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (statutory claims generally). The Court also expanded the FAA's scope by holding that arbitration of state claims pendent to concurrent litigation must be compelled too, though it results in bifurcation of disputes and increased costs. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

federal law was sealed in 1995's *Allied-Bruce Terminix Co. v Dobson*,⁶² when the Court construed the FAA's "involving commerce" language⁶³ to have the broadest reach within Congress's Commerce Clause power.⁶⁴ It even includes a homeowner service contract to have termite infestation eradicated from a home.⁶⁵

Less appreciated is how the Court's jurisprudence since 1983 increasingly eclipses the role of contracts and contract law with a radically different body of law, though the Court insists it is simply enforcing contracts and applying contract law.⁶⁶ Throughout the Court's arbitration jurisprudence in those years, its rhetoric about fidelity to contract has escalated while its faithfulness to contract and contract law has proportionally declined. Often that gap is vast, though sometimes it appears to be a simple misunderstanding of contract law.⁶⁷ The Court

⁶² *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995). Substantive aspects of *Allied-Bruce* are discussed *infra* text accompanying notes 90-95.

⁶³ See *supra* text accompanying note 10.

⁶⁴ See *United States v. Lopez*, 514 U.S. 549 (1995); Strickland, *supra* note 30 (problems with federal judicial expansion of arbitration law and urging Congress to intervene to restore some authority to the states).

⁶⁵ *Allied-Bruce Terminix*, 513 U.S. 265. Some modest statutory exceptions put contracts outside the FAA's scope: (1) a miniscule population of purely local matters, e.g., *Arkansas Diagnostic Center v. Tahiri*, 2007 Ark. LEXIS 345, at 14-15 (Ark. 2007); (2) a narrow class of employment agreements exempted by the statute, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (construing FAA exemption concerning employment contracts narrowly, as solely applicable to transportation workers); (3) insurance contracts under a different federal statute making all insurance law the province of the states, *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011 et seq.; and (4) collective bargaining agreements subject to a different federal statute and a parallel set of issues about arbitration, *National Labor Relations Act*, 29 U.S.C. §§ 151 et seq.; see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987) (FAA does not apply to labor employment contracts); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (asserting that the same national policy applies to arbitration agreements in the context of collective bargaining agreements not subject to the FAA but to federal labor statutes). This Article's scope is confined to contracts deemed to be within the FAA.

⁶⁶ See Ware, *Arbitration and Unconscionability*, *supra* note 22, at 1006 ("While the substance of the Court's arbitration decisions over the last twenty years has been remarkably faithful to the contractual approach, the Court's rhetoric has been even more supportive of the principle that arbitration law is a part of contract law.") As the following discussion documents, in the fourteen years since Professor Ware wrote that, the gap has widened, with incremental curtailment of fidelity to contract and increased assertions of contract rhetoric.

⁶⁷ A good example appears in Justice Scalia's dissent in *Allied-Bruce*, protesting federalization but appreciating *stare decisis*. Scalia suggested that for parties who had relied on *Southland*, which he considered erroneous, "rescission of the contract for mistake of law would often be available." *Allied-Bruce*, 513 U.S. ____ (Scalia, J., dissenting) (citing CORBIN ON CONTRACTS § 616 and Restatement (Second) of Contracts § 152). The authorities Scalia cited for this proposition do not support the assertion—nor would others. Contract law allows rescission based on mutual mistake of a material fact that is a basic assumption of a contract. It is not obvious that a binding precedent of the Supreme Court, later overruled, qualifies. An old-fashioned view even held that mistakes about law are not grounds to rescind a contract. See E. ALLEN FARNSWORTH, *CONTRACTS* 679, § 9.2 (2d ed. 1990) ("Some courts have denied relief [in mistake of law cases but] the modern view is that the existing law is part of the state of facts at the time of agreement. Therefore, most courts will grant relief for such a mistake, as they would for any other mistake of fact.") But what's wrong with Justice Scalia's statement is not about the difference between a mistake of law or fact. It is about the state of the law existing at the time of contract formation. At that time, the

occasionally acknowledges that it is not relying on state contract law, but the FAA, yet still declares or implies that the federal law it is creating is some species of contract law. But, as the following documents, that species is so alien to actual contract law as to defy the recurring assurances that arbitration is fundamentally about contracts or contract law. This discussion treats a dozen leading Court cases, a tour of the terrain, organized topically but tending also to follow a chronological pattern in which one can see the rhetoric-reality gap widening over time.

A. Interpretive Presumptions and Limited Choice of Law

Contract's laws tools to address ambiguity channel analysis into recognized and capacious categories, useful to determine such recurring matters as whether to admit extrinsic evidence to aid interpretation or whether parties manifested sufficiently definite intention to form a binding contract. Contract law does not take a stance on whether to treat ambiguous language to channel performance in any particular direction—though the Court's arbitration jurisprudence rushes it headlong into that territory.⁶⁸

In 1983, in an opinion that launched the Supreme Court on a trajectory, the Court invented a presumption favoring arbitration. Despite declaring that arbitration is contractual, Justice Brennan in *Moses H. Cone Memorial Hospital*⁶⁹ asserted that the FAA “requires a liberal reading of arbitration agreements” and “is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state . . . policies to the contrary.”⁷⁰ The FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”⁷¹

Though such assertions do not exist in the common law of contracts,⁷² there are doctrinal grounds that could justify them. Among methods of interpretation elaborated in Arthur Corbin's definitive treatise, for example, they could be classified as a construction of the contract in the public interest—stressing congruence not with particular intentions of specific parties but general judicial notions of public policy.⁷³ More generously, the Court might be seen as establishing a default rule to deal with ambiguity, at least in the sense that parties can avoid the result by

parties did not mistakenly apprehend the state of the law. Under Scalia's model, they were not mistaken at all. The Court was mistaken.

⁶⁸ In addition to the cases discussed in this Section exhibiting this feature, concerning the Court's national policy favoring arbitration, the Court has created special interpretive tools to address the meaning of the word “arbitration,” discussed *infra* text accompanying notes 128-140 (discussing *Stolt-Neilsen S.A. v. Animal Feeds*, 130 S. Ct. 1758 (2010)).

⁶⁹ *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

⁷⁰ *Id.*, at 24 (quoted in, e.g., *Howsam* 537 U.S. 79).

⁷¹ *Moses Cone*, at 460 U.S. 25 (quoted in, e.g., *Stolt-Neilsen*, 130 S. Ct. 1758; *First Options*, 514 U.S. 938; *Mastrobuono*, 514 U.S. 52).

⁷² See Sternlight, *supra* note 23, at 704-05 (noting how foreign these ideas are to contract law).

⁷³ See ARTHUR L. CORBIN, CORBIN ON CONTRACTS, § 550.

avoiding ambiguity.⁷⁴ But the Court did not provide any such analysis. Indeed, neither the *Moses Cone* Court's rhetoric about contracts nor its presumption was relevant to the issue the Court faced.⁷⁵ Even so, the dicta influenced the Court's arbitration jurisprudence simultaneously to declare freedom of contract while imposing a national policy favoring arbitration.⁷⁶

For a few years, it remained possible for parties to opt out of the FAA and choose the law of a particular state, as suggested by 1989's *Volt Information Sciences, Inc. v. Stanford University*.⁷⁷ It addressed a construction contract naming California the applicable law. A statute let courts stay arbitration pending litigation among third parties that could risk inconsistent rulings on like facts. Amid a payment dispute, the contractor wanted to arbitrate and the owner to litigate against the contractor and others not party to the arbitration agreement. In a rare and never-repeated show of restraint, the Supreme Court agreed with all California courts ruling for the owner. Federal policy favors arbitration and requires interpreting contracts accordingly, but there is no policy or rule about particular arbitration procedures.⁷⁸ For the same reasons, state law was not preempted, Chief Justice Rehnquist's opinion concluded.

Volt's respect for contract and choice of law was short-lived, however, truncated in a nearly-identical case six years later, *Mastrobuono v. Shearson Lehman Hutton, Inc.*⁷⁹ A securities brokerage contract on a standard form chose New York law and directed arbitration under industry rules. After customers won an arbitration award of punitive damages, the broker wanted it vacated because New York law said arbitrators lack authority to award punitive damages.⁸⁰ The Court refused, in an opinion by Justice Stevens, saying the contract did not manifest intention to include New York's law limiting arbitrators' power to award punitive damages. It perceived a conflict between the choice of New York law, so limiting arbitrator power, and the securities arbitrator's rules allowing punitive awards. In fact, there was no conflict. The choice of New York law could easily mean no punitive damages could be awarded in arbitrations that the contract said would be used to resolve disputes. That was the brokerage firms' simple and compelling argument, which would be deferential to New York law and faithful to the contract.

⁷⁴ See Rau, *Seventeen Propositions*, *supra* note at 25, at 29, 32, 34 (developing a defense of some of the important elements of the Court's federal arbitration jurisprudence based on contract law default rule theory); see also *infra* text accompanying notes 96-109 (noting Justice Breyer's attempts to defend some of the Court's jurisprudence using contract law default rule theory).

⁷⁵ The issues concerned the finality and appeal-ability of judgments.

⁷⁶ See Sternlight, *Panacea or Corporate Tool?*, *supra* note 23, at 660-61 & 674.

⁷⁷ *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989).

⁷⁸ *Volt*, 489 U.S. ____ (“[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”). That stance from 1989 was radically altered over the next two decades, clearly manifest in *Stolt-Neilsen*, where the Court favored a particular type of arbitration and eschewed relevant state contract law. See *infra* text accompanying notes 128-140.

⁷⁹ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

⁸⁰ *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976).

Though stating that arbitration is a matter of contract and contract law, the Court instead chose a convoluted approach that first created ambiguities in the contract and then applied federal arbitration jurisprudence, along with a modicum of state contract law, to resolve them. Standard contract law principles⁸¹ and conflict of laws rules⁸² hold that a choice of law incorporates into a contract the law of the named jurisdiction—including rules barring arbitrators from awarding punitive damages. But the Court decided it could mean less than that. It could cut some rules from its scope, including arcane rules like a state law denying arbitrators power to award punitive damages. Presto: the contract contained an ambiguity.⁸³

To resolve it, the Court used three principles. The first was a fair rendering of contract law, construing ambiguities against the drafter, the brokerage.⁸⁴ The second was a strained rendering of another contract law principle, to harmonize all terms of a contract, which the Court thought required denying effect to part of New York law to uphold a broader scope of arbitration clause. But the opposite reading is equally consistent with that principle. The Court's third, and most striking ground, was the expanding federal arbitration law hatched in *Moses Cone*: "ambiguities as to the scope of the arbitration clause [are] resolved in favor of arbitration."⁸⁵ The upshot is to require crystal clarity on terms restricting arbitration power, even in a standard form adhesion contract.⁸⁶ The common law requires no such clarity⁸⁷ and it is a stretch to contend that

⁸¹ See SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 15.11 (Richard A Lord ed., 4th ed. 2007) [hereinafter WILLISTON, CONTRACTS].

⁸² Restatement (Second) Conflict of Laws §§ 186, comment b; 187(1), 187(3), comments b, c, h; 205 and comments and Reporter's Note; 207.

⁸³ In dicta, the Court suggested that if the contract were silent about punitive damages, silence would manifest no intention to bar them and they would be allowed because the FAA would preempt New York's law barring them. *Mastrobuono*, 514 U.S. _____. Why is not clear. The Court assumed that a state law limiting remedies available in arbitration was anti-arbitration, unsurprising given the Court's enthusiasm for expansive readings of the FAA. But it is not obviously anti-arbitration. Punitive damages are allowed in tort actions but not for breach of contract and there are considerable differences between procedural and substantive rules of law on the one hand and the law of remedies on the other.

⁸⁴ For the two contract law principles, the Court rightly drew upon state law (in New York, whose law the contract said applied, as well as Illinois, where the contract was formed), along with the Restatement (Second) of Contracts.

⁸⁵ *Mastrobuono*, 514 U.S. ____ (citing *Moses Cone*, discussed *supra* text accompanying notes 69-72). That was a strange holding, since the issue was not whether to arbitrate but what remedies an arbitrator might award.

⁸⁶ See WILLISTON, CONTRACTS, *supra* note 81, at § 15.11 ("while the Court has continued to hew to the freedom of contract model, at least paying lip service to the notion that it will enforce the parties' agreement to arbitrate in accordance with the parties' wishes, it insisted to a far greater degree than previously that those wishes be made clear.")

⁸⁷ The Court years earlier accurately applied contract law when it enforced another standard-form forum selection clause. In standard form contracts, such clauses usually are not assented to, but contract law sees them as enforceable so long as they are reasonable. See Restatement (Second) of Contracts §211 (1981). In *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1990), the Court noted that a choice of forum clause in a cruise ship ticket is not likely to be negotiated or represent true assent of a passenger, but that only means the clause is tested for reasonableness and the clause in question passed that test. *Id.* at 593-94. *Mastrobuono* acted as if there was assent to the standard form securities brokerage contract and probed to determine exactly what was assented to by a choice of law clause.

the Court's interpretive gymnastics are merely supplying a default rule that parties can readily reverse at will. Worse, a basic principle of contract law is to interpret similar contracts similarly, yet *Mastrobuono* does not square with *Volt*.⁸⁸ *Mastrobuono* silently overruled *Volt* and respect for states, contracts, and contract law, putting the Court's national policy favoring arbitration ahead of the country's longer-standing tradition favoring freedom of contract.⁸⁹

The Court's 1995 *Allied-Bruce Terminix Co. v Dobson*⁹⁰ opinion completed the diminution of party choice of applicable law—despite Court rhetoric stressing freedom of contract. Justice Breyer's opinion addressed the FAA's scope,⁹¹ capturing contracts that “evidence a transaction involving [interstate] commerce.”⁹² Lower courts had split on whether to read this as a directive from Congress about the population of contracts within its reach or a reference to intentions of parties about the scope of the deals they make. The case concerned a contract between a homeowner and a termite-protection provider. The Alabama Supreme Court denied that the FAA applied, considering the local nature of the contract, and lack of any indication that the parties contemplated the transaction involving interstate commerce.⁹³

The U.S. Supreme Court reversed, deciding that “contemplation of the parties” is not the test of whether the FAA applies. It instead stated a test solely based on its declarations about what interstate commerce is. It took this position by reaffirming *Southland*'s preemption a decade earlier and despite 20 state attorneys general filing amicus briefs to overrule it. The Court

⁸⁸ The contracts were analytically identical (choosing state law that contained a twist on arbitration practice) but got different treatment. Justice Thomas made that point in his dissent. *Mastrobuono*, 514 U.S. ____ (Thomas, J., dissenting). Justice Stevens acknowledged it, distinguishing the cases procedurally, not substantively: the Court in *Volt* deferred to California's interpretation of the contract and state law whereas the Court in *Mastrobuono* was reviewing federal court interpretations of the contract. *Mastrobuono*, 514 U.S. _____. Yet another way to distinguish *Volt* and *Mastrobuono* is to stress how in *Mastrobuono* the parties chose NASD arbitration rules, those rules permitted punitive awards, and an NASD arbitrators' manual told arbitrators they were authorized to award punitive damages.

⁸⁹ See Alan Scott Rau, *Does State Arbitration Law Matter at All? Federal Preemption*, in *ADR AND THE LAW* 199, 207 (15th ed. 1999) (“*Volt* has become peripheral” and the enforceability of party choice of state law at odds with federal mandates “has been steadily eroding and is being increasingly ignored”). It's possible to claim that an unadorned choice of a state law (say New York or California) selects that state over other states, rather than that state over any federal law, since federal and state law are both sovereign in each state. See Ware, *Punitive Damages in Arbitration*, *supra* note 53. Though that view contributes a modest defense of part of the *Mastrobuono* opinion, it does not reconcile it with *Volt*. Further, at least in today's arbitration-rich world, that reading is less obvious. Contracts today often expressly choose to be governed by both the Federal Arbitration Act, concerning arbitration, and by particular state law, concerning other matters. Parties are aware that arbitration law differs under the various regimes and people may wish to choose which applies, state or federal, but the Court's jurisprudence does not facilitate such choice.

⁹⁰ 513 U.S. 265 (1995).

⁹¹ See *supra* text accompanying notes 62-64.

⁹² 9 U.S.C. § 2.

⁹³ As a result, Alabama law applied, which then barred arbitration.

invoked *stare decisis* and the statute's recently-discovered national policy favoring arbitration. But the ruling gets contract law backwards. Contract law is all about contemplation of parties. Aside from narrow technical corners such as the statute of frauds,⁹⁴ contract law is not about statutory directives channeling agreements into baskets for legislatively-ordained treatment or courts setting default rules that parties are not allowed to change.⁹⁵ Despite stern proclamations that its arbitration jurisprudence is all about contracts and contract law, the Court curtails private autonomy to opt out of the Court's national policy in favor of state law.

B. *Clarity of Intention*

Even in the rare cases when the Court tries to imagine what actual contracting parties intended, or would have intended had they thought about an issue, its national policy retains a strong presence. The result is jurisprudence ringing of classical contract law rhetoric while working it into forms making contract law a tool of social control. For example, in 1995's *First Options of Chicago, Inc. v. Kaplan*,⁹⁶ an agreement between a company and a securities firm contained an arbitration clause. A dispute arose between individuals who had not signed the agreement who wished to litigate and that firm which wanted to arbitrate. At issue was whether a court or arbitrator decides if the arbitration clause governs. Reciting standard rhetoric, the Court said that "turns upon what the parties agreed about the matter,"⁹⁷ usually by applying "ordinary state-law principles that govern the formation of contracts."⁹⁸ Having recited the rhetoric, the Court retreated with an "important qualification:" courts cannot assume parties agreed to arbitrate such questions absent "clear and unmistakable" evidence of that intention.⁹⁹

That creates a special rule of federal arbitration jurisprudence alien to contract law: amid ambiguity about who decides whether an arbitration clause governs, doubts are resolved in favor of courts. That special rule differs from the Court's special rule of arbitration interpretation, invented in *Moses Cone* and extended in *Mastrobuono*, resolving ambiguities in the scope of a clause to favor arbitration. Justice Breyer distinguished the cases using hypothetical bargain

⁹⁴ Even such technical statutory directives are subject to considerable ameliorating doctrines, such as part performance. *See infra* note 162.

⁹⁵ The importance of the contemplation of the parties was stressed in a 1961 concurring opinion of Chief Judge Lumbard in *Metro Industrial Painting Corp. v. Terminal Const. Co.*, 287 F.2d 382 (2d Cir. 1961). He explained how such a test is necessary to implement Congressional intent without forfeiting state contract law to a new federal arbitration jurisprudence. The Court in 1995's *Allied-Bruce* said that concern was moot, after the Court for several decades had abandoned federalism in its arbitration jurisprudence. *Allied-Bruce*, 513 U.S. at ____.

⁹⁶ 514 U.S. 938 (1995).

⁹⁷ *First Options*, 514 U.S. at ____.

⁹⁸ *Id.*

⁹⁹ *Id.* (quoting a case from the context of labor arbitration, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) (refusing to compel arbitration of labor dispute though possibly within scope of collective bargaining agreement)).

analysis popular among contract law theorists.¹⁰⁰ He supposes that parties to agreements with arbitration clauses “likely gave at least some thought to the scope of arbitration” so that, given a national policy favoring arbitration, the Court demands clarity to show parties did *not* intend arbitration—as in *Moses Cone* and *Mastrobuono*.¹⁰¹ In contrast, “who decides” is “rather arcane” and “a party often might not focus upon that question.”¹⁰² After reverting to contract rhetoric—under “the principle that a party can be forced to arbitrate only those issues it has specifically agreed to submit to arbitration”¹⁰³—the Court insisted on “clear and unmistakable” evidence of that intent, inventing a standard alien to contract law and of such limited use in law generally as to bewilder rather than enlighten.¹⁰⁴

Despite the attempt at using contract theory’s hypothetical bargain analysis, its use underscores weaknesses in the Court’s jurisprudence not strengths in Breyer’s engagement. The analysis supposes that people forming contracts with arbitration clauses make degrees of calculation about matters closely related. The Court does not justify its belief that there are significant differences between whether an issue will be resolved by arbitration and whether a court or arbitrator decides fights over that. Both are arcane. Parties often will give neither the slightest thought. Those giving thought to one can as likely be supposed to give thought to the other. The *First Options* Court’s analysis also departed from contract law when applying its new test to the facts. In deciding that the reluctant parties had not “clearly and unmistakably” vested the arbitrator with decision-making power, the Court concentrated not on the terms of the agreement, but on post-contractual conduct.¹⁰⁵

The Court saw the obverse of *First Options*, finding requisite “clear and unmistakable” intent, in 2002’s *Howsam v. Dean Witter Reynolds, Inc.*¹⁰⁶ A dispute under a brokerage contract requiring arbitration posed a threshold issue of whether an arbitrator or court should decide if, under industry arbitration rules, a time limitation for bringing claims applied or had run. As usual, the Court recited rhetoric (“arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”)¹⁰⁷ then

¹⁰⁰ E.g., David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991).

¹⁰¹ *First Options*, 514 U.S. at ____.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ The phrase “clear and unmistakable” is not used in law generally. It is an invention of the Supreme Court that it has used with some regularity in the context of addressing waivers in the labor union context and in ascertaining Congressional intent. A December 2010 Westlaw search for the phrase in Supreme Court opinions returned a mere 66 instances, the vast majority using the phrase colloquially rather than as an operative legal standard.

¹⁰⁵ *Id.*

¹⁰⁶ 537 U.S. 79 (2002).

¹⁰⁷ *Id.*

added qualifications (there is a “liberal federal policy favoring arbitration agreements”¹⁰⁸ with a heightened clarity standard about the “who decides” issue¹⁰⁹). The Court elaborated its hypothetical bargain analysis from *First Options*, this time finding clear and unmistakable intent bound up in the contract’s structure and language. In this exercise, however, the Court draws inferences less about what parties would want under the common law of contracts, than what they would want, given the Court’s FAA jurisprudence—while making it no clearer what the imported and rarely-used concept of “clear and unmistakable” means.¹¹⁰

Again, the hypothetical bargain analysis is a nice touch, but proves more rhetorical than real, indicated by Justice Thomas’s concurring opinion in *Howsam*. He stressed that “arbitration is a matter of contract”—and he really means it. As *Volt* held, under the FAA, courts must enforce agreements to arbitrate just as they would what Thomas called “ordinary contracts”—in “accordance with their terms.”¹¹¹ *Volt* directs courts to choice of law clauses in agreements containing arbitration clauses and to enforce them. The *Howsam* contract chose New York law, whose highest court construed a nearly-identical agreement to mean that the decision was for an arbitrator, not a court.¹¹² Thomas is thus clear: state contract law governs, not federal arbitration jurisprudence. On inspection, therefore, the Court’s *Howsam* opinion emerges as characteristically opaque: expressing fealty to contract law while advancing arbitration jurisprudence expressing a national policy favoring arbitration over freedom of contract.

C. Federal Severing of Private Contracts

The common law of contracts takes a contextual approach to determining the effects of the invalidity of one clause on the rest of a contract.¹¹³ The Court’s federal arbitration jurisprudence imposes a severability rule, so that the existence of an arbitration clause—even in a fraudulent, illegal or unconscionable bargain—makes disputes over the bargain’s validity for arbitration, not court. The Court minted this tool in 1967’s *Prima Paint*,¹¹⁴ when a business buyer sued its seller to rescind a contract based on fraud and the seller invoked the contract’s arbitration clause. The seller won because the Court made a stunning move: it severed the arbitration clause from the rest of the contract. The Court observed that the buyer challenged the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Joseph L. Franco, Comment, *Casualty Finding the Clear and Unmistakable: A Re-Evaluation of First Options in Light of Recent Lower Court Decisions*, 10 LEWIS & CLARK L. REV. 443 (2006); Mark A. Mulchek, Note, *Arbitration by Accident: Unintentionally Meeting the Clear and Unmistakable Evidence Standard*, 2007 J. DISP. RESOL. 597 (2007).

¹¹¹ *Howsam*, 537 U.S. ____ (Thomas, J., dissenting).

¹¹² *Id.* (citing *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884 (N.Y. 1997)).

¹¹³ See FARNSWORTH, CONTRACTS, *supra* note 67, at §§ 5.7-5-9; Restatement (Second) of Contracts, §184; Mark Movsasian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 42, 46-48 (1995).

¹¹⁴ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), mentioned *supra* text accompanying notes 54-55.

contract as a whole as fraudulently induced, but not the arbitration clause. So the arbitration clause stood and the Court directed the fraud claim to arbitration.¹¹⁵ Nothing in the contract authorized the Court to do so and the common law of contracts warrants the opposite.¹¹⁶

Despite controversy,¹¹⁷ the Court embraces its severability invention, as in 2006's replay of *Prima Paint, Buckeye Check Cashing, Inc. v. Cardegna*.¹¹⁸ A borrower objected to usurious terms as illegal under Florida law and the lender invoked an arbitration clause. The Florida Supreme Court held the entire contract void, including its arbitration clause. The U.S. Supreme Court reversed, citing *Prima Paint's* federal procedure to sever the arbitration clause from the rest of the contract. Justice Scalia also announced: "The issue of the contract's validity is different from the issue whether any agreement . . . was ever concluded,"¹¹⁹ saying courts can decide questions about contract formation, such as whether a party had contractual capacity. But nothing in contract law makes any such distinction to disempower courts to decide the legality of a contract. *Buckeye* thus sustains an invention of uncertain congruity with contract law,¹²⁰ and of

¹¹⁵ The basis for this invention of federal arbitration jurisprudence, which is not based on state contract law, was the FAA. Section 4 outlines procedures to compel arbitration and stay litigation: when the court, after a hearing, is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." When reviewing an application to stay under FAA Section 3, the Court found that Section 3 limits the court's consideration to issues "relating to the making and performance of the agreement to arbitrate." 9 U.S.C. §§ 3-4.

¹¹⁶ *E.g.*, *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996) (fraud in inducement of contract renders invalid an arbitration clause contained in it). Before *Prima Paint*, most federal and state courts addressing the issue had taken the opposite approach to what *Prima Paint* did, though an influential federal circuit court applied the severability rule a decade earlier. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, *cert. denied*, 364 U.S. 801 (1960). *See infra* text accompanying notes 216-224.

¹¹⁷ *See, e.g.*, Richard L. Barnes, *Prima Paint Pushed Compulsory Arbitration Under the Erie Train*, 2 BROOK. J. CORP. FIN. & COM. L. 1 (2007); Richard L. Barnes, *Buckeye, Bull's-Eye, or Moving Target: The FAA, Compulsory Arbitration, and Common-Law Contract*, 31 VERMONT L. REV. 141 (2006); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability*, 56 SMU L. REV. 819 (2003); Ware, *Separability Doctrine*, *supra* note 31. For a resounding defense of the severability doctrine, based in part on the policies favoring arbitration, but mostly on earnest attempts to anchor it in traditional contract law doctrine, *see also* Rau, *Seventeen Propositions*, *supra* note 25.

¹¹⁸ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

¹¹⁹ *Buckeye*, 546 U.S. ____.

¹²⁰ Scholars and lower court judges vigorously debate whether there are meaningful differences between contracts that are void or voidable or between contracts that existed but are later excused and those that never existed in the first place. For example, Professors Ware and Rau have engaged in long-running debate on the severability rule and how to distinguish between doctrines rendering a contract a nullity from the outset and therefore a question for courts and those excusing a contractual duty and therefore a question for arbitrators. *See* Ware, *Separability Doctrine*, *supra* note 25; *see also* *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (Judge Frank Easterbrook's attempt to explain the difference, believing that a contract induced by fraud is still a contract assented to whereas a contract signed by forgery or by an agent lacking authority is not assented to). The debate about whether there are differences between void/voidable contracts or between contracts that existed but are excused and contracts that never existed is akin to the once-vigorous debate over the difference between conditions precedent and conditions subsequent—which turns out to have no substantive significance but importance in legal procedure. *See* FARNSWORTH, *CONTRACTS*, *supra* note 67, at § 8.2 (noting the classic case of *Gray v. Gardner*, 17 Mass. 188 (1821)).

certain incongruity with the Court’s stern declarations that it never holds people to arbitration agreements to which they did not assent.¹²¹

The apotheosis of the separation of arbitration jurisprudence from contract law using severability is 2010’s *Rent-A-Center West, Inc. v. Jackson*.¹²² An employee-at-will signed an employment application containing nothing but an agreement to arbitrate disputes and related rules, including a meta-clause directing that arbitration would resolve whether that agreement to arbitrate was valid. The employee sued for unlawful discrimination and alleged that the agreement was unconscionable because its arbitration rules were obnoxious.

Justice Scalia took the familiar formula, starting with incantations: arbitration is a matter of contract, the FAA puts arbitration clauses on an equal footing with other contracts, courts must enforce arbitration agreements in accordance with their terms, and they are, like other contracts, subject to defenses such as fraud, duress or unconscionability.¹²³ The rhetoric restated, the Court applied federal arbitration jurisprudence, not contract law, and severed the clause. In a rare show of candor, however, the Court acknowledged that the source of its rule is federal arbitration jurisprudence.¹²⁴ Despite that acknowledgement, the Court insisted that its holding “merely reflects the principle that arbitration is a matter of contract.”¹²⁵

D. *Dealing with Silence by Federal Judicial Fiat*

Contractual silence is a vexing problem in the common law that has at least twice bedeviled the Supreme Court’s arbitration jurisprudence as well. In 2003’s *Green Tree Financial Corp. v. Bazzle*,¹²⁶ Justice Breyer’s opinion returned to the issue of “who decides” and what

¹²¹ E.g., *Volt*, 489 U.S. 468; *First Options*, 514 U.S. 938; *Howsam*, 537 U.S. 79.

¹²² *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

¹²³ *Id.* (citing or quoting *Buckeye*, 546 U.S. 440; *Volt*, 514 U.S. 938; and *Doctor’s Associates*, 517 U.S. 681).

¹²⁴ *Rent-A-Center*, ___ U.S. ___ (“The severability rule is a ‘matter of substantive federal arbitration law,’ and we have repeatedly ‘rejected the view that the question of ‘severability’ was one of state law, so that if state law held the arbitration provision not to be severable a challenge to the contract as a whole would be decided by the court.’”) (quoting *Buckeye*, 546 U.S. 440; citing *Prima Paint*, 388 U.S. 395; *Southland*, 465 U.S. 1; and *Allied-Bruce*, 513 U.S. 265). The cited authorities are far from clear that the law being applied is a special federal arbitration law—they read as though they are applying contract law.

¹²⁵ *Rent-A-Center*, ___ U.S. ___ (citing *First Options*, 514 U.S. 938, 943; *Howsam* 537 U.S. 791; and other Court rhetoric). The Court also offered a statutory defense of its severability rule: the statute speaks of “a written provision” to arbitrate rather than to the “contract” or “agreement” in which such a written provision appears. For the Court, that justifies remitting challenges to the “contract” to arbitration and limiting judicial review to the “provision.” Though it may seem hyper-technical, the Court’s textual reading may not be intense enough. The referenced FAA section talks about a “written provision” but the FAA’s ensuing savings clause talks about grounds applicable to “any contract.” That contrast between a “provision” and a “contract” is jarring and inexplicable taken literally. The more natural reading is to equate “provision” with “contract” so that the “contract” is just as valid as any other “contract.” It’s not technically possible for a “provision” to be as valid as “any contract.”

¹²⁶ 539 U.S. 444 (2003).

“clear and unmistakable” intent means. An arbitration clause was silent about whether arbitration might take the form of class arbitration. The South Carolina Supreme Court held that its contract law takes such silence to permit class arbitration. The U.S. Supreme Court reversed because the state court wrongly thought that question was for the judiciary when, as a matter of federal arbitration jurisprudence, particularly *Howsam*, it was for the arbitrator (the Court finding “clear and unmistakable” party intention).¹²⁷

Bazze confused people (as much of the Court’s arbitration jurisprudence does). That confusion manifested in a 2010 Court opinion chastising arbitrators for being confused and rebuking them for allegedly not following the law. *Stolt-Neilsen S.A. v. Animal Feeds*¹²⁸ involved a commercial shipping contract with a standard arbitration clause. A customer wanted to use class arbitration to air allegations that the shipping company illegally fixed prices for many years. The two agreed that their contract did not say one way or the other whether class arbitration was authorized. So they asked arbitrators to rule on the meaning of that silence. The arbitrators held a hearing, took testimony, and researched the law and industry practice. Their written report concluded that the clause authorized class arbitration, citing the clause, custom in the shipping industry and general arbitration practice plus contract law precedents from New York and elsewhere. The shipping company objected and sued to have that ruling vacated.

The Court vacated the award,¹²⁹ accusing the arbitrators of exceeding their power under the FAA.¹³⁰ The Court recited the full litany of its incantations—nearly every specimen of contract rhetoric the Court has used to characterize its arbitration jurisprudence since 1983: arbitration clause interpretation is a matter of state contract law;¹³¹ arbitration is a matter of

¹²⁷ Chief Justice Rehnquist’s dissent contended the case was controlled by *First Options*, not *Howsam*, making the decision one for courts, not arbitrators (not seeing the requisite “clear and unmistakable” intent). He thought the case easy for a judge to decide and that silence has but one meaning: the contract did not authorize class arbitration, so no class arbitration could be ordered. Rehnquist followed the standard script: (a) lead with rhetoric that contract law governs arbitration clauses, ordinarily a state law question, the goal being merely to put such clauses “upon the same footing as other contracts,” and requiring the Court to “rigorously enforce agreements to arbitrate” to effectuate contract rights and party expectations; (b) follow that with the qualification that state law is preempted when it conflicts with federal law; and (c) conclude by announcing that federal law interpretation requires a certain result (here, that the clause cannot possibly authorize class arbitration). Scholars have been generous about Rehnquist’s dissent. Professor Huber called it “puzzling,” noting: “His approach, if adopted, would amount to nothing less than a federal common law of arbitration contract interpretation.” Stephen K. Huber, *Confusion About Class Arbitration*, 7 J. TEX. CONSUMER L. 2, 6 (2003). That is an accurate description of Rehnquist’s dissent—and of much of the rest of the Court’s federal arbitration jurisprudence. Moreover, as discussed in the ensuing text, the Court did adopt it in the next big case, *Stolt-Neilsen S.A. v. Animal Feeds*, 130 S. Ct. 1758 (2010).

¹²⁸ *Stolt-Neilsen S.A. v. Animal Feeds*, 130 S. Ct. 1758 (2010).

¹²⁹ The Court heard the case even though the FAA limits appellate review to arbitration “awards” and this was a mere preliminary ruling at an early stage of the process. Justice Ginsburg’s dissenting opinion stressed this objection. *Stolt-Neilsen*, ___ U.S. at ___ (Ginsburg, J., dissenting) (citing Federal Arbitration Act, 9 U.S.C. § 10).

¹³⁰ Section 10(a)(4) of the FAA authorizes federal courts to vacate awards when arbitrators exceed their powers. 9 U.S.C. §10(a)(4). It likewise authorizes vacatur for awards procured by corruption, fraud or undue means or when arbitrators evidence partiality or misconduct. . 9 U.S.C. §10(a)(1)-(3). Courts do not routinely invoke any such grounds, and the excess powers ground is extremely rarely used.

¹³¹ *Stolt-Neilsen*, ___ U.S. at ___.

consent, not coercion;¹³² the FAA’s purpose is to make arbitration clauses enforceable according to their terms;¹³³ arbitrators derive power from contract;¹³⁴ and arbitration procedures can be freely designed because arbitration is a consensual matter.¹³⁵ Justice Alito then wrote that it is “clear from our precedents and the contractual nature of arbitration that courts and arbitrators give effect to these contractual limitations [and we] must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.”¹³⁶

Despite saying all of that, the Court never showed how a contract law analysis would apply to the case or yield a result different from what the arbitrators reached under New York contract law. Instead, after acknowledging that sometimes it is appropriate to supply missing terms to agreements otherwise sufficiently definite to be binding,¹³⁷ it simply declared that the difference between “arbitration” and “class arbitration” is too vast to imply such a term.¹³⁸ This is not a statement of contract law, of course, but of federal arbitration law opinion, for which the Court cited no authority.¹³⁹ The Court’s thick and stirring rhetoric about its devotion to contract

¹³² *Id.*, ___ U.S. at ___ (quoting *Volt*, 489 U.S. 468).

¹³³ *Stolt-Nielsen*, ___ U.S. at ___ (citing *Volt*, 489 U.S. 468, 479; *Mastrobuono* 514 U.S. 52, 57, 58; *Doctor's Associates*, 517 U.S. 681, 688).

¹³⁴ *Stolt-Nielsen*, (citing *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-649 (1986); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960)).

¹³⁵ *Stolt-Nielsen*, (quoting *Mastrobuono*, 514 U.S. 52; citing *Volt*, 489 U.S. 468; *First Options*, 514 U.S. 938, 943; and *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002)). Conspicuously, the Court failed to cite an opinion from its prior term contradicting its hyperbole about how important contracts and contract law really are in the Court’s arbitration jurisprudence, *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009), discussed *infra*.

¹³⁶ *Stolt-Nielsen*, ___ U.S. at ___. Characteristic of its arbitration opinions, the Court spends paragraphs reciting all these rhetorical antecedents, only to conclude that the point it is asserting about the contractual basis of arbitration is obvious. *Cf.* *Hamlet*, Act III, scene 2 (“The [Court] doth protest too much, methinks.”).

¹³⁷ *Stolt-Nielsen*, ___ U.S. at ___ (citing Restatement (Second) of Contracts § 204 (1979)).

¹³⁸ The Court asserted: “In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts to realize benefits of private dispute resolution: lower costs, greater efficiency and speed, and ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties’ mutual consent to resolve disputes through class-wide arbitration.” *Stolt-Nielsen*, ___ U.S. at ___. The Court cited no authority for this assertion. Instead it draw an analogy to the idea in *First Options* about how difficult it is to imagine people thinking ahead of time about arcane questions like who decides whether a clause covers a dispute. *See supra* text accompanying notes 96-105.

¹³⁹ In dissent, Justice Ginsburg revealed that the arbitrators relied on contract law in their decision interpreting this contract, including the case of *Evans v. Famous Music Corp.*, 1 N.Y.3d 452 (2004). It defines the law of contract interpretation to consist first of reading text to resolve a dispute or, if that does not enable resolving it, consulting extrinsic evidence, including industry custom and practice, to find a reasonable interpretation. The case involved a musical recording contract’s royalties. It defined royalties as all actual receipts less expenses including taxes. The company paid foreign taxes and received US tax credits under a complex formula that left the company with a net advantage. The issue was whether the clause required sharing half that advantage with artists. The clause was oblique—much as a clause requiring arbitration is oblique on whether that means solo or class arbitration. The court referenced custom and industry practice to resolve the ambiguity (finding intention not to share tax advantage). That

law makes its reliance on perceived differences between direct and class arbitration pale by comparison.¹⁴⁰

E. *The Death of Contract and The Denial of Death*

Under the common law of contracts, people are usually free to make bargains on any terms they wish and have the terms enforced. That is the essence of freedom of contract. Contract law's third party beneficiary doctrine recognizes that strangers may enforce contracts only in narrow circumstances when parties to contracts manifested intention to grant them. That exquisitely illustrates a corollary principle called freedom from contract.¹⁴¹ The Court's arbitration jurisprudence gives short shrift to both fundamental principles, though proclaiming devotion to them.

In 2009's *Arthur Andersen LLP v. Carlisle*,¹⁴² clients sued professional advisors after a tax shelter the advisors fashioned was held illegal. Contracts between the clients and a management firm had arbitration clauses, but the firm was bankrupt so it and its contracts were out of the case. Still, the advisors invoked those contracts, to which they were not parties, to seek a stay. Lower courts denied the stay given that the advisers were strangers to the contracts. The Court reversed, in an opinion by Justice Scalia. It began with incantations—arbitration agreements are contracts that federal law puts on equal footing with others and state law governing contracts generally applies to determine what contracts are enforceable. It added that the FAA directs courts to stay litigation in the face of arbitration clauses found binding under state law. The Court declared that the lower courts erred in holding that strangers to contracts cannot obtain stays under arbitration clauses because, it said, state law allows “a contract to be enforced by or against nonparties to the contract through ‘assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.’”¹⁴³

The Court did not explore how any of those theories could give the advisors rights against the clients under the latter's agreements with the management firm. None of the listed

is a strong precedent for resolving the dispute in *Stolt-Neilsen*, which the arbitrators relied upon, as the Court's dissent stressed, though the Court majority did not cite the case.

¹⁴⁰ The Court's holding in *Stolt-Neilsen* does not have much to do with the Court's national policy favoring arbitration—except to favor a particular form of arbitration, one-on-one, not class. The Court takes the liberties it seized under the mantle of the national policy to greater lengths, setting by fiat how to interpret the word “arbitration” when used in private contracts. Most striking about the opinion in terms of the rhetoric-reality gap is how the Court sternly rebuked arbitrators for failing to apply contract law while the Court then failed to follow contract law itself. *See supra* text accompanying notes 128-140. All of that contrasts sharply with the Court's Volt opinion, holding that the national policy does not favor any particular type of arbitration and deferring to state law. *See supra* text accompanying notes 77-78.

¹⁴¹ *E.g.*, Speidel, *supra* note 26.

¹⁴² *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009).

¹⁴³ *Id.* (citing 21 R. LORD, WILLISTON ON CONTRACTS § 57:19, p. 183 (4th ed.2001)).

theories work. The only theory the advisors asserted was estoppel, the equitable doctrine available to do justice when legal principles fail, but that was unlikely applicable on the facts.¹⁴⁴ So the Court simply declared that third-party beneficiary law might be a ground and reversed on that basis. But that was an even wilder stretch since there was no evidence that the clients intended for the advisers to have rights under their contracts with the management firm.¹⁴⁵ Although state contract law on third party beneficiaries varies slightly from state to state, all at minimum require the third party to prove that the contract parties intended them to have rights.¹⁴⁶ The Court's assertions that arbitration is a matter of contractual consent, not coercion, fall flat.¹⁴⁷

The clearest declaration of the death of contract in federal arbitration jurisprudence is 2010's *Hall Street Associates, L.L.C. v. Mattel, Inc.*¹⁴⁸ The Court declared that parties are not allowed by contract to supplement FAA grounds for judicial review of arbitration awards. The FAA states grounds courts may invoke to vacate or modify an award, including fraud, arbitrator misconduct, or (as in *Stolt-Neilsen*) an arbitrator exceeding powers.¹⁴⁹ The parties by contract in *Hall Street* added that awards under the arbitration agreement they assented to would be subject

¹⁴⁴ Examples of equitable estoppel in arbitration are when a party claims the rights under an agreement while trying to escape its duties or when the issues for resolution are intertwined. *E.g.*, *J.A. Construction Mgmt. Corp. v. Insurance Co. of N. Amer.*, 659 F.2d 836 (7th Cir. 1981); *Thomson-CFA S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), cert. denied 513 U.S. 869 (1994); see J. Douglas Uloth, *Equitable Estoppel as a Basis for Compelling Non-Signatories to Arbitrate: A Bridge Too Far?*, 21 REV. LITIG. 593 (2002). Nothing of the sort appeared in *Arthur Andersen*.

¹⁴⁵ See THOMAS H. OEHMKE, COMMERCIAL ARBITRATION §11:8, at 11-10. (3d ed. 2003); compare *Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947-48 (11th Cir. 1999); *Parker v. Center for Creative Leadership*, 15 P.3d 297 (Col. App. 2000) (employer and service provider manifested intention to benefit employee under contract so that employee's claim against provider asserting employer rights was subject to contract's arbitration clause). The idea that two people can make a contract binding on a stranger is alien to the common law of contracts, though the Court refers to the possibility numerous times without illustration or citation. *Arthur Andersen*, ___ U.S. ___, ___, ___.

¹⁴⁶ Compare *Wilson v. Waverlee Homes*, 954 F. Supp. 1530 (M.D. Ala. 1997), *overruled on other grounds* (Alabama law requires intention of the parties to benefit a stranger) with *E.I. DuPont de Nemours v. Rhone Poulenc Fiber & Resin*, 26 F.3d 187 (3d Cir. 2001) (applying Delaware law) (requiring not only intention to benefit but either intention to make a gift or discharge a debt and for that point to be a material part of the exchange).

¹⁴⁷ Nor could the Court avoid that criticism by blaming the statute, as it tried to do when writing: "If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute's terms are fulfilled." *Arthur Andersen*, ___ U.S. ___. Professors Stone and Bales put the point presciently in their casebook without adverting directly to *Arthur Andersen*, wondering whether third party beneficiary status should be determined by state contract law or special federal law congruent with federal preemption and liberal federal arbitration policy. See STONE & BALES, ARBITRATION LAW, *supra* note at, 418. They ask if the federal presumption favoring arbitration commands that states grant third party beneficiary status "whenever there is a colorable claim" to that standing and then ask, poignantly, "If so, what happens to the bedrock principle that arbitration is grounded in consent of the parties." *Id.* The *Arthur Andersen* case, like the dozen others considered in this Article, raise doubt about whether that "bedrock principle" is more rhetorical than real.

¹⁴⁸ 552 U.S. 576 (2008). See Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1106 (2009) ("This decision constitutes arguably the most significant constraint on party autonomy in arbitration that the Court has imposed.").

¹⁴⁹ 9 U.S.C. § 10; see *supra* note 130 (summarizing grounds FAA authorizes courts to use to vacate awards).

to judicial review for erroneous conclusions of law. The arbitrator drew such an erroneous conclusion and the party it hurt sought judicial review. The Supreme Court refused to enforce that contract, demolishing contractual freedom,¹⁵⁰ despite forty years of proclaiming that its arbitration jurisprudence rests on contract and is intended to enforce contracts. The Court's latest work thus shows both the death of contract at its hands and its denial of that death.

II. EXPLAINING AND ASSESSING THE RHETORIC-REALITY GAP

The Supreme Court routinely says that the FAA and federal arbitration jurisprudence are a matter of contract law.¹⁵¹ There is some truth to such assertions, particularly when referring to the existence of a flicker of volition nodding toward arbitration for dispute resolution. But the Court's rhetoric about contract and contract law is more exuberant than the reality that dislodges contracts and contract law from their usual roles. And the problem is not limited to widely-referenced contexts such as when consumers or employees sign adhesion contracts with boilerplate arbitration clauses the Court nevertheless enforces.¹⁵² The Court likewise imposes its national policy favoring arbitration on commercial parties in arms'-length negotiations using equally alluring rhetoric.¹⁵³ Wonderment arises: what explains this gap and why might it matter?

A. Doctrinal Explanations

Scholars could defend the Court's arbitration jurisprudence by reinterpreting it in different ways, loosely classifiable as doctrinal. Doctrinal explanations might assert that: (1) there is less difference than appears between rhetoric and reality or between any gap the Court shows and gaps prevalent in other areas of law or the general law of contracts or (2) contract law's default rule theory explains the Court's jurisprudence, including any perceived differences between what it says and what it does. However, neither retelling of the Court's arbitration jurisprudence is compelling. Instead, the best doctrinal account is less an explanation than another anomaly requiring explanation: the Court's rhetoric reflects 19th century classical

¹⁵⁰See Christopher R. Drahozal, *Contracting Around Hall Street*, 14 LEWIS & CLARK L. REV. 905 (2010) (demonstrating insurmountable obstacles people face who wish to contract around the Court's holding in the case) .

¹⁵¹ Scholars urge the point. *E.g.*, Kenneth R. Davis, *When Ignorance of the Law Is Not Enough: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 51 (1997) ("The central element of arbitration is the intention of the parties as expressed in the arbitration agreement"); STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* 20, 22-23 (2d ed. 2007).

¹⁵² *E.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (securities brokerage contract), discussed *supra* text accompanying notes 79-89; *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (at-will employment agreement form), discussed *supra* text accompanying notes 122- 127.

¹⁵³ *E.g.*, *Stolt-Neilsen S.A. v. Animal Feeds*, 130 S. Ct. 1758 (2010) (commercial actors and trans-ocean shipping contracts), discussed *supra* text accompanying notes 128-140; *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009) (business entrepreneurs and sophisticated professional advisors), discussed *supra* text accompanying notes 142-147; *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (commercial lease agreement between sophisticated parties), discussed *supra* text accompanying notes 148-150.

contract law while its applications evince a caricature of late 20th century post-realist contract law that Grant Gilmore called “contorts” in his famously enigmatic book, *The Death of Contract*.

1. Rhetoric and Reality. The rhetoric-reality gap may simply reflect similar gaps that are pervasive in law. Courts roundly intone one policy tradition of grand and enduring appeal, such as tort law’s “no duty to rescue,” then announce an exception, in a process that if repeated enough yields the familiar result of the exception swallowing the rule. Episodes like that recur in law. But they still tend to be special cases rather than routine. Rhetoric-reality gaps remain an anomaly to highlight, explain or criticize—as this Article does—rather than the norm to be expected. In the case of the Court’s talk and action, it repeatedly asserts a singular rule—freedom of contract—then often generates applications at odds with that.¹⁵⁴ At that general level, the gap is difficult to deny.

At a more particular level, it is possible to claim that a peculiarly vibrant rhetoric-reality gap pervades contract law. Besides freedom of contract, judges routinely proclaim mantras in contract law such as no punitive damages are awarded, mutuality is required, and party autonomy is the standard. Yet some research studies show punitive damages are awarded in a greater percentage of contracts cases than tort cases,¹⁵⁵ case analysis shows that mutuality is often lacking when binding contracts are found, and party autonomy has faded into the deep background amid the past century’s proliferation of standardized forms. To that extent, the Court’s arbitration jurisprudence may replicate national contract law jurisprudence.

But there are both qualitative and quantitative differences. The Court has fielded only a handful of arbitration cases annually in the past two generations and the Justices do not rotate very much. The same dozen people have written about a score of opinions. They can be expected more readily to produce opinions coherent in rhetoric and reality than a welter of far-flung courts in many jurisdictions facing a bewildering variety of fact patterns, contending equities, and varying judicial staffing. Yet the small coterie of Justices has not produced such a coherent body of opinions, leaving a gap more pronounced than appears elsewhere in the law of contracts.

On the other hand, a variation on this explanation might question whether the gap portrayed in Part I is exaggerated because of contract law’s breadth and capaciousness. After all, contract law governs an infinite variety of deals. That often requires tailoring general doctrines to particular contexts, such as for transactions in goods, land sales, construction contracts, or consumer exchanges. The Court’s adaptation of general contract law to the special context of arbitration may simply advance a grand tradition, still being about freedom of contract, warranting the rhetoric, with applications that differ slightly from applications in other contexts. Some of the Court’s rules may be explained in these terms, particularly its rules to interpret

¹⁵⁴ At the other extreme, skeptics may wonder if there can even be a gap between judicial rhetoric and reality. If the Court starts by saying it is embracing the red principle and people detect in its application that it is in reality applying the blue principle, is there a gap between the rhetoric of red and the reality of blue or is there a new relation between talk and practice, in which red means blue. This is a farfetched stance and does not remotely capture the relation between the Court saying such things as “arbitration is a matter of consent, not coercion,” and ordering a client to arbitrate with professional advisors thought it never agreed with them to do that.

¹⁵⁵ See Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WISC. L. REV. 1.

ambiguous expressions—construing doubtful clauses to favor arbitration though insisting on clear and unmistakable evidence of intent to have arbitrators decide threshold questions.¹⁵⁶

But many Court arbitration law doctrines depart so considerably from general contract law that they achieve a different purpose—one in the service of social control, not freedom of contract. Examples are the holding in *Allied-Bruce* announcing federal rules declaring which contracts are within the FAA’s scope,¹⁵⁷ expanding the enforcement rights of strangers to contracts under *Arthur Andersen*,¹⁵⁸ and denying party autonomy to contract for judicial review of arbitration awards as stated in *Hall Street*.¹⁵⁹ The rules more clearly advance the purpose of a national policy committed to arbitration than a national policy committed to freedom of contract—while denying doing that—as evidenced in the Court’s approach to choice of law clauses in such cases as *Mastrobuono*¹⁶⁰ and its severability rule stated in cases such as *Prima Paint*, *Buckeye* and *Rent-A-Center*.¹⁶¹ Thus there remains something unusual about the rhetoric-reality gap in the Court’s arbitration jurisprudence requiring further explanation.

2. Default Rule Theory. Another doctrinal explanation for the Court’s jurisprudence, and its gap between rhetoric and reality, reinterprets the jurisprudence in terms of default rule theory in contract law. This framework appreciates that no contract can be perfectly complete given transaction costs and limitations of human foresight. One function of contract law is to provide rules that apply when a contract does not address an issue or that apply no matter what, courtesy of public policy. Most contract law default rules can be changed (such as risk of loss to goods in transit or the destruction of a contract’s subject matter); the few that cannot (such as the compensation principle or the statute of frauds) exhibit a strong and readily identifiable rationale consistent with fundamental principles of contract law and accompanied by ameliorating doctrines to avoid harsh results in particular cases.¹⁶²

¹⁵⁶ Compare *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), discussed *supra* text accompanying notes 69-76, with *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), *supra* text accompanying notes 96-105.

¹⁵⁷ See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), discussed *supra* text accompanying notes 90-95.

¹⁵⁸ See *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009), discussed *supra* text accompanying notes 142-147.

¹⁵⁹ See *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), discussed *supra* text accompanying notes 148-150.

¹⁶⁰ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), discussed *supra* text accompanying notes 79-89.

¹⁶¹ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), discussed *supra* text accompanying notes 118-121; *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), discussed *supra* text accompanying notes 122-127.

¹⁶² For example, exceptions from the nominally immutable statute of frauds default rule include the part performance doctrine and, in some states, promissory estoppel; exceptions from the nominally immutable default rule against stipulated remedies that impose penalties for breach is the alternative performance doctrine.

The strongest examples supporting the default rule explanation of the Court's jurisprudence are the Court's express statements of this approach in cases such as *Howsam* and *First Options*. They are explicit in using hypothetical bargain analysis and saying the Court's goal is to "align probable expectations with the understood comparative expertise of institutional arbitrators in interpreting their own rules."¹⁶³ But, aside from being rare for that feature, the talk remains more rhetorical rather than real, and the rest of the Court's arbitration rules tend to be statements of judicial fiat in the name of the national policy favoring arbitration, without regard to presumed or probable party intent.

Exquisitely, *Allied-Bruce* denies that party contemplations matter when determining whether the Court's national policy or state law should govern, favoring a determination based on what the Court declares to involve interstate commerce.¹⁶⁴ Another strong example negating the default rule explanation is the Court's express denial of this approach in *Hall Street*. The Court refused to recognize as enforceable a contract clause contemplating judicial review of an agreed arbitration award for errors of law.¹⁶⁵ This denial of freedom of contract illustrates how default rule theory simply crumbles as an explanation of the Court's jurisprudence and its rhetoric-reality gap.¹⁶⁶

It is also difficult to explain cases such as *Mastrobuono* in terms of default rule theory. That case denied effect to a New York choice of law clause when the Court found that state's laws about arbitrators' powers unappealing. Portraying this as a matter of default rule might begin by asserting that choice of law clauses choose only among state laws, not between state and federal law, since both the latter are sovereign in the states. But if the Court has produced an appealing contribution to the law governing arbitration, authentically about contract law, then it has also created a choice between co-equal governing laws, such as New York versus Federal. Yet cases such as *Mastrobuono* do not promote free party choice over whether a particular state's law or the Court's FAA law should govern. That is not exactly consistent with default rule theory.¹⁶⁷

¹⁶³ See *supra* text accompanying notes 96-109 (noting Justice Breyer's attempts to defend some of the Court's jurisprudence using contract law default rule theory).

¹⁶⁴ *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), discussed *supra* text accompanying notes 90-95.

¹⁶⁵ *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), discussed *supra* text accompanying notes 148-150.

¹⁶⁶ Some language toward the end of the *Hall Street* opinion obliquely suggests some possibility of altering the Court's rule by reference to general principles of state law discussed in *Volt*, but that escape route is not explicated and not highly reliable.

¹⁶⁷ Proponents of viewing *Mastrobuono*-as-default-rule could reply that people do not ordinarily think choosing New York law means choosing to apply its rules of civil procedure in all proceedings, wherever held, whether California state court or federal court in New York. Proponents would then stress that a rule barring punitive damages in arbitrations is not obviously substantive. On the other hand, however, there is nothing inevitable about a choice of law excluding procedural or administrative law, or the law of remedies. And even if the anti-punitive damages rule is not obviously substantive, it is not obviously procedural or administrative—it is remedial. So the argument at best yields a stalemate. In *Mastrobuono*, the Court puts on the scale its national policy thumb favoring arbitration, which is not about contract default rules.

Arthur Andersen cannot be squared with default rule theory. It expands the Court's presumption favoring arbitration by finding that parties who signal will to arbitrate anything, agree to arbitrate everything. Conceiving of the case in default rule terms, Professor Rau suggests this analogy: if you expressly agree to arbitrate about the sale of fruit, then you implicitly agree to arbitrate about whether the sale of tomato is a sale of fruit.¹⁶⁸ The analogy may be persuasive in principle, but does not justify *Arthur Andersen*. The question in *Arthur Andersen* was whether a party can be compelled to arbitrate an issue, not against a party it made that agreement with, but against a party with whom it made no such agreement. That is not analogous to the fruit-tomato example. Indeed, in compelling that arbitration, the Court distinguished its rhetoric suggesting it does not compel people to arbitrate issues they did not agree to arbitrate. The result is greater reluctance to compel arbitration about classifying tomatoes under an agreement to arbitrate about fruit and greater willingness to compel arbitration against a stranger to a contract so long as that contract had an arbitration clause.¹⁶⁹

Even if the default rule theory of the Court's arbitration jurisprudence retains some purchase, another weakness in that conception is how many of the Court's default rules tend to be sticky. True, if classified as default rules, some are easy to contract around, such as avoiding ambiguity or using an adjective to modify the word arbitration if intending to authorize particular forms of arbitration, such as class arbitration. But try to choose a law other than the FAA or try to make clear that no third parties can enforce an arbitration clause. The logic if not the language of the Court's opinions indicate a stickiness not common in general contract law default rules. As a contrast, consider such routine subjects as the default rule setting a reasonable time, which may be contracted around simply by stating dates and times. The Court's arbitration default rules, as a class, are more akin to warranty law that can only be disclaimed by following particular procedures, especially using unambiguous and specific language.¹⁷⁰ These rules are more familiar in the law of torts than they are in the law of contracts, inviting a final doctrinal view of the Court's jurisprudence better classified as *contorts* than contracts.

3. Contorts. A final way to classify the Court's arbitration jurisprudence is: classical in rhetoric, but post-realist in application. The Court reflects two contending strands of contract law, one exuberantly and classically about autonomy, the other consciously and modernly injecting a role for society in contracting and contract law. Contract law is rooted deeply in party autonomy and freedom and was historically unshackled by status-based impositions that distinguish contract from tort law. That deep root and vital distinction loom large in the Court's

¹⁶⁸ See Alan Rau, *Arbitral Jurisdiction and the Dimensions of Party "Consent,"* 24 ARB. INT'L 99 (2008).

¹⁶⁹ Professor Rau allows that no party can compel another to arbitrate who has not agreed to any arbitration whatsoever. But, like *First Options*, that just reemphasizes the national policy thumb on this scale to determine the default rule. Agree to anything, you agree to everything, even if that default rule differs from standard third party beneficiary law. Again, the Court insists it is merely following and applying contract law, here third party beneficiary doctrine, and not making a special default rule for "signatories in arbitration." So this is not contract or contract law, despite rhetoric. It is mandatory obligation, more akin to contorts, as discussed in the next sub-section.

¹⁷⁰ The history of warranty is a central story in the history of the relationship between contract and tort law.

rhetoric about arbitration jurisprudence. Another view of contracts recognizes its distinction from tort as far more blurry and its roots in party autonomy often overstated. That view of contracts was charmingly dubbed contorts by Grant Gilmore in his controversial caricature of modern contract law in his endlessly fascinating book, *The Death of Contract*.¹⁷¹ It is more congruent with the Court's real applications in its arbitration jurisprudence, rhetoric aside.

In this interpretation, autonomy is not so much a manifestation given a person's context and the purpose of her actions, but autonomy limited by the context and purpose of the rules. It is not merely heeding old-fashioned principles in the common law of contracts. The Court is not applying the common law of contracts, but a special brand of contract law it has developed for arbitration in light of its declared national policy favoring arbitration. It is a national policy that supersedes values embedded in the common law of contracts (volition, autonomy, freedom or and from contract). There is thus a gap between the Court's rhetoric (all about those venerable values) and the reality (heavily influenced by a superseding national policy). It remains to be explained.

B. *Legalistic Accounts*

A likely explanation for the rhetoric-reality gap is how it is a tool to cover an inherent conflict in the Court's arbitration jurisprudence. The Court insists that there is a national policy favoring arbitration over litigation. That entails a policy disfavoring trial by jury as guaranteed by the Constitution along with other procedural due process.¹⁷² To validate that national policy requires respecting such constitutional rights and associated traditions. It demands some voluntary basis to direct people to arbitration instead of the courthouse. That means contracts.¹⁷³ But if parties have true freedom of contract, they could interfere with that national policy. People could freely agree to levels of judicial review over arbitration awards,¹⁷⁴ be free from strangers asserting mandates to arbitrate disputes,¹⁷⁵ and easily escape the clutches of federal law in favor of state law.¹⁷⁶ Allowing such a full range of contractual freedom would prevent the possibility

¹⁷¹ GRANT GILMORE, *THE DEATH OF CONTRACTS* (1970).

¹⁷² See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

¹⁷³ Even with contractual assent to arbitration, state action may be present in the process to warrant imposition of constitutional rights and due process norms. See Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997). That prospect ups the ante favoring contractual rhetoric.

¹⁷⁴ *Contra* Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008), discussed *supra* text accompanying notes 148-150.

¹⁷⁵ *Compare* Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1902 (2009), discussed *supra* text accompanying notes 142-147.

¹⁷⁶ *Compare* Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995), discussed *supra* text accompanying notes 90-95; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), discussed *supra* text accompanying notes 79-89.

of maintaining a national policy favoring arbitration. The tension thus induces rhetoric about contracts.

Similarly, when insisting on a national policy favoring arbitration, the Justices know that entails the federalization of an area of law traditionally reposed in the states. Such a move defies federalism. States' rights are thus at stake in the Court's arbitration jurisprudence. That is true for all Justices, whatever their usual view on the relative powers of federal and state government. To promote the respectability of an assertion of national policy, it helps to maintain its links to state law prerogatives. That means contract law. But, again, too much deference to state law would undermine a national policy. That tension induces rhetoric about state contract law. It is therefore easy to understand why the Court would embrace the rhetoric of contracts and of contract law while advancing its national policy favoring arbitration.

On the other hand, maneuvering to secure legitimacy under constitutionally-pedigreed access to justice or federalism impulses does not require a rhetoric-reality gap as wide as the cases reveal. Finding requisite citizen volition to warrant re-channeling disputes from litigation to arbitration can be done within a federal arbitration regime expressly unmoored from contract law. Gestures towards federalism could be made by showing such linkages between the Court's jurisprudence and state law that do exist without rhetorical exaggeration. Certainly, the rhetoric-reality gap as to contract law does not cure the federalism objection, and the rhetoric about fidelity to contracts is not a perfect disguise for the coercive aspects of the jurisprudence.

An additional explanation for the rhetoric-reality gap is the statutory basis of the Court's jurisprudence. The FAA was motivated by judicial reluctance to enforce contracts. The text of the statute speaks of contracts. The Court's talk of anchoring its application of the statute in contract law thus makes obvious sense. But it does not explain why the Court fashioned a separate federal arbitration law, distinct from the common law of contracts, and certainly does not explain the rhetoric-reality gap. The choice to develop a different body of law is explicable, ultimately and simply, by the Court's determination that there should be a national policy favoring arbitration. Once that policy was declared, a new set of tools, not merely those found in general contract law, was necessary to implement it. The rhetoric compensates for the need to be faithful not only to the statute—and the Constitution and federalism—but to the Court's determination of the national policy it expresses.

This legalistic account, thus combining constitutional, legislative, and policy impulses, provides a plausible explanation for the rhetoric-reality gap. Even so, it cannot be claimed as definitive. After all, it suggests that the Justices consciously cultivate the rhetoric-reality gap. But evidence is scarce to support such disingenuous calculation. So the legalistic accounts are probably incomplete and further explanation warranted.

C. Institutional Stories

A credible institutional explanation for the rhetoric-reality gap is lack of interest among the Justices in subtleties that grappling with contract law in the arbitration context requires. One version of this explanation suggests that the Court may think it is enforcing contracts according to the common law of contracts, supplemented with federal rules that are contractual too. The

Justices occasionally cite contract law authority.¹⁷⁷ In clear cases of departures, especially with its severability rule, the Court stresses forthrightly that it is developing and applying substantive arbitration law based on the FAA.¹⁷⁸ In others, such as the Court's presumptions concerning the question of "who decides" whether an issue is subject to arbitration, it even uses the tools of hypothetical bargain to struggle with contract law terrain.¹⁷⁹ But those citations, admissions, and struggles are sparse and most of the Court's citations in its arbitration opinions are to its own previous opinions, not to material on the common law of contracts or state contract law.

Another version of this explanation is more fundamental—that the Court is not equipped to attend to the required subtleties of the common law of contracts. There is a good deal of evidence to support this take. The Court has historically acknowledged its comparative disadvantage in matters of the common law, including contracts, which can vary among the states.¹⁸⁰ The Court has few occasions to immerse the Justices in the common law of contracts, since it is rarely the court of last resort to address contract law issues.¹⁸¹ That contrasts with the Court's routine and deep engagement in the fields that form most of its docket, such as constitutional law, federal courts, administrative law, and statutory and regulatory interpretation. Leading students of the Court's arbitration jurisprudence detect a comparative lack of serious interest in the subject.¹⁸² If true, it would not be surprising that the Court would slight contract law aspects of these cases.

The Court receives plenty of briefs and could read the substantial literature about all aspects of the issues. But lawyers and scholars involved likewise have not stressed the rhetoric-reality gap nor given the Court reason to redress it. Much of the Court's jurisprudence, as with the literature, uses vocabulary unique to arbitration cases. It is not only alien to the common law of contracts but sometimes suggests a subordination of contract and contract law to arbitration and national policy. A pervasive, though modest, example of the subordination rhetoric is how the Court refers to contract law as providing "background principles." Though that phrase is commonly used among contract law scholars to designate default rules that parties can tailor in

¹⁷⁷ Examples from principal cases discussed in this Article include a few citations to the Restatement (Second) of Contracts, occasional references to Williston or Corbin on Contracts, and the odd invocation of state high court contracts opinions.

¹⁷⁸ *E.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), discussed *supra* text accompanying notes 118-121; *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), discussed *supra* text accompanying notes 122-127.

¹⁷⁹ *E.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), discussed *supra* text accompanying notes 96-105; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), discussed *supra* text accompanying notes 106-113.

¹⁸⁰ *See, e.g.*, *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

¹⁸¹ *See* Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 61 (1995).

¹⁸² *E.g.*, Alan Scott Rau, "Separability" in the United States Supreme Court (referencing opinions by Justice Scalia); Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469 (2006) (referencing opinion by Justice Souter).

particular settings,¹⁸³ the Court's use suggests those are subordinate to what it declares to be the principles of federal arbitration law.¹⁸⁴

The most cynical explanation for the rhetoric-reality gap is how the judiciary is a primary beneficiary of the Court's discernment of a national policy favoring arbitration.¹⁸⁵ Federal judges, especially Justices of the Supreme Court, may be uncomfortable as primary marketers of such a national policy. It could feel better to wrap the product and pitch in slogans of contract and contractual freedom—while exercising the powerful leverage of federal law to guarantee the product's marketing success.¹⁸⁶ Though cynical, there is some purchase in this account, at least as a partial explanation.¹⁸⁷

Finally, it is difficult to attribute the rhetoric-reality gap to ideology, since all the Justices contribute to the gap. Indeed, scholars stress that the Justices share the perception of a national policy favoring arbitration and the resulting pro-arbitration bias pulsing through its jurisprudence.¹⁸⁸ In early cases developing this national policy, in the 1980s, there was clear

¹⁸³ E.g., Rau, *Seventeen Propositions*, *supra* note at 25, at 29 n. 71 (“Of course sales law consists of little else but an abundant off-the-rack stock of background presumptions”).

¹⁸⁴ Justice Scalia wrote in *Arthur Andersen*: “Neither provision [FAA sections 2 and 4] purports to alter *background principles of state contract law* regarding the scope of agreements (including the question of who is bound by them).” *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) (emphasis added), discussed *supra* text accompanying notes 142-147. Justice Alito wrote in *Stolt-Neilsen* of how a default rule can be “grounded in the *background principle* that “[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.” *Stolt-Neilsen S.A. v. Animal Feeds*, 130 S. Ct. 1758, 1775 (2010) (emphasis added), discussed *supra* text accompanying notes 128-140.

A striking example is how, of arbitration law's severability doctrine, scholars (though not the Court) talk of a distinction between the arbitration clause and a “container contract.” They separate these two concepts analytically, envisioning the substantive bargain as performing the ministerial function of delivering the arbitration clause, suggesting that the arbitration clause is the paramount expression and the “container contract” incidental. Yet the reality is exactly the opposite: an arbitration clause is incidental to the principal terms of a bargain. Aside from thus wrongly trivializing the contract, the whole idea of a “container contract,” in which an arbitration clause rests, suggests a misapprehension of the real world of contracts. The more faithful depiction would describe the two different aspects as the “principal contract” and the “arbitration clause.”

¹⁸⁵ See David E. Feller, *Fender Bender or Train Wreck: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS U. L.J. 561, 561, 565, 572 (1997) (*Prima Paint* began a process of the Court “rewriting” the FAA to reduce court dockets); *supra* text accompanying notes 47-49.

¹⁸⁶ See Stephen L. Hayford, *Federal Preemption and Vacatur*, 2001 J. DISPUTE RES. 67, 85 (2001).

¹⁸⁷ See Rebecca Hanner White, *Arbitration and the Administrative State*, 38 WAKE FOREST L. REV. 1283, 1296 (2003).

¹⁸⁸ E.g., Jeffrey W. Stempel, *Mandating Minimum Fairness in Mass Arbitration*, 76 U. CINN. L. REV. 383 (2008); Siegel, *supra* note 7, at 1142-43. That is true even of those Justices, such as Thomas and at least once upon a time O'Connor, devoted to federalism. They are skeptical of applying federal jurisprudence in state court, but nevertheless champion its application in federal court. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984). (O'Connor, J., dissenting); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) (Thomas, J., dissenting).

divergence on ideological grounds between the Justices as to federalism—a majority willing to sally forth into state territory while a conservative minority resisted on federalism grounds—notably O’Connor and Rehnquist in the 1980s and Scalia and Thomas later.¹⁸⁹ Yet that initial rallying charge was led by another conservative, Burger, and gradually all but Thomas capitulated to federalization.¹⁹⁰ That said, opinions by Justices Thomas and Rehnquist, concerned with federalism, exhibit the narrowest gap between the rhetoric of contracts and contract law and the reality.¹⁹¹

Though ideology does not explain the rhetoric-reality gap, it does influence its shape. Justice Brennan, liberal lion, wrote the Court’s most forceful assertions of federal pro-arbitration policy in *Moses Cone*.¹⁹² Then-Justice Rehnquist, a conservative, objected to Brennan’s opinion: “In its zeal to provide arbitration for a party it thinks deserving, the Court has made an exception to established rules of procedure”¹⁹³—not an objection to FAA jurisprudence, but an acknowledgement of zealotry’s role in protecting a favored class of party. Likewise, Rehnquist, devotee of federalism, deferred to state law in *Volt*¹⁹⁴ while Justice Stevens, a liberal less moved by states’ rights, withheld deference in *Mastrobuono* on analytically-identical facts.¹⁹⁵ Stevens empathized with consumers, including securities brokerage customers, and leaned over backwards in *Mastrobuono* to allow them an award of punitive damages. Justice Thomas, die-hard conservative, dissented. But the majority opinions in *Volt* and *Mastrobuono* stated the standard contract rhetoric and then applied federal arbitration jurisprudence discordantly.

Justice Breyer wrote the Court’s principal opinions on the clarity of threshold intent about “who decides.”¹⁹⁶ The opinions suggest a moderate judge offering a nuanced and cautious approach, finding some room for judicial oversight of the arbitration process. They commanded wide assent among the Justices.¹⁹⁷ In contrast, Justice Scalia wrote the Court’s recent opinions

¹⁸⁹ See *supra* note 32.

¹⁹⁰ See *supra* notes 59 and 67.

¹⁹¹ See *supra* note 47 and text accompanying notes 111-113.

¹⁹² *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), discussed *supra* text accompanying notes 69-76.

¹⁹³ *Moses Cone*, 460 U.S. 1, ___ (Rehnquist, J., dissenting).

¹⁹⁴ *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), discussed *supra* text accompanying notes 77-78.

¹⁹⁵ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), discussed *supra* text accompanying notes 79-89.

¹⁹⁶ See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), discussed *supra* text accompanying notes 96-105; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), discussed *supra* text accompanying notes 106-113.

¹⁹⁷ The opinions were nearly-unanimous, only with Thomas, stressing federalism, dissenting in *First Options* and concurring in *Howsam*.

on the severability doctrine.¹⁹⁸ The opinions reflect a conservative judge taking a formal approach strongly committed to the arbitrator's power. They prompted dissents by liberal Justices like Stevens more willing to use policing tools such as unconscionability.

But all these opinions—by Breyer, Scalia and Stevens—first venerated contract law and then applied arbitration jurisprudence in ways at odds with it. In addition, Justice Alito, a conservative, strained himself in *Stolt-Neilsen* to prevent class actions against businesses¹⁹⁹ over the liberal Justice Ginsburg's dissent calling the majority out for benefiting big business on terms that may not apply to help consumers. But, again, the opinions of both Justices make the same points about contractual freedom and contract law and then bury that in conflicting federal arbitration jurisprudence.

Ideology simply vanishes in many cases where Justices have disagreements. Justice Scalia's majority opinion in *Arthur Andersen*, taking an expansive view of third party beneficiary law, prompted a dissent joined by the liberal Stevens, the conservative Roberts, and the moderate Souter.²⁰⁰ But the opinions showed pretty much the same rhetoric-reality gap, both first championing the contractual nature of arbitration only to state and apply contract law principles more loosely than the common law of contracts would. Similarly, Justice Souter's majority opinion in *Hall Street*, denying contractual freedom to expand judicial review of arbitration awards, prompted a dissent joined by the liberal Stevens, the conservative Kennedy and the moderate Breyer.²⁰¹

So there is little doubt that ideology plays a role in how the Justices approach federal arbitration jurisprudence and how they perceive, describe and apply contract law principles. But the rhetoric-reality gap transcends the ideological spectrum, making this at best a partial explanation for the character of the gap. Nor is it the case that the Justices are faithful to or disagree about a particular theory of contract law or school of contract law thought—such as classical, formalist, realist, anti-formalist, neo-formalist, or anything else.²⁰² Far from struggling

¹⁹⁸ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), discussed *supra* text accompanying notes 118-121; *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), discussed *supra* text accompanying notes 122-127.

¹⁹⁹ *Stolt-Neilsen S.A. v. Animal Feeds*, 130 S. Ct. 1758 (2010), discussed *supra* text accompanying notes 128-140.

²⁰⁰ *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009), discussed *supra* text accompanying notes 142-147.

²⁰¹ *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), discussed *supra* text accompanying notes 148-150.

²⁰² E.g., Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443 (2008); Larry DiMattero & Blake D. Morant, *Contract in Context and Contract as Context*, 45 WAKE FOREST L. REV. 549 (2010); Robert Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879 (1999); William C. Whitford, *Relational Contracts and the New Formalism*, 2004 WIS. L. REV. 631.

to classify contract law into such categories, the Court elides them, sallying forth to state and apply versions of contract law that suit its national policy favoring arbitration.²⁰³

Finally, the persistence and widening of the rhetoric-reality gap is likely also due to how there is no higher court that can correct the Court, even in matters outside its bailiwick, such as contract law. The story helps to underscore the beauty of the common law as a system. It seems highly unlikely that a group of nine judges sitting on high, and hearing a handful of cases annually over a few decades, will produce law as appealing as that produced in contract law over centuries by up to 50 state supreme courts plus England's high courts over tens of thousands of cases.

D. *Costs*

Scholarly debate concerning federal arbitration jurisprudence is dominated by disagreement about the comparative efficacy of arbitration compared to litigation.²⁰⁴ What's at stake is the fairness and efficiency of the process. By studying federal arbitration jurisprudence from the perspective of contract rhetoric versus reality, a different set of problems appears. These concern the effects of a federal jurisprudence that is often wrong and misleading about contracts and contract law. The rhetoric-reality gap produces abstract costs of illegitimacy; defiance or distortion; incoherence; and misperception.

Any gap between what judges or other public officials do and what they say creates risk to the legitimacy of the official and the official's actions.²⁰⁵ The rhetoric-reality gap in federal arbitration jurisprudence exposes several problems. The talk of freedom of contract obscures how the primary engine of this jurisprudence is the Court's discernment of a national policy favoring arbitration. That has nothing to do with freedom of contract or the exquisitely apolitical body of contract law,²⁰⁶ but everything to do with judicial power and institutional prerogatives.²⁰⁷ It is also by definition a national rather than state policy; the talk of deference to state contract law as a gesture to federalism not only makes the assertion hypocritical but unfairly mutes valid federalism objections to the Court's usurpation of the field.²⁰⁸

A related risk of perceived illegitimacy is how the Court's pronouncements may provoke state defiance.²⁰⁹ The Supreme Court faces rebuke from state courts, which thumb their noses at

²⁰³ The only version of such a theory that the Court tends to embrace is the notion of contorts, as Grant Gilmore described. See *supra* Part II.A.3. But that is not so much a school of thought as much as a critical account of certain trends in common law jurisprudence evident in the period before 1970.

²⁰⁴ See *supra* text accompanying notes 19-32.

²⁰⁵ See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); Geoffrey C. Hazard, Jr., *Rising Above Principle*, 135 U. PA. L. REV. 153 (1986).

²⁰⁶ See David A. Hoffman & Tess Wilkinson-Ryan, *Breach is for Suckers*, 63 VAND. L. REV. 1003 (2010).

²⁰⁷ See Anthony Niblett, *Tracking Inconsistent Judicial Behavior* (July 31, 2010), www.ssrn.com/abstract=1434685.

²⁰⁸ See Schwartz, *supra* note ____.

²⁰⁹ See David A. Straus, *Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1866 (2005).

the Court²¹⁰ or state legislatures, which sometimes leave on the books statutes that would be illegal under its precedents.²¹¹ Obviously, such state objections to federal invasion may exist even if the Court's rhetoric were faithful to its applications. But it seems likely that the gap between rhetoric and reality fortifies state objections; it invites states to explain why, under contract law as state officials know it, unlike how the Supreme Court develops it, the state is correct and the Court wrong.²¹² State officials may have a duty to resist usurpations of constitutionally-protected state prerogatives, including those that federal law under the FAA purports to preempt.²¹³

On the other hand, some states simply knuckle under, declaring the Court's opinions the law of the land and withdrawing contrary state opinions after being rebuked.²¹⁴ Though not all states defy the federal regime, those following it often cause the problem of distortion. Before *Prima Paint*,²¹⁵ most state courts held that defenses asserting fraud in the inducement were for courts to decide, not arbitrators.²¹⁶ Among these was New York, leader in contract law, including in arbitration cases.²¹⁷ The grounds were straightforward principles of contract law: the arbitration clause was not severable from the principal contract. Similar results and reasoning appeared elsewhere.²¹⁸ *Prima Paint* led New York to switch and follow the federal rule.²¹⁹ The grounds were a more adventuresome principle of arbitration policy: following contract law "defeats . . . two of arbitration's primary virtues, speed and finality"²²⁰

²¹⁰ *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); see Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139 (2005).

²¹¹ See WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION, *supra* note 151, at 39 (2d ed. 2007). A survey of examples compiled in the early 1990s performed for this Article, based on WILLISTON, CONTRACTS, *supra* note 81, indicated that most remain on the books.

²¹² Some commentators assert that California courts apply unconscionability doctrine that is deliberately out of step with Court directives. See *infra* note 232.

²¹³ See 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 (2004).

²¹⁴ E.g., *Cardegna v. Buckeye Check Cashing, Inc.*, 930 So.2d 610, 611 (Fla. 2006) (Florida Supreme Court so capitulating after *Buckeye*).

²¹⁵ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), discussed *supra* text accompanying notes 114-117.

²¹⁶ See Linda H. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1330 (1985); see also *supra* note 116.

²¹⁷ *Wrap-Versier Corp. v. Plotnick*, 143 N.E.2d 366 (N.Y. 1957).

²¹⁸ E.g., *American Airlines v. Louisville and Jefferson County Air Board*, 269 F.2d 811, 816-17 (11th Cir. 1959); *Kulukundis Shipping v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942) (Jerome Frank, J.).

²¹⁹ *Weinrott v. Carp*, 298 N.E.2d 42, 47 (N.Y. 1973).

²²⁰ *Id.* The court thought its new-found approach more compatible with both "the initial intent of the parties as well as legislative policy" and further justified to align state law with the federal rule. It stressed its belief that "no party"

The Court's jurisprudence has prompted the distortion of state law in other states too, including California.²²¹ Its high court likewise construed the California arbitration statute to distinguish sharply between arbitration clauses and the broader contracts of which they usually are part. Its rationale was the same, putting arbitration policy above freedom of contract. Dissenting, Justice Mosk declared that approach to put the cart before the horse, showing "resupination: logic and procedure turned upside down."²²² Mosk was more persuaded by the "irrefutable dissent" in *Prima Paint* and the few state courts that held out against the sweep of the federal rule, including Montana and Louisiana.²²³ Mosk stressed that, if arbitration is really a matter of contract, then courts must take seriously, and not merely rhetorically, basic principles, including that "one of the essential elements of a contract [is] that the parties enter into it knowingly and consensually, not through fraud, duress, menace, undue influence, or mistake."²²⁴

The gap and challenges to jurisprudential legitimacy pose additional practical problems of doctrinal incoherence, both within federal jurisprudence and collaterally on the law of contracts. The Court's jurisprudence is often confusing, especially concerning questions such as "who decides"²²⁵ and what "clear and unmistakable" means.²²⁶ The confusion is likely at least a partial product of assertions that contract and contract law dominate with applications showing that a national federal policy favoring arbitration dominates. Indeed, the concept of "clear and unmistakable" simply does not appear as an interpretive principle or presumption anywhere in the law of contracts.²²⁷ Worse, other courts are nevertheless tempted by the Supreme Court's lead to adapt statements of presumptions about contractual intent from the arbitration context to the general context of contracts.²²⁸

agrees to arbitration's scope "based on whether the contract in question involves interstate commerce." *Id.* The Supreme Court echoed that sentiment in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), discussed *supra* text accompanying notes 90-95.

²²¹ *Ericksen v. 100 Oak Street*, 673 P.2d 251 (Cal. 1983).

²²² *Ericksen*, 673 P.2d 251 (Mosk, J., dissenting).

²²³ *George Engine Co. v. Southern Shipbuilding Corp.*, 350 So.2d 881, 884-85 (La. 1977).

²²⁴ *Ericksen*, 673 P.2d 251 (Mosk, J., dissenting).

²²⁵ *See, e.g., Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), discussed *supra* text accompanying notes 126-127.

²²⁶ *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), discussed *supra* text accompanying notes 96-105; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), discussed *supra* text accompanying notes 106-113.

²²⁷ *See supra* note 104.

²²⁸ For instance, there is no general principle of contract law directing construing ambiguous clauses in favor of arbitration, yet courts have enlarged the Court's version of that statement to portray it as a general principle of contract law. *E.g., Collins v. International Dairy Queen, Inc.*, 2 F. Supp. 2d 1473 (M.D. Ga. 1998).

A cumulative variation of all these problems is the problem of misperception. The Court's rhetoric, taken literally, gives contract law a bad name. For example, Professor Linda Mullenix wrote: "the supremacy of contract law over long-established jurisdictional doctrines has significantly eroded certain fundamental litigation rights."²²⁹ This lays the blame for infirmities in the Court's jurisprudence on contract law. But it is not the "supremacy of contract law" that is responsible for any such infirmities that may exist. It is the rhetorical invocation of notions of contracts while really using a different batch of arbitration jurisprudence.

A final particular problem arising from lack of coherence in the jurisprudence is how it impairs the Court's primary job under which the FAA, which is determining whether inferior courts apply contract law consistent with the statute. This problem is evident in the 2010-11 term's prominent case, *AT&T Mobility v. Concepcion*. The issue is whether California unconscionability law applies to "any contract," within the meaning of the FAA as the Court construes it. The case involved a form contract where a consumer claimed a fraud of \$30 and sought to wage a class arbitration—which a contract clause barred. California precedents classify as unconscionable procedurally-adhesive clauses that can be used to prevent people from banding together to challenge crooked practices that involve stealing small sums from large numbers of people.²³⁰

The case shows how the Court's rhetoric is at war with itself: rhetoric from pure nineteenth century freedom of contract suggests upholding the bar because the clause is in the written agreement; rhetoric about state contract law suggests striking the bar because the written agreement is invalid. The Court's challenge is thus to state a test of preemption: how to tell if a state's judges comply with the FAA's mandate to treat arbitration clauses like other contracts? The company said it was simple: look at general unconscionability doctrine applied to all contracts and compare it to unconscionability doctrine applied to arbitration clauses.²³¹ Taking the FAA literally, the company argued that the comparison must be between the unconscionability doctrine applied to arbitration clauses and general unconscionability doctrine applicable to "any contract"—not just other dispute resolution clauses.

This approach reflects how the Court's jurisprudence induces thinking about the question. Under that jurisprudence, moreover, it is difficult to escape concluding that the doctrine does not apply to "any contract." It applies to a species of contracts that enable cheating small sums from large numbers of people. But preempting the law and upholding the statute on such grounds would be a strange result. Such a stance suggests that contract law is monolithic and static when

²²⁹ Linda S. Mullenix, *Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 296-97 (1988).

²³⁰ *E.g.*, *Fensterstock v. Education Finance Partners*, 611 F.2d 124 (2d Cir. 2010) (reviewing and applying California law of unconscionability doctrine to arbitration clause in consumer finance contract).

²³¹ In California, the company saw the general doctrine to ask whether: (1) at the time of contract formation, (2) based on how it affects parties to the contract, it (3) shocks the conscience. It said California courts use a special version applied to arbitration clauses looking at whether: (1) at the time dispute arises, (2) based on effects on third parties too, it (3) deviates too much from recognized litigation practice and its deterrent effects.

in reality it is rich and dynamic. The result would make concrete some of the abstract costs noted earlier, such as illegitimacy and defiance.²³²

Beyond rhetoric, it's not obvious how the Court's national policy favoring arbitration applies. Simply to favor arbitration does not necessarily answer whether a clause banning class arbitration promotes or retards that policy. But a national policy favoring a particular kind of arbitration—the swift and cheap bilateral form, not the lengthy and costly class form—clearly calls for reversing the lower courts, preempting state contract law that holds such bans unconscionable.

The Court would do well to find a more practical and legitimate approach to assessing the validity of state law under the FAA. It would be best to abandon the rhetoric and instead embrace contracts, contract law, and federalism. The first principle would be federal deference to state courts and state contract law. That could be subject to qualifying principles to catch subterfuge based on an objective determination about a state's faithfulness to the FAA. States would be freer to develop contract law for application across settings, including to contracts with arbitration clauses.

Citizens could rely on venerable principles of freedom of contract (and freedom from contract) developed in the common law rather than the truncated versions of those doctrines applied underneath the Court's rhetoric. Alas, the Court's jurisprudence has not equipped it to reach such a result, which would require retreating significantly from its exuberance for the national policy favoring arbitration. It would be impressive to see the Court make a switch in the *AT&T* case. But it would also be surprising.

CONCLUSION

My initial motivation for writing this article was receipt in early 2010 of a reprint of an Illinois Law Review article apparently sent to contract law teachers nationally, by noted arbitration scholar Thomas Stipanowich.²³³ In a comprehensive review of the state of arbitration law and practice, the piece criticized editors of Contracts casebooks for paying too little attention to arbitration and especially to how the attention given was often extremely negative.²³⁴ As a Contracts law teacher for 20 years, the point resonated.²³⁵ With modest exceptions, contract law books and courses have not generally treated arbitration much and the treatment often is in the

²³² Some critics of the California courts suggest that happened when they develop contract law in ways at odds with the Court's arbitration jurisprudence. See Broome, *How The California Courts Are Circumventing The Federal Arbitration Act*, *supra* note 16; McGuinness & Karr, *California's "Unique" Approach To Arbitration*, *supra* note 16.

²³³ Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. ILL. L. REV. 1.

²³⁴ *Id.* at 50.

²³⁵ See Richard L. Barnes, *Manipulating Court Doctrine for the Good of the Common Law and Compulsory Arbitration*, 51 S. TEX. L. REV. 41, 42 (2009) ("Five years ago, after having taught contracts for fifteen years, [the FAA] was little more than a footnote to me. Yet that statute can have an enormous impact [on] the common law. . .").

context of illustrating doctrines like unconscionability or lopsided terms not comporting with reasonable expectations of a community. The piece stimulated my interest in arbitration.

I began following pending Supreme Court cases on the subject and scrutinizing those handed down in preceding terms. I found the talk about contracts and contract law intriguing because it made it sound as if arbitration was at the center of contract law and that contract law was at the center of arbitration law. That made it seem irresponsible for me, Contracts casebook editors, and other teachers, to leave arbitration at the margins of the Contracts course or outside it altogether. Alas, the truth is that contract and contract law have so little to do with what happens in arbitration jurisprudence, particularly compared to Court rhetoric, that it would confuse or mislead students taking Contracts to provide it as an illustration. To that extent, arbitration thus warrants the glancing treatment in the Contracts course, warranting treatment in a separate course.²³⁶

Even so, Contracts teachers and students may wish to pay more concerted attention to what the Court has been up to, since the rhetoric-reality gap should be of some concern to them. Moreover, as pressure to close the gap builds, the Court may abandon its novel experiment with a national policy favoring arbitration dressed in contract rhetoric and embrace the older national policy favoring real freedom of contract. That would be of great interest to Contracts teachers and students. In fact, that raises one normative implication of this Article worth stating explicitly: the Court should either give up its national policy favoring arbitration and truly respect freedom of contract or come clean about its national policy's real implications, and acknowledge its embrace of a restricted conception of contract and contract law.

²³⁶ One prominent casebook, currently edited by Professor Ian Ayres, does devote a short chapter to contractual aspects of federal arbitration jurisprudence, but a survey of teachers who use the book and of syllabi available on line show that the materials are rarely covered.