

# The “Insurmountable Textual Obstacle”: A Narrow Interpretation of the Federal Arbitration Act

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Every American deserves her day in court, that is, unless your employer put an arbitration clause in your contract. Seeking to overcome the longstanding judicial resistance to the enforcement of arbitration clauses in contracts, the 68th Congress passed into law the Federal Arbitration Act in 1925.<sup>1</sup> Since then, the Supreme Court has been more than happy to expand the reach of the FAA as far as it possibly can.<sup>2</sup> In 1991, Supreme Court ruled in *Gilmer v. Interstate/Johnson Lane Corp.* that a registered securities representative claim under the Age Discrimination and Employment Act was not exempt from arbitration under the Federal Arbitration Act,<sup>3</sup> and since then the percentage of private sector nonunion employers who have adopted mandatory arbitration procedures has risen from 2.1% to 53.9%.<sup>4</sup> Traditionally, there are five factors in favor of arbitration, all of which equally apply to employment arbitration: it is quicker, is cheaper, allows freedom of choice, is confidential, and is final and binding, providing a mechanism to dispose of disputes and legal liabilities without the protracted, expensive process of litigation.<sup>5</sup> The promulgation of employment arbitration after *Gilmer*

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1. See e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984) (noting that Congress passed the FAA in part to overcome “the old common law hostility toward arbitration”). For an example of the early judicial resistance to arbitration, see *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1320-21 (C.C. Mass. 1845).

2. See e.g., *Southland*, 465 U.S. at 2 (holding that the FAA is a substantive, not procedural, law and is therefore applicable in state courts); *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265 (1995) (holding that the phrase “involving commerce” indicates Congressional intent to enforce the FAA to the fullest extent of its Commerce Clause powers); *Circuit-City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that the employment contracts exception in § 1 of the FAA applies only to transportation workers).

3. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-27 (1991).

4. Alexander Colvin, *The growing use of mandatory arbitration*, ECONOMIC POLICY INSTITUTE, 4-5 (2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

5. Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, J. OF EMPIRICAL LEGAL STUDIES 8, 1, 6, 13 (2011) (noting that the overall mean fee for employment arbitration from 2003 to 2007 was \$6,430 and \$11,070 for cases which involved a hearing). The bulk of the expenses involved in litigation occur due to discovery and going to trial. Paula Hannaford-Agor & Nicole L. Waters. *Estimating the Cost of Civil Litigation*, COURT STATISTICS PROJECT 20.1, 6-7 (2013) (noting in automobile tort litigation which go to trial, parties in the 25th to 75th percentiles of costs will pay between \$17,598 and \$109,426 in attorney and expert witness fees, compared to \$8,000 to \$36,000 for post-discovery ADR or formal settlement negotiations); *id.* at 7 (median attorney and expert witness fees in the following types of litigation: Premises liability (\$54,000), real property (\$66,000), employment (\$88,000), contract (\$91,000), and malpractice (\$122,000)). Besides a clear cost advantage to arbitration, many professionals opt for arbitration due to its confidentiality

was due in large part to the “skyrocketing cost of litigation.”<sup>6</sup> In contrast, critics of arbitration, and specifically employment arbitration in specific, argue that these reduced costs to the company come at great costs to the employee. Punitive damages are exceedingly rare in employment arbitration, and most awards are limited to back pay and expenses like medical costs.<sup>7</sup> Employees lose more often in arbitration than in court, and arbitrators on average grant smaller awards than when claims are litigated.<sup>8</sup> There is also evidence of a repeat player effect that tends to favor the employer over the employee.<sup>9</sup>

Regardless of one’s opinion on the merits of arbitration, one thing is certain: compulsory arbitration for private sector nonunion employees has been cemented into the American employment landscape for the foreseeable future by *Circuit City Stores v. Adams*. The Supreme Court in a 5-4 decision penned by Justice Kennedy held that, in accordance with the liberal federal policy in favor of arbitration, the FAA applied to all contracts of employment except those of “transportation workers.”<sup>10</sup> Justice Kennedy rejected the Ninth Circuit’s conclusion that § 2 of the FAA does not encompass contract of employment.<sup>11</sup> Justice Kennedy reasoned that a § 2 which did not include contracts of employment would render the § 1 exemption for “seamen, railroad employees, and any other class of worker engaged in foreign or interstate commerce” superfluous.<sup>12</sup> Applying the interpretive tool of *ejusdem generis*, he concluded that the more reasonable interpretation

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and its flexibility in planning, particularly in discovery. See also E. Norman Veasey. *The Conundrum of the Arbitration vs. Litigation Decision*, AMERICAN BAR ASSOCIATION, Sept. 9, 2018, [www.americanbar.org/groups/business\\_law/publications/blt/2015/12/07\\_veasey/](http://www.americanbar.org/groups/business_law/publications/blt/2015/12/07_veasey/).

6. See David L. Gregory. *The Supreme Court’s Labor and Employment Law Jurisprudence, 1999-2001*, 36 TULSA L. REV. 515, 544 (2001).

7. See Samuel Estreicher et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 Rutgers U.L. Rev. 375, 388-89 (2018) (noting that past research has shown that employment arbitration awards tend to be much lower than litigation damages and that employment arbitration is built around awarding back pay, tending to not award punitive damages).

8. Colvin, *supra* note 5, at 7-11; *id.* at 5-8. Honestly, smaller awards might be justified (to some extent: see repeat player discussion in note 8) since there are fewer attorney fees compared to a full-blown trial. The greater problem to me is that these lower awards, while definitely incorporating the lower transaction costs, also incorporate the lack of vindication of particular rights: part of the reason arbitration does not allow punitive damages (besides being largely a contractual dispute at issue) is because the process itself is not robust enough to justify an arbitrator making such demands of the parties.

9. Large employers are more likely to be repeat players in arbitration as opposed to employees who tend to be involved in only one arbitration proceeding. As a result, employers may develop employment policies which will benefit them in arbitration (including internal grievance procedures for dispute resolution pre-arbitration), have a better understanding of the arbitral process, and have more resources to devote to arbitration. Additionally, arbitrators themselves may be biased in favor of the employer since employers tend to pay all arbitration fees and employees tend to only have one interaction with arbitration. To complement this, employers may be able to identify the arbitrators who favor employers, a skill an employee likely does not have. Statistically, employers who are repeat players have about half the loss rate of employers who are not repeat players and pay less than half in awards on average. Colvin, *supra* note 5, at 18-20.

10. *Circuit City Stores*, 532 U.S. at 105-06.

11. *Id.* at 113-15.

12. *Id.* at 113-14.

excluded only “transportation workers” from the FAA’s coverage, an area in which Congress had already intended to pass separate laws.<sup>13</sup>

Section I of this Note will argue that, although Justice Kennedy may be correct that § 1 exemption only applies to transportation workers, contracts of employment do not fall under “contracts evidencing a transaction involving commerce” because the Court, six years earlier in *Allied-Bruce*, misinterpreted what Congress intended by the phrase “involving commerce.”<sup>14</sup> As will be apparent from both the text and legislative history of the FAA, a stronger interpretation of “involving commerce” places the phrase closer in meaning to “engaged in commerce” than to “affecting commerce,” indicating that Congress intended to limit the enforcement of arbitration clauses to contracts in the flow of interstate commerce. Under this narrower view of § 2, the Court in *Circuit City Stores* never needed to address whether the § 1 exemption applies to all contracts of employment because the only contracts of employment which could be covered by the FAA would be those of transportation workers, who are explicitly exempted by § 1. As such, the § 1 exemption functions both as a specific guarantee to labor groups that their disputes would not be subject to arbitration (as is well documented)<sup>15</sup> and as specific notice that Congress is reserving the right to legislate regarding arbitration for employment contracts (as the majority in *Circuit City* points out with regards to railroad workers).<sup>16</sup>

Recognizing the difficulty in achieving the above-stated interpretation on such a conservative court, Section II of this Note will also argue that *Southland v. Keating* be overturned. As argued in Justice O’Connor’s dissent in *Southland* and both Justice Scalia’s dissent and Justice Thomas’s dissent in *Allied-Bruce*, the text of the FAA repeatedly specifies “United States district court” or “courts of the United States” as the proper place to file suit, and multiple Senators, Representatives, and various advocates for the bill recorded in the legislative history when asked if the bill were substantive or procedural, responded that the FAA was procedural.<sup>17</sup> Together, it is clear that the FAA is a procedural, not substantive, law meant to be applied only in federal courts.<sup>18</sup> While this alone will

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13. *Id.* at 114-15.

14. 9 U.S.C.A. §§ 1-2 (West 2018); *Allied-Bruce*, 513 U.S. at 265-66. Justice Kennedy even makes mention of *Allied-Bruce*’s core holding. *Circuit City Stores*, 532 U.S. at 115.

15. *Infra*, note 103-04.

16. *Circuit City Stores*, 532 U.S. at 125-27 (Stevens, J., dissenting); *Id.* at 120-21.

17. *Southland*, 465 U.S. at 25-29 (O’Connor, J., dissenting); *Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting) (“I agree . . . that *Southland* clearly misconstrued the Federal Arbitration Act . . . Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes.”); *Id.* at 285-97 (Thomas, J., dissenting) (using the text of §§ 3 and 4 and the legislative history of the FAA to prove the FAA only applies to federal courts and further arguing that, if § 2 did apply to state courts, nothing in the FAA requires state courts to award specific performance of the arbitration clause, suggesting that monetary damages could suffice instead).

18. The *Southland* majority noted that O’Connor’s dissent would lead to quite a bit of forum shopping. *Southland*, 465 U.S. at 14-15. As part of this portion of the Note, I will also explain why, given my narrower interpretation of § 2, concerns over forum shopping are largely mitigated.

not provide an exemption in the FAA for employment contracts, it does open the door to invalidating arbitration clauses using state law and common law.<sup>19</sup> For example, California state law guarantees a right to a jury trial, and contract provisions waiving a jury trial have been barred by those state statutes.<sup>20</sup> Regarding on-contract claims, one could argue that it is not unreasonable for arbitration clauses, in select circumstances, to function as liquidated damages provisions where employers deliberately include them in order to undercut the value of potential damages or that arbitration clauses can be challenged individually as unconscionable, subject to a “shock the conscience” standard.<sup>21</sup>

Finally, Section III will argue that, should all else fail, we ought to be able to rely on employment arbitrators to self-regulate in order to best preserve the rights of those subjected to compulsory employment arbitration. Currently, the National Academy of Arbitrators (NAARB) has issued non-binding guidance regarding steps arbitrators can take to ensure that the fundamental principles of due process are being upheld in any given arbitration proceeding. However, given that this guidance is non-binding and arbitration proceedings are often confidential, it would behoove the NAARB to develop procedures with more teeth or a training program for those who wish to be employment arbitrators.

## I. A NARROW INTERPRETATION OF THE FAA

### A. JUSTICE KENNEDY’S REASONING IN *CIRCUIT CITY STORES*

The Ninth Circuit had previously held that the FAA did not extend to contracts of employment on a number of grounds: First, contracts of employment were not within the meaning of “transaction” as intended by Congress.<sup>22</sup> Second, when applying the more limited interpretation of the Commerce Clause held by members of Congress at the time of the FAA’s passage, contracts of employment outside the “flow of commerce” could not have been contemplated as within the scope of the FAA.<sup>23</sup> Third, legislative history showed that the § 1 exemption was

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19. Justice Stevens in his *Southland* concurrence noted that he does not believe that Congress, especially a Congress at that time, would have truly intended for the FAA to completely override state sovereignty and therefore suggests that the federal courts fashion a federal common law wherein arguments fashioned under the § 1 savings clause can be evaluated without unauthorized favoritism towards arbitration. Stevens concurs on the jurisdictional question, that is, that the FAA is substantive, not procedural, and does apply to the States, but dissents as to the enforceability of the arbitration clause because he would side with the California Supreme Court. See *Southland*, 465 U.S. at 18-21 (Stevens, J., dissenting). The Court has never attempted to fashion a common law like this, although occasionally lower courts do find individual arbitration clauses unconscionable or the like. *Id.*

20. *In re Cnty. of Orange*, 784 F.3d 520, 528-29 (9th Cir. 2015).

21. Under the FAA’s § 2 “savings clause,” arbitration clauses may be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C.A. § 2 (West 2019).

22. *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1998) (noting that Congress at the time would have understood “transaction” to mean a “business deal”—an “act involving buying and selling”—something which an employment contract is not).

23. *Id.* at 1087-88.

included during drafting to assuage the concerns of labor groups that the FAA would be applied to their contracts of employment.<sup>24</sup> Considering that mandatory employment arbitration only took off after *Gilmer*, this issue had only recently been addressed by a few Circuit Courts, all of whom besides the Ninth Circuit held that employment arbitration was compulsory under the FAA.<sup>25</sup> The Supreme Court ultimately sided with the majority of the Circuit Courts.

Justice Kennedy rejected the view that contracts of employment are wholesale not covered under the general authority of § 2 of the FAA.<sup>26</sup> He argued that excluding all contracts of employment from the meaning of a “contract evidencing a transaction involving commerce” would render superfluous the § 1 exemption for all “contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce.”<sup>27</sup> Furthermore, an expansive reading of the § 1 exemption where “engaged in interstate or foreign commerce” has the same reach as “involving commerce” in § 2 would run into the “insurmountable textual obstacle” of the residual phrase, “any other class of worker engaged in foreign or interstate commerce.”<sup>28</sup> Applying the interpretive tool of *ejusdem generis*, Justice Kennedy argued that this residual phrase must be construed to encompass only subjects like those specifically enumerated in the preceding language<sup>29</sup> Thus, the § 1 exemption could only be interpreted to include classes of workers most similar to seamen and railroad employees, which would broadly be understood as “transportation workers.”<sup>30</sup>

To bolster this stance, Justice Kennedy also relied on Congress’s deliberate choice to specify “engaged in commerce” in § 1 and “involving commerce” in § 2.<sup>31</sup> “Engaged in commerce” historically had been interpreted to refer only to activities in the flow of commerce, such as the procurement of goods for interstate commerce and their interstate transport and distribution<sup>32</sup>; “involving commerce” instead had been given the same expansive interpretation as “affecting commerce,” which indicates that Congress intended to regulate to the outer limits of

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24. *Id.* at 1089-90.

25. *See, e.g.*, *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-37 (8th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997), cert. denied, 522 U.S. 912 (1997); *Signal-Stat Corp. v. Local 475, United Elec. Radio & Mach. Workers of Am.*, 235 F.2d 298, 302-03 (2d Cir. 1956), overruled on other grounds by *Coca-Cola Bottling Co. of N.Y. v. Soft Drink & Brewery Workers Union Local 812 Int’l Bhd.*, 242 F.3d 52 (2d Cir. 2001); *Tenney Eng’g, Inc. v. United Elec. Radio & Mach. Workers of Am. (U.E.)*, Local 437, 207 F.2d 450, 452 (3d Cir. 1953).

26. *Circuit City Stores*, 532 U.S. at 113.

27. *Id.* Kennedy also argued that such a reading is not consistent with the expansive interpretation of “involving commerce” adopted in *Allied-Bruce*.

28. *Id.* at 114-15.

29. *Id.* (quoting N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991) and citing *Norfolk and Western Ry. Co. v. Am. Train Dispatchers Ass’n.*, 499 U.S. 117, 129 (1991)).

30. *Circuit City Stores*, 532 U.S. at 114-15.

31. *Id.* at 115-16.

32. *Id.* (citing to *Allied-Bruce*, 513 U.S. at 273 and *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 279-80 (1975)).

its Commerce Clause powers.<sup>33</sup> “Engaged in commerce” could not be read as expansively as “involving commerce” because doing so would require interpreting “engaged in commerce” solely within the understanding of the phrase held by the 68th Congress, a task which would create a great deal of instability in the statutory interpretation of common phrases.<sup>34</sup> With this distinction solidified by the evolving interpretation of the Commerce Clause, the residual phrase in § 1 could only apply to those classes of workers within the flow of commerce.<sup>35</sup>

Following Justice Kennedy’s apparent preference for formalist analysis, the opinion largely disregards the FAA’s legislative history in interpreting the § 1 exemption. Noting that the legislative history for the FAA is rather sparse, Justice Kennedy admonished the Ninth Circuit for relying on statements made by persons who were not members of Congress, such as then-Commerce Secretary Herbert Hoover and the head of the ABA committee which drafted the FAA, to discern the intent of Congress.<sup>36</sup> According to Justice Kennedy, it made sense for Congress to carve out an exemption for transportation workers, not merely to assuage labor concerns, but to ensure that pending legislation regarding the contracts of employment of seamen and railroad employees and future similar legislation would not be affected by the FAA.<sup>37</sup>

Justices Stevens and Souter, in dissent, spiritedly defended the Ninth Circuit’s narrower interpretation of the § 1 exemption.<sup>38</sup> Justice Stevens pointed to legislative history indicating that Congress intended the FAA to only cover commercial contracts.<sup>39</sup> He also explained that Justice Frankfurter’s explanation of the majority’s rejection of the FAA as the basis of enforcing labor arbitration in collective bargaining agreements in *Textile Workers v. Lincoln Mills of Alabama* established precedent that § 1 excludes contracts of employment.<sup>40</sup> Justice Stevens concluded his dissent by chiding Justice Kennedy for blindly manipulating the text and ignoring legislative history and broader context in writing the majority opinion.<sup>41</sup> Justice Souter on the other hand sought to explain why “engaged in commerce” actually has as expansive of coverage as “involving commerce.”<sup>42</sup> He stated his belief that Justice Kennedy fell back on *ejusdem generis* to ignore how strange it would be for Congress to exclude only those employment contracts over which it had the most obvious authority: Because defining “transportation

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33. *Allied-Bruce*, 513 U.S. at 273–74.

34. *Circuit City Stores*, 532 U.S. at 117.

35. *Id.* at 118–19.

36. *Id.* at 119–20.

37. *Id.* at 120–21.

38. See *Circuit City Stores*, 532 U.S. at 128–31 (Stevens, J., dissenting); *Id.* at 133–36 (Souter, J., dissenting).

39. *Id.* at 125–29 (Stevens, J., dissenting).

40. *Id.* at 130–31 (Stevens, J., dissenting) (citing *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 466–68 (1957) (Frankfurter, J., dissenting)).

41. *Id.* at 131–33 (Stevens, J., dissenting).

42. *Circuit City Stores*, 532 U.S. at 135–37 (Souter, J., dissenting).

worker” would lead to much litigation, it would make more sense for Congress to have just excluded all employment contracts from the FAA’s coverage.<sup>43</sup>

Over these objections, the Court cemented compulsory arbitration for private sector non-union employees—a trend that had only recently entered into prominence—into the employment contracts of millions of Americans. However, as this Note will now show, because the FAA’s overall scope should be interpreted more narrowly, Justice Kennedy’s core analysis applying *ejusdem generis* actually supports the proposition that most contracts of employment ought to be excluded from the coverage of the FAA. The interpretive error expanding the scope of the FAA can be found in a case decided six years earlier, *Allied-Bruce Terminix Co. v. Dobson*.

### B. THE KEY ERROR IN *ALLIED-BRUCE*

Prior to *Allied-Bruce*, the Court had not engaged in a textual analysis of § 2<sup>44</sup> and had instead more or less asserted a progressively more expansive reach of the FAA, typically presuming that, because the FAA espoused a strong federal policy in favor of arbitration, that more arbitration is *per se* good.<sup>45</sup> This is rather strange considering that, until the late 1990s, the FAA was the only federal statute to use the phrase “involving commerce,”<sup>46</sup> a notable digression from the phrase “affecting commerce” which Congress has come to use in order to express intent to exercise its Commerce Clause powers to their limits.<sup>47</sup> So when the Dobsons filed suit against Allied-Bruce Terminix Companies for failing to rid their home of termites and found themselves litigating the arbitration clause in their contract, the Supreme Court of Alabama decided that the FAA does not apply this contract because the parties had not “contemplated substantial interstate activity” and had rather entered into a primarily local contract.<sup>48</sup> After reaffirming *Southland*, the Supreme Court reversed Alabama’s highest court, ruling that the phrase “involving commerce” was substantially the same as “affecting commerce” and

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43. *Id.* at 137–40 (Souter, J., dissenting).

44. “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable . . .” 9 U.S.C.A. § 2 (West 2019) [italics added].

45. See e.g., *Southland*, 465 U.S. at 11–12; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

46. *Allied-Bruce*, 513 U.S. at 273 (“We cannot look to other statutes for guidance for the parties tell us that this is the only statute that uses the word “involving” to describe an interstate commerce relation.”). Since 1995, a few statutes have been passed which use the “involving commerce” language, but none are particularly relevant to the arbitration context.

47. *Id.* at 273–74. There is some question, raised by the dissents in *Circuit City Stores*, as to whether we can assert that Congress pre-1937 can be said to have used terminology such as “engaged in commerce” in the same sense as a Congress after the expansion of the Commerce Clause power. *Circuit City Stores*, 532 U.S. at 133–34 (Souter, J., dissenting) (explaining that the current understanding of “engaged in commerce” as limiting coverage to the flow of commerce would not be applicable to the 68th Congress, and they would instead have intended the expansive coverage now afforded to the phrase “affecting commerce”).

48. *Allied-Bruce*, 513 U.S. at 269.

therefore indicates that Congress intended to use as much of its Commerce Clause powers as possible, meaning that it did not matter that the parties had not contemplated interstate commerce as long as the contract had in fact affected commerce.<sup>49</sup> In his opinion, Justice Breyer rested this interpretation on four main arguments: first, based on the definition of “involve,” interpreting “involving” to mean the same as “affecting” is linguistically permissible; second, legislative history indicates an expansive Congressional intent; third, previous decisions read the FAA’s reach as coinciding with that of the Commerce Clause; and, fourth, a broad interpretation best serves the FAA’s purpose to put arbitration clauses on the same standing as other contract terms.<sup>50</sup> Justice Breyer then parses out what was meant by “a contract *evidencing a transaction* involving commerce,” preferring the “commerce in fact” test (did the contract involve commerce in fact?) to the “contemplation of the parties” test (did the parties “contemplate” interstate commerce at the time the contract was formed?), an issue which is not particularly important to this Note, though the adopted “commerce in fact” test does square well with this Note’s overall argument.<sup>51</sup> In Part A, I will first show how Justice Breyer mistakenly interpreted “involving” as indicating the same reach as “affecting.” Justice Breyer proffered a definition of “involve” from the 1933 Oxford English Dictionary (OED) without a full analysis of other potential definitions from the same dictionary. He also missed indications in the legislative history that the 68th Congress intended a narrower application of the FAA. Furthermore, the cases to which Breyer refers at best flimsily defend a very expansive reading of the FAA (and, in fact, this Note will later clash directly with *Southland*), and the narrower reading espoused by this Note would not be inconsistent with the Act’s purpose in equating arbitration provisions to other contracts.<sup>52</sup>

#### 1. A TEXTUALIST CRITIQUE OF BREYER: THE 1933 OXFORD ENGLISH DICTIONARY

To properly ascertain what is meant by “involving commerce,” the following three words must be defined: involve, affect, and engage. “Affect” and “engage” are known to have distinct legal meanings, and Justice Breyer does not dispute this. We see this enshrined in the distinction between “engage in commerce” and “affecting commerce,” the former encompassing a much smaller range of activity

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49. *Id.* at 273–74.

50. *Id.* at 273–75.

51. *Id.* at 277–80.

52. In fact, Breyer said that an interpretation that placed “involving” between “affecting” and “in commerce” would lead to a result inconsistent with the FAA’s purpose, “unless unreasonably narrowed to the flow of commerce.” *Id.* at 275. I am proud to say that this Note will be narrowing the meaning of “involving” to “the flow of commerce” and will prove that, given other definitions and the legislative history of the FAA, such an interpretation is not unreasonable.



than the latter.<sup>53</sup> The definition most in question is that of “involve.” Dictionary definitions are by no means dispositive, especially when there are a wide variety of conflicting definitions, but it does provide a good starting point since these definitions typically evoke some representation of what the words mean in common usage. Justice Breyer used the 1933 OED to define “involve” as to “include or affect in . . . operation.”<sup>54</sup> The inclusion of “affect” in this definition seems to have been sufficient for Justice Breyer to prove equivalence. In fact, Justice Breyer’s entire discussion of the definition of involve reads as follows:

For one thing, such an interpretation, linguistically speaking, is permissible. The dictionary finds instances in which “involve” and “affect” can sometimes mean about the same thing. V Oxford English Dictionary 466 (1st ed. 1933) (providing examples dating back to the mid-19th century, where “involve” means to “include or affect in . . . operation”).

Yet this definition is actually the fourth part of the sixth definition. By exploring the previous definitions of “involve” and the definitions of “affect” and “engage” through a close reading, it becomes obvious that Justice Breyer did not pick the most accurate definition nor did he fully understand the ramifications of the definition he had chosen.

#### a. Discovering the Best Definition of “Involve”

While the first through fifth definitions are probably not the *exact* definitions that I would attribute to “involving commerce” (as will be seen later on, the best definition is 6c) and are not frequently used today, they do illuminate the distinction that ought to be drawn between “involve” (as used in the FAA) and “affect” which is key to understanding why Justice Breyer’s interpretation is erroneous. The base definition of involve is “to roll into or upon, to wrap up, envelop, surround, entangle, make obscure . . . To enfold, envelop, entangle, include . . . .”<sup>55</sup> The first through fifth definitions, regardless of literal or figurative usage, evoke that same sense of entanglement. The first and second definitions are the most literal, relating to the actual act of being intertwined, enveloped, or wrapped into something. The first definitions reads, “To roll or enwrap in anything that is wound round, or surrounds as a case or a covering; to enfold, to envelop.”<sup>56</sup>

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53. See *Am. Bldg. Maint. Indus.*, 422 U.S. at 276 (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)) (in comparing § 1 of the Clayton Act and § 1 of the Sherman Act, the Court found that the “in commerce” language in the Clayton Act “appears to denote only persons or activities within the flow of commerce - the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer,” such that mere showing that the activities “affect commerce,” unlike for § 1 of the Sherman Act, will not pass muster).

54. *Id.* at 274 (quoting *Involve*, OXFORD ENGLISH DICTIONARY 466 (1st ed. 1933)). It is worth noting that in their brief, *Allied-Bruce* referred to a 1992 definition of “involve”, defined as “‘influenc[ing]’ or ‘affect[ing].’” *Allied-Bruce*, 1994 WL 198822 (U.S.), 14 (U.S. Ala. Pet. Brief, 1994).

55. *Involve*, OXFORD ENGLISH DICTIONARY V, 465 (1st ed. 1933).

56. *Id.*

A literal example of usage traces to Elizabeth Barrett Browning's 1856 *Aurora Leigh*: "I saw Fog only, the great tawny weltering fog, Involve the passive city."<sup>57</sup> However, it can be used figuratively, as done by Sir Harcourt in an 1896 House of Commons speech: "The hon[orable] member made a speech last night in which he proceeded to involve himself in his own virtue."<sup>58</sup> The second definition, which is defined in part as "[t]o wind in a spiral form, or in a series of curves, coils, or folds; to wreath, coil, entwine," similarly has literal and figurative usages.<sup>59</sup> The third definition is entirely figurative, relating to the idea of enveloping something in "obscurity" or "difficulty," drawing upon that same literal sense of entanglement and direct presence as is evident in the previous two definitions.<sup>60</sup>

The fourth and fifth definitions contain that sense of entanglement with respect to getting mixed up in something bad.<sup>61</sup> The fourth definition reads, "To envelop or . . . entangle (a person) in trouble, difficulties, perplexity, etc.; to embarrass; to engage in circumstances from which it is difficult to withdraw."<sup>62</sup> An example from A.W.W. Dale's 1898 *Life of R.W. Dale* reads, "Mr. Müller had been involved in financial difficulties."<sup>63</sup> The fifth definition reads, "To implicate in a charge or crime; to cause or prove (a person) to be concerned in it."<sup>64</sup> For an example, the OED provides a 1885 Dictionary of National Biography entry: "He was soon induced . . . [sic] to make confessions which seriously involved the duke."<sup>65</sup> Each of these definitions and examples, to varying degrees of literalness ranging from a fog overtaking a city to artfully calling someone narcissistic to a person stuck in financial trouble, uses "involve" to signal that two or more entities are directly present and being mixed into or enshrouded in each other, producing a very real sense of intimacy between the subject and the object.

This same sense extends into the sixth definition: "To include; to contain, imply." Definition 6a was obsolete back in 1933, and it is still obsolete.<sup>66</sup>

57. *Id.*

58. *Id.*

59. *Id.* As a point of clarity, the 1933 OED provides a multitude of examples for each subdefinition, some dating back as far as the 14th century. I will use the most recent examples (i.e. those from the 19th century) wherever possible. For a literal usage of the second definition, the OED provides an 1818 example from Shelley's *The Revolt of Islam*: "Like a choir of devils, Around me they involved a giddy dance." *Involve*, OXFORD ENGLISH DICTIONARY V, 465 (1st ed. 1933). For a figurative example, the OED provides an example from Congregationalist minister Henry Rogers's 1953 "The Eclipse of Faith": "Whether faith can ever exist independently of belief, – whether it is not always involved with it, . . . [sic] that is the point on which I want light." *Id.*

60. *Id.* ("To envelop within the folds of some condition or circumstance; to environ, esp. so as to obscure or embarrass; to beset with difficulty or obscurity"). An example comes from Jowett's 1875 *Plato*: "The numerous difficulties in which this question is involved." *Id.*

61. *Id.* at 465–66.

62. *Involve*, OXFORD ENGLISH DICTIONARY V, 465 (1st ed. 1933).

63. *Id.* at 466.

64. *Id.*

65. *Id.*

66. *Id.* ("Of a person, or with reference to personal action: To include covertly *in* or *under* something; to wrap up.").

Definition 6b reads, “Of a thing: To include within its folds or ramifications; to contain, comprise, comprehend.”<sup>67</sup> This definition is primarily used in mathematics, as used in Todhunter’s 1875 *Algebra*: “Any equation which involves rational quantities and quadratic surds.”<sup>68</sup> However, the definition says that, if not used in mathematics, using “involve” with regards to things “pass[es] into” definition 6c, which reads, “*esp.* To contain implicitly; to include as a necessary (and therefore unexpressed) feature, circumstance, antecedent condition, or consequence; to imply, entail.”<sup>69</sup> That “*esp.*” notation—“especially”—means that definition 6c is the preferred definition for “involve,” at least among the other definitions listed under the sixth definition.<sup>70</sup> One example comes from Lynch’s 1855 *Rivulet*: “Some new task Involving care or strife.”<sup>71</sup> Another comes from Westcott’s 1892 *Gospel of Life*: “Every argument involves some assumptions.”<sup>72</sup> A good definition for “involve” from the era in which the FAA was passed ought to capture the same sense of intimacy that the bulk of the provided definitions evoke. Those definitions of “involve” implicated the subject in a direct, and relatively intimate, relationship with whatever entity was the object of the involvement: A subject could not be considered “involved” in or with something unless the subject and object are co-present in the same circumstance, and definition 6c best applies that principle.

#### b. Mistaking Definition 6d to Define “Involve” as “Affect”

Definition 6d and its examples seem on face to lack that intimacy: Afterall, the example drawn from Grant’s 1885 *Personal Memoirs* reads, “Men who . . . [sic] could not be induced to serve as soldiers, except in an emergency, when the safety of the nation was involved,” and replacing “involved” with “affected” seems to make sense.<sup>73</sup> Justice Breyer would have us end the inquiry there. But definition 6d does not say “to include or affect”; rather, it reads, “To include or affect *in its operation.*”<sup>74</sup> This additional phrase—“in its operation”—once again invokes that sense of intimacy. When a person is involved with something, they are affecting the operation of that thing because of their direct participation.

This is bolstered by the 1933 OED’s definitions of “affect.” The first definition deals with “affect” as it pertains to illnesses having impacts upon other people or parts of the body, and the second definition—which is obsolete—addresses “affect” as a juridical phrase.<sup>75</sup> But the third definition—“To lay hold of, impress,

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67. *Id.*

68. *Involve*, OXFORD ENGLISH DICTIONARY V, 466 (1st ed. 1933).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Involve*, OXFORD ENGLISH DICTIONARY V, 466 (1st ed. 1933) (italics added).

75. *Affect*, OXFORD ENGLISH DICTIONARY I, 151-52 (1st ed. 1933).

or act upon (in mind or feelings); to influence, move, touch”—and the fourth definition—“To make a material impression on; to act upon, influence, move, touch, or have an effect on”—illustrate a particular aloofness that distinguishes “affect” from “involve.”<sup>76</sup> There need be only a tangential relationship in order for a subject to “have an effect on” or to “touch” an object. This is why definition 6d of “involve” required that “affect” be supplemented by “in its operation”: without that qualifier, “affect” could never rise to the level of intimacy required for it to transform into “involve.” With regards to the phrase “contracts evidencing a transaction involving commerce,” this means that the act of commerce must be central to the transaction in question because either the transaction must result in commerce or the transaction causes the participation in commerce, much more than merely having some effect upon commerce. This places “involving commerce” much closer in meaning to how the Commerce Clause was understood at the time of the FAA’s passing, that Congress only had the authority to regulate actual interstate commerce and not those industries or activities which merely affected commerce, a stance later changed by the Court in the 1930s.<sup>77</sup>

To further the distinction between “involve” and “affect,” one should note the similarities between the definitions of “involve” and “engage,” the latter of which is known as the opposite of “affect.” Most of the definitions of “engage” in the 1933 OED (namely listed Categories I, II, and IV) relate to the creation of a binding obligation (such as engaging oneself to another for marriage or to debts) or more archaic usages derived from the original French root of the word or relating to combat.<sup>78</sup> While one could argue that these definitions are close to “involve” (being “engaged in” something under these definitions requires the same intimacy as “involve” because of the binding obligation), Category III, which reads, “To cause to be held fast; to involve, entangle,” has at least one subdefinition which is significantly better, namely the sixteenth.<sup>79</sup> This reads, “. . . to enter upon or employ oneself in an action,” and it is most often used with “in,” as illustrated by Jowett’s 1875 *Plato*: “If I had engaged in politics, I should have perished long ago.”<sup>80</sup> Much like the most appropriate definitions for “involve,” this definition requires direct presence in something, an level of intimacy well beyond that of “affect.”

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76. *Id.* at 152.

77. You could also view the relationship between “involve” and “affect” as an “all squares are rectangles but not all rectangles are squares” sort of thing: Being involved in something obviously affects that thing, but you can affect something without being involved in it. Similarly, all things which are “engaged in commerce” necessarily “affect” commerce, but not all things which affect commerce are also engaged in commerce. Breyer seems to really drop the ball regarding how mutually inclusive these categorizations are.

78. *Engage*, OXFORD ENGLISH DICTIONARY III, 173–74 (1st ed. 1933).

79. *Id.* at 174. The eleventh through fourteenth definitions all either are obsolete, relate to military tactics, or have only a mechanical meaning. *Id.* The fifteenth definition relates to employment (as in “men engaged in [mining]”), so it might be applicable, but that meaning is encompassed within the sixteenth definition. *Id.*

80. *Id.*

Instead of using what is a very comprehensive and authoritative dictionary<sup>81</sup> for a complete and accurate understanding of what “involve” meant in the FAA, Justice Breyer opted for the easy way out and cut off his inquiry once he saw that definition 6d included the word “affect,” calling it a “permissible” definition. Yet as seen above, even if this author’s preference for definition 6c over 6d is not persuasive, Justice Breyer still missed the nuance present in his preferred definition. Given the above analysis of the relevant definitions, it is clear that “involving commerce” is much closer in meaning, if not identical, to “engaged in commerce” than to “affecting commerce.”<sup>82</sup>

## 2. EXPLORING THE LEGISLATIVE HISTORY

This textualist analysis is also consistent with the legislative history. Justice Breyer cites to four different pieces of legislative history to support his argument, but his choice of quotations seems to have failed to engage with other quotations that undermine his argument. For example, Breyer quoted Charles Bernheimer as testifying that the FAA “relates to contracts arising in interstate commerce” but fails to include Mr. Bernheimer’s carefully chosen example of a Wisconsin farmer selling his produce to a dealer in New Jersey.<sup>83</sup> Mr. Bernheimer illustrated that the FAA applied to more than just the physical transportation of goods: it went so far as to ensure that two merchants in two different states could avoid costly litigation and instead arbitrate their dispute across state lines. This limitation to physical transportation and commercial contracts across state lines fits within the definitions of “engaged in commerce” and “the flow of commerce.”<sup>84</sup> In another instance, Breyer quoted a House Committee Report which states that “the control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.”<sup>85</sup> Julius H. Cohen, the American Bar Association’s (ABA) drafter for much of the proposed language of the FAA, reasons that the FAA is necessary to ensure a tripartite scheme for the enforcement of arbitration clauses: because state arbitration laws cannot enforce admiralty contracts or contracts in interstate trade, federal

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81. Justice Scalia liked his Webster’s Third, but I believe it best to use the same dictionary cited to by Justice Breyer in the authoritative opinion on this issue.

82. In earlier drafts, before finding a copy of the 1933 OED, I arrived at the same conclusions using both the modern OED and the 1913 Webster’s. See *Involve*, OXFORD ENGLISH DICTIONARY (2018), <https://en.oxforddictionaries.com/definition/involve> [<https://perma.cc/B8AF-B9L3>]; *Involve*, WEBSTER’S 1913 DICTIONARY (1933), <https://www.webster-dictionary.org/definition/involve> [<https://perma.cc/N5X5-J4MZ>]; *Affect*, OXFORD ENGLISH DICTIONARY (2018), <https://en.oxforddictionaries.com/definition/affect> [<https://perma.cc/5YGT-Q4MZ>]; *Engaged*, OXFORD ENGLISH DICTIONARY (2018), <https://en.oxforddictionaries.com/definition/engage> [<https://perma.cc/AC87-GMWV>]; *Engage*, WEBSTER’S 1933 DICTIONARY (1913), <http://www.webster-dictionary.org/definition/engage> [<https://perma.cc/G3MM-ZED2>].

83. Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 7 (1924) (hereinafter “Joint Hearings”) (testimony of Charles Bernheimer).

84. *Supra* note 53.

85. H.R.Rep. 96, 68th Congress, 1st Session, 1 (1924).

legislation was necessary to cover contracts where state law cannot reach, and international treaties would allow the federal government to develop international arbitration procedures.<sup>86</sup> Additionally, Breyer also cited § 1's definition of commerce, which is written in the language of the Commerce Clause, to prove the expansive coverage of the FAA.<sup>87</sup> However, statutory definitions of commerce written in the language of the Commerce Clause are rarely instructive as to how Congress intended its use of its Commerce Clause powers within that specific act.<sup>88</sup> While the legislative history of the FAA is rather sparse due to the FAA's quick and near unanimous passage, the legislative history that does exist indicates a narrower application of the FAA than has been promoted by the Court in recent history.

### 3. PRECEDENT AND PURPOSE

Furthermore, in attempting to find precedent to support his interpretation, Breyer first quoted both *Perry v. Thomas* and *Southland* regarding the Court's position that the FAA expresses Congressional intent to enforce arbitration agreements within the full reach of Congress's Commerce Clause powers.<sup>89</sup> He also referenced Justice Harlan's concurrence in *Prima Paint*.<sup>90</sup> The dicta quoted in *Perry* reiterates the primary holding of *Southland*, that the FAA is a substantive law applicable in state courts. *Southland* partially argues that the FAA could not be procedural because Congress never calls upon the Commerce Clause when making a procedural law.<sup>91</sup> This ignores the fact that Congress could fashion a procedural law that only applies to certain types of cases. Justice Breyer seems to have relied on the traditional choice of law distinction between procedural and substantive laws, the latter being out-come determinative. However, this ignores the fact that procedural law affects outcomes as well: Procedural laws permits certain, supposedly worthy, cases to be heard while filtering out cases the law deems trivial, all according to the preferences set forth by Congress and the courts. It is not crazy for Congress to write a procedural law that applies only to contracts within a select category (that is, in the instant case, commercial contracts). Finally, Harlan's concurrence in *Prima Paint*, while espousing the view

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86. Joint Hearings at 16 (testimony of Julius Cohen) (because federal courts will not enforce state statutes, he proposes: "first is to get a State statute, and then to get a Federal law to cover interstate and foreign commerce and admiralty, and, third, to get a treaty with foreign countries.").

87. *Allied-Bruce*, 513 U.S. at 274.

88. See e.g. 15 U.S.C.A. § 12 (West 2018) ("commerce" for the purposes of the Clayton Act is defined in the language of the Commerce Clause). *But see* *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271 (1975) (holding that "in commerce," as used in the Clayton Act, refers only to the flow of interstate commerce). The interpretive focus is typically less on the definition of "commerce" and more on the verbals and prepositions preceding the word "commerce."

89. *Allied-Bruce*, 513 U.S. at 274–75 (citing *Perry v. Thomas*, 482 U.S. 483, 490 (1987) and *Southland*, 465 U.S. at 14–15).

90. *Id.* at 275.

91. *Southland*, 465 U.S. at 14–15.

held by the Second Circuit that Congress intended to use all their Commerce powers, is merely a concurrence without precedential value: In fact, the majority in *Prima Paint* took pains to avoid calling the FAA a substantive law.<sup>92</sup> All-in-all, Justice Breyer relied on rather weak precedent to argue in favor of the expansive reach of the FAA.

In the last of his main points, Justice Breyer argued that interpreting “involving commerce” as “affecting commerce” would be most in line with the FAA’s most basic purpose to put contracts containing arbitration clauses on “the same footing” as other contract terms.<sup>93</sup> As previously noted, Justice Breyer concedes that a narrower interpretation of “involving” that limits the FAA to contracts relating to the flow of commerce would not be inconsistent with the purpose of the FAA.<sup>94</sup>

#### 4. OTHER STATUTORY CONSTRUCTION CONCERNS

Beyond the problems with Justice Breyer’s own analysis, there are a variety of other statutory interpretation concerns raised by the interpretation adopted by *Allied-Bruce*. If “involving commerce” is the same as “affecting commerce” and thus indicates the fullest extent of Congress’s Commerce Clause powers, then the preceding phrase “maritime transactions” would be rendered superfluous because surely even the weakest conception of the commerce clause includes maritime transactions.<sup>95</sup> In contrast, limiting the meaning of “involving” to the flow of commerce would be more reasonable considering Congress’s explicit mention of “maritime transactions.” Additionally, this narrower interpretation works well with the Court’s belief that the FAA requires only a showing of “commerce in fact” and not “contemplation of interstate commerce”: With a narrower interpretation of the FAA, the only difference is that the objective criteria required under a “commerce in fact” standard is limited to contracts which in fact were within the flow of commerce (as opposed to contract which in fact affected commerce).

#### 5. PLACING “INVOLVE” BETWEEN “AFFECT” AND “ENGAGE”

It is worth noting that, for all the discussion as to why a very narrow interpretation of “involving commerce” makes the most sense for FAA, the FAA itself and

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92. “The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases . . . rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.” *Prima Paint*, 388 U.S. at 405. This text clearly indicates that the Court in 1967 was not convinced that the FAA creates federal substantive law that applies to the states. Although this is referenced in O’Connor’s dissent in *Southland*, the *Southland* majority ignores this point and treats *Prima Paint* as if it supports the FAA as substantive law.

93. *Allied-Bruce*, 513 U.S. at 275.

94. *Supra* note 52.

95. *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824).

its accompanying legislative history are not clear enough to definitively state that a perfect equivalency exists between “engaged in commerce” and “involving commerce.” However, it is clear that acts which “involve commerce” and acts which “affect commerce” are two separate categories. In two separate cases, one the same year the FAA was passed, the other two years earlier, the Supreme Court noted a distinction between those acts which involve commerce—which were covered under the Commerce Clause—and those acts which merely affect commerce—which were not covered by the Commerce Clause.<sup>96</sup> These cases address whether an act which does not “involve commerce” may so affect commerce directly that it would be in the ambit of federal regulatory power. The very fact that acts which involve commerce may be regulated without question and that acts which affect commerce require further inquiry before regulation indicates that these sets of acts entail different levels of participation in the flow of interstate commerce: Acts which involve commerce are so clearly integrated into the flow of interstate commerce that they are regulable without question while acts which merely affect commerce lack the integration necessary to be inherently regulable. As such, a number of interpretations of “involving commerce” would be permissible that are more expansive than “engaged in commerce” while falling short of “affecting commerce.”<sup>97</sup> For example, since the FAA is merely a procedural statute and not substantive (as will be later argued), the FAA would only apply to contracts that Congress would have believed capable of being filed in federal court at the time the FAA was passed. This would exclude the bulk of what is currently covered by the FAA, including contracts of employment outside the flow of commerce, and would likely limit the number of commercial, non-employment contracts subject to mandatory arbitration. Alternatively, one could argue that Congress only intended the FAA to apply to commercial contracts, that is, contracts between entities mutually engaged in trade (only contracts between corporations or other such business entities). This definition would exclude individual contracts of employment and contracts between businesses and their consumers, but interestingly, it would allow another mechanism besides the Taft-Hartley Act to enforce arbitration clauses in collective bargaining agreements since labor unions would be considered a corporate-like entity. Justice Breyer was correct that finding a definition of “involving commerce” that lie somewhere between “engaged in commerce” and “affecting commerce” would be a difficult task, but it would be a task worth engaging in should the narrowest interpretation of “involving commerce” not persuade.

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96. See *United Leather Worker’s Int’l Union, Local Lodge or Union No. 66 v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 470–71 (1924) (quoting *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 410–11 (1922)).

97. Justice Breyer would disagree, as mentioned before. *Allied-Bruce*, 513 U.S. at 275.



## C. APPLICATION TO CONTRACTS OF EMPLOYMENT

Justice Breyer’s interpretive mistake in *Allied-Bruce* has serious ramifications for Justice Kennedy’s opinion in *Circuit City*. Because § 2 of the FAA ought to be restricted to contracts for maritime transactions and transactions in the flow of interstate commerce, Congress never contemplated that the vast majority of employment contracts would be covered by the FAA. Of course, within this narrower interpretation, contracts of employment of transportation workers would be covered, as those workers are in the flow of commerce. Justice Kennedy raised concerns that if § 2 never contemplates contracts of employment, then the § 1 contracts of employment exemption would be superfluous.<sup>98</sup> The employee in *Circuit City* argued that contracts of employments are not transactions, thus rendering no contracts of employment whatsoever within the scope of the FAA.<sup>99</sup> Kennedy is likely right that, under such an interpretation, the § 1 exclusion would be superfluous. However, if the application of § 2 is limited to contracts relating to the flow of interstate commerce, § 2 would include contracts of employment in the flow of commerce, that is, transportation workers. Therefore, the § 1 exemption exempts from the FAA the only class of employment contracts to which it could possibly apply, that is, transportation workers, however that term may be defined.<sup>100</sup> This argument does not render the § 1 exemption superfluous: exemptions by their very nature exclude something which otherwise would be included. An exemption is only superfluous if the category to which the exemption applied was never included to begin with. But because the contracts of employment of transportation workers (or of those workers in the flow of commerce) are initially included in the term “contracts . . . involving commerce,” the § 1 exemption has a distinct, functional purpose in excluding those types of contracts from coverage. As Justice Kennedy pointed out, this exemption was included in the FAA because Congress had already enacted or planned to enact legislation specific to arbitration proceedings between seamen and their employers and between railroad employees and their employers.<sup>101</sup> Congress understood that including the catch-all provision preserved Congress’s ability to specify labor relations laws for other classes of transportation workers, such as truckers, aviation workers, etc., who would otherwise be covered by § 2.<sup>102</sup>

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98. *Circuit City Stores*, 532 U.S. at 113–14.

99. *Id.* The employee in *Circuit City* argued that contracts of employments are not transactions within the meaning of “contracts evidencing a transaction involving commerce,” defining transactions as referring to purely commercial transactions between business-like entities. While this line of argumentation may have some merits, it is not the stance espoused by this paper.

100. *Id.* at 114–16.

101. See Shipping Commissioners Act of 1872, 17 Stat. 162; Transportation Act of 1920, §§ 300–316, 41 Stat. 456; Railway Labor Act of 1926, 46 U.S.C. § 651 (repealed).

102. Justice Kennedy never defined “transportation worker”: while the various acts referred to by Justice Kennedy address disputes between companies and unions in those respective industries, it is not clear even to what extent “transportation worker” reaches. Are management and supervisory employees exempt from mandatory arbitration clauses? The FAA on its face would say so since management employees of a railroad company

Additionally, the legislative history regarding § 1 supports the conclusion that this exemption was included to placate the fears of labor groups that the FAA would be misconstrued to apply to contracts of employment. The chairman of the ABA committee that drafted the FAA, Mr. Piatt, said as much at a Senate Judiciary Subcommittee hearing, and Herbert Hoover, then-Secretary of Commerce, in a letter, stated:

[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'<sup>103</sup>

Congress only included the § 1 exemption in the 1924 bill after Hoover and Mr. Piatt suggested this amendment in response to the 1923 bill (nearly identical, save for the § 1 exemption).<sup>104</sup> Both of these proffered reasons for the inclusion of this exemption are rational and consistent with a narrow interpretation of "involving commerce": Congress explicitly exempted the only employment contracts to which the FAA could possibly apply both for the sake of its own legislative flexibility and for the sake of labor leaders. As pointed out by Justice Stevens, the precise definition of "maritime transactions" in § 1 underscores the purely commercial nature of the FAA, something further supported by Representative Graham's floor statements specifying the FAA's application to "commercial contracts and admiralty contracts."<sup>105</sup> Mr. Bernheimer's repeated reference to "merchants" and "business men [sic]" as the primary actors in an arbitration also reinforce the notion that § 1 was intended to catchall remove employment contracts from the scope of the FAA.<sup>106</sup>

Justice Kennedy was likely right that the § 1 exemption only applies to transportation workers, but compulsory arbitration for private sector nonunion employees is still not authorized by the FAA. If "involving" is interpreted

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are still "railroad employees." A captain of a vessel is surely still a seaman. To say otherwise would be ludicrous. Furthermore, when Justice Kennedy briefly retreated from his *ejusdem generis* arguments, he relied on the "engaged in commerce" language to limit the expanse of the catchall phrase to classes of workers within the flow of commerce, another rather broad phrase with little guidance: Are warehouse employees within the flow of commerce? Are stock brokers who trade securities nationally within the flow of commerce? How about traveling salespeople? By allowing § 2 to cover employment contracts *carte blanche*, Justice Kennedy created uncertainty in the scope of the exemption which may give rise to further litigation. It is much cleaner to allow § 2 to only cover those contracts of employment within the flow of commerce (whatever that definition may be) and to have § 1 explicitly exclude all those contracts: The exact scope of what appears to be a loosely defined exemption becomes moot. This also satisfies Justice Souter's concerns about the oddity of Congress exempting the class of employees over which they would have the clearest jurisdiction. *Supra* note 43.

103. Senate Judiciary Subcomm. Hearing 14 (1923) (comments of Commerce Secretary Hoover); *id.* at 9 (comments of Mr. Piatt).

104. *Id.* at 9, 14; *see* Joint Hearings at 2.

105. *Circuit City Stores*, 532 U.S. at 125–26 (Stevens, J., dissenting) (quoting 65 Cong. Rec. 1931 (1924)).

106. Senate Judiciary Subcomm. Hearing 2–6 (1923) (Comments of Mr. Bernheimer). Mr. Bernheimer also submitted two lists, in 1923 and 1924, respectively, of 28 and 67 organizations in support of the bill, all of which were trade/commerce organizations. *Id.* at 4; Joint Hearings at 21–22.

narrowly to include only contracts relating to the flow of interstate commerce, then the “insurmountable textual obstacle” presented by the residual phrase in § 1 can easily be overcome: The 9th Circuit is wrong that contracts of employment are not covered by the FAA because they do not fall under the scope of § 2. Rather contracts of employment would be covered by the FAA, but only to the extent contracts of employment are “involving commerce.” This means that § 2’s coverage only extends to “transportation workers” or employment contracts within the flow of commerce. § 1 then excludes these types of contracts from the coverage of the FAA, thus leaving no contracts of employment subject to mandatory arbitration under federal law. I have not found other authors who advocate for this argument, but the 9th Circuit did attempt to arrive at the same conclusion without attempting to parse apart the language of §§ 1 and 2. There are no illusions that such an interpretation stands little chance of ever being adopted by this country’s highest court, in large part due to the Court’s unrelenting desire to force people into arbitration wherever such clauses may be found. But this advocacy does ring truer to the original intentions of the framers of the FAA who would have expected a much narrower reach of compulsory arbitration, likely limited to commercial contracts. Fortunately, there are other arguments, arguments which have been espoused by the more conservative members of the Court, which may provide some reprieve from compulsory arbitration for private sectors, nonunion employees.

## II. OVERTURNING *SOUTHLAND CORP. V. KEATING*

*Southland Corp. v. Keating* very neatly held that, because § 2 of the FAA establishes a national policy in favor of arbitration and is rooted in Congress’s plenary power to make substantive laws under the Commerce Clause, state laws that conflict with the FAA are in violation of the Supremacy Clause.<sup>107</sup> The majority opinion relied strongly on the legislative history to argue that Congress intended to address a problem—the unenforceability of arbitration clauses—present in commerce at large, rather than a problem confined to the federal courts.<sup>108</sup> Specifically, Congress intended to overcome, first, “the old common law hostility to arbitration” and, second, “the failure of state arbitration statutes to mandate enforcement of arbitration agreements.”<sup>109</sup> As such, the Court holds that state statutes cannot disrupt this Congressional intent.

### A. WHY *SOUTHLAND* SHOULD BE OVERTURNED

Justice O’Connor centers her dissent on two arguments: first, the legislative history unambiguously indicates that Congress in passing the FAA did not intend to create new federal substantive law and instead merely desired to create a “law

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107. *Southland*, 465 U.S. at 10–14.

108. *Id.* at 13–14.

109. *Id.* at 14.

of remedy” in the federal courts; second, § 2 of the FAA does not decide which judicial forums are bound by its requirements or the procedures for the FAA’s enforcement since §§ 3 and 4 specifically refer to “courts of the United States” and “United States district court” as the appropriate forums for remedy.<sup>110</sup> Justice O’Connor’s arguments are expounded below (along with supporting arguments and evidence not explored in her dissent).

Justice O’Connor is by and large correct that the *Southland* majority relies very heavily on inapplicable precedent. Both cases which support the majority’s assertion that the FAA “creates a body of federal substantive law” addressed only federal court litigation, only commenting in dicta on the applicability of the FAA to state courts.<sup>111</sup> Both §§ 3 and 4 are “implementing provisions” which expressly limit the application of the FAA to federal courts.<sup>112</sup> Both the majority and Justice O’Connor cite to Justice Black’s dissent in *Prima Paint* to support their arguments, the latter noting that Justice Black specifically stated that the majority “does not hold that the body of federal substantive law created by federal judges under the [FAA] is required to be applied by state courts” since such a holding “would flout the intention of the framers of the [FAA],”<sup>113</sup> which was to mandate arbitration in interstate disputes that would otherwise be addressed in federal court.<sup>114</sup> Furthermore, procedural law can be fashioned to apply in select areas: here, the text makes it plain that, when there is a maritime contract or a “contract evidencing a transaction involving commerce” with an arbitration clause, there shall be a remedy available in federal courts.<sup>115</sup>

However, the legislative history provides further clarity. For instance, the Committee Report from the House Judiciary Committee states that:

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110. *Southland*, 465 U.S. at 22–25 (O’Connor, J., dissenting). Justice Scalia and Justice Thomas both produced similar dissents in *Allied-Bruce*, arguing that *Allied-Bruce* should not have been decided on the merits because it was a purely intrastate matter, thus calling for the overturning of *Southland*. *Allied-Bruce*, 513 U.S. at 284–85 (Scalia, J., dissenting); *Id.* at 285–86 (Thomas, J., dissenting).

111. *Southland*, 465 U.S. at 12; *Id.* at 24, 30 (J. O’Connor, dissenting).

112. *Id.* at 29. For reference, § 3 states: “If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration . . . the court . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . .” 9 U.S.C.A. § 3 (West 2018). § 4 states that a party aggrieved by a refusal to arbitrate “may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . .” 9 U.S.C.A. § 4 (West 2018).

113. *Southland*, 465 U.S. at 30 (O’Connor, J., dissenting) (quoting *Prima Paint*, 388 U.S. at 424 (Black, J., dissenting)).

114. This will be apparent from the legislative history.

115. One could compare this to Justice Souter raising pleading standards in antitrust cases in *Twombly* (which was later expanded to almost all pleadings in *Iqbal*): before heightened pleading was universal, there were about two years where technically only antitrust was subject to heightened pleading. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009). This is not a law passed by Congress, but it does illustrate a procedural legal principle being specifically molded to particular subject matter.

[W]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made . . . . The bill declares simply that such agreements for arbitration shall be enforce, and provides a procedure in federal courts for their enforcement.<sup>116</sup>

Furthermore, the Senate Committee Report regarding the FAA holds a similar view: “Section 4 provides a simple method for securing the performance of an arbitration agreement. The aggrieved party may apply to *the proper district court* on five days’ notice, and the court will order the party to proceed.”<sup>117</sup> Julius H. Cohen, who drafted much of the proposed language at the ABA, stated that federal courts cannot enforce arbitration agreements unless Congress, “in the exercise of [its] power to confer jurisdiction on the Federal courts,” tells them how to proceed and, as mentioned earlier, referred to a scheme of having state arbitration statutes to address intrastate issues, a federal statute for interstate and foreign commerce and admiralty, and arbitration treaties with foreign nations, implying a desire for the FAA to apply only in federal courts.<sup>118</sup> Cohen, as noted by Justice O’Connor, also stated:

Nor can it be said that the Congress of the United States, directing its own courts . . . , would infringe upon the provinces or prerogatives of the States . . . [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced . . . . There is no disposition therefore by means of the federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.<sup>119</sup>

Representative Graham from Pennsylvania made floor statements regarding the fact that the FAA “does not involve any new principle of law except to provide a simple method . . . in order to give enforcement . . . . It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.”<sup>120</sup> Additionally, Congress relied on more than its commerce and admiralty powers to enact the FAA: In a brief placed into the record at the Joint Hearings, the record notes that, in passing the FAA, “Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.”<sup>121</sup> Justice O’Connor found this quote and parts of

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116. H.R.Rep. 96, 68th Congress, 1st Session (1924).

117. Sen. Rep. No. 536, 68th Congress, 1st Session. [italics added].

118. Joint Hearings at 16–18.

119. *Southland*, 465 U.S. at 26–27 (O’Connor, J., dissenting) (quoting Joint Hearings at 39–40).

120. 65 Cong. Rec. 1931 (1924).

121. Joint Hearings at 38.

the discussion in *Prima Paint* compelling enough to justify Congress's at least partial reliance on their Article III powers.<sup>122</sup>

In the *Southland* majority opinion, Chief Justice Burger criticized O'Connor's dissent as inviting forum shopping. On its face, this seems to make sense: If the FAA applies to all contracts involving commerce, then many of these claims could equally be pursued in either state courts or federal courts. However, this concern is ultimately unfounded. If "involving commerce" is limited to the flow of commerce, then a whole class of contracts—those which do not relate to the flow of commerce—would not be subject to the FAA, limiting the pool of cases susceptible to forum shopping.<sup>123</sup> However, even if the Court did not adopt the narrower interpretation of "involving commerce" espoused above, diversity requirements (and therefore the ability for both parties to petition federal courts in cases having complete diversity) would eliminate most instances of forum shopping: as long as there is complete diversity, either party can petition a federal court under §§ 3 or 4.<sup>124</sup> This preserves a federalist system in which states can elect to have arbitration statutes to govern state courts while mandating the federal courts do mandate arbitration.

#### B. BENEFITS OF OVERTURNING *SOUTHLAND*

While overturning *Southland* would not create a per se exemption in the FAA for contracts of employment, it would allow the invalidation of arbitration clauses on state law grounds if the lawsuit were filed in state court. In addition, state courts would likely be more susceptible to arguments rooted in the common law of contracts, such as unconscionability or duress.<sup>125</sup> The following paragraphs describe (briefly) three separate arguments that could be successful in a state court. Granted, many of these could be applied in state court to any contract with an arbitration clause, but they work well for challenging arbitration clauses in the context of employment contracts.

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122. *Southland*, 465 U.S. at 28, n. 14 (O'Connor, J., dissenting) (citing to *Prima Paint*, 388 U.S. at 405, n. 13 and *Prima Paint*, 388 U.S. 416–20 (Harlan, J., dissenting)).

123. Essentially, if the Court were to narrow § 2 to maritime contracts and contracts in the flow of commerce, much of the forum shopping concerns will disappear since fewer contracts generally will be eligible for enforcement under the FAA due to the narrower scope: maritime contracts are only enforceable federally, and contracts in the flow of commerce, presuming the claims meeting the dollar value threshold, would typically be litigated in federal courts anyways. This narrower interpretation, regardless of how one decides regarding the substantive versus procedural debate, does function to make arbitration clauses *de facto* only enforceable in federal courts (though sometimes such claims may be litigated in state courts anyways).

124. *Southland*, 465 U.S. at 34–35 (O'Connor, J., dissenting).

125. The "savings clause" provides that an arbitration clause may be invalidated "upon such grounds which exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. While this clause does apply to federal courts, such courts often find themselves rejecting most common law claims of unconscionability and the like. However, state courts, which typically wind up overturned on this point, tend to be more accommodating of common law claims. *See, e.g.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

First, under California and Georgia state law, any contract provision for a pre-dispute jury trial waiver is unenforceable.<sup>126</sup> Since an arbitration clause when enforced necessarily results in the absence of a jury, under state laws like these, arbitration clauses could be invalidated because they violate a right to a jury guaranteed by the state’s constitution. Federal courts have already ruled that, considering the national policy in favor of arbitration, arbitration clauses are effective waiver of the right to a jury trial.<sup>127</sup>

Second, arbitration clauses, in select circumstances, function as liquidated damages provisions when employers deliberately include them in order to undercut the value of potential damages. Under the common law, a provision for liquidated damages will not be enforced unless, first, the provision is a reasonable estimate of compensation for breach, and, second, the harm caused by the breach must be difficult to measure at the time the contract was formed.<sup>128</sup>

An arbitration clause functions as a liquidated damages provision because employers know that arbitration provides a speedy, cheaper, and less in-depth resolution than litigation. While the lack of available arbitration results data (due to the confidential nature of arbitration proceedings) makes statistical analysis difficult, the differences between arbitration outcomes and litigation outcomes are notable. For example, arbitration results in an employee win rate, defined as receiving some sort of award, of 21.6%, compared to 30–36% in federal employment cases and 50–60% in state court employment cases.<sup>129</sup> There is plenty of statistical evidence to show that arbitration does in fact favor the employer and results in a significantly cheaper dispute resolution.<sup>130</sup> Knowing this, one could argue that an arbitration clause is an unreasonable estimate of the cost of breaching the contract: the employer put the clause into the contract because they knew that the end result would be significantly cheaper, both in terms of time and resources spent on the process and in terms of the actual award paid. Furthermore, the types of damages that stem from employer-employee disputes are not particularly difficult to calculate since courts determine those values all

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126. West’s Ann.Cal. Const. Art. 1, § 16; West’s Ann.Cal.C.C.P. § 631; see *In re Orange*, 784 F.3d at 528–29.

127. See *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S.Ct. 1421, 1427 (2017) (holding that the FAA preempts a state law requiring express jury trial waiver since such a law abrogates a “primary characteristic” of arbitration - “waiver of the right to go to court and receive a jury trial”).

128. *Southwest Eng’g Co. v. United States*, 341 F.2d 998, 1001 (8th Cir. 1965); see also UCC § 2-718 (West 2018) (although the UCC applies only to commercial contracts, the common law regarding liquidated damages provision is functionally the same).

129. Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, J. EMPIRICAL LEGAL STUDIES 8, 1, 6 (2011). Other studies cited to in Colvin’s analysis report employee win rates in arbitration of 65–70% in studies conducted in the mid-1990s and 46% in an early 2000s study on arbitration for employees in the securities industry. These other studies are less reliable because 1) in the 1990s, employment arbitration reached comparatively fewer employees, and 2) securities industry employees, being higher income, likely individually negotiated their contracts which, as Colvin notes, results in a higher employee win rate than “take it or leave it” contracts, the latter of which comprises most employment contracts.

130. See e.g. Colvin, *supra* note 5, at 8–9.

the time. Courts disfavor liquidated damages provisions when they function as “penalty clauses,” a finding typically made when those provisions grossly overestimate the value of damages from breach, since they are oppressive and the court should only enforce accurate representations of damages done. I see no reason why, if courts are willing to not enforce overestimates, courts would be willing to enforce underestimates.<sup>131</sup>

Third, arbitration clauses can be challenged individually as unconscionable, subject to a “shock the conscience” standard. Under the § 2 savings clause, such a claim is available under the FAA. However, federal courts have been less receptive to claims of unconscionability (likely because states have often passed laws or had judicial rules which declare most arbitration clauses per se unconscionable, something to which federal courts are not amenable since those statutes do not put arbitration clauses on equal footing with other contracts).<sup>132</sup> State courts, especially in more left-leaning states such as California, may be more willing to set aside an arbitration provision as unconscionable, regardless of whether or not it is required by state statute.

These arguments are mere examples, and there are many more possible ways to invalidate an arbitration clause (e.g. duress). The liquidated damages argument may not be the most persuasive, but it showcases the flexibility in common law rules to find ways in which arbitration clauses go too far and why they ought not be enforced. Without *Southland*, states would have a great deal more flexibility in how to approach these arbitration clauses. The American system of federalism would be best supported this way since each state would have a variety of options for the enforceability of arbitration clauses without being forced to adopt arbitration by the federal government. In this way, states can truly remain “laboratories of democracy” and provide ways out of arbitration clauses for their constituents.<sup>133</sup>

### III. ETHICAL CONSIDERATIONS

Considering both that the jurisprudence of the FAA is unlikely to undergo any radical transformations and that the fundamental reason lawyers and academics rail against compulsory arbitration for private sector nonunion employees is the fear of a lack of due process and of anti-employee bias, it would behoove this paper to explore ways in which the employment arbitrators themselves could self-regulate to ensure a fair, efficient process. Currently, the NAARB has issued a set

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131. Lies: I do see reasons (e.g. people may be more likely to accept underestimates than overestimates, so therefore underestimates are less oppressive), but considering the systemic use of arbitration clauses to under-value claims, I would hope courts—especially in states traditionally less amenable to arbitration—would not find such arguments persuasive.

132. See e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that the FAA preempts a California judicial rule which declared most arbitration clauses in consumer contracts unconscionable).

133. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting).



of non-binding guidelines for employment arbitration in the nonunion context.<sup>134</sup> Generally, these guidelines address procedural concerns: were the arbitrators selected fairly (and is the arbitrator aware of that process)? Is there an adequate discovery process? Has the arbitrator disclosed any conflicts of interest? Etc. Furthermore, they are not binding, meaning arbitrators may be free to deviate from these guidelines (which are by and large fine: The Guidelines and the Due Process Protocol do a decent job of addressing procedural concerns that would give rise to a suspicion of prejudice against the employee). A lot of these procedures are followed, and ensuring procedural parity is important. However, such non-binding guidelines do not go far enough and in some instances may inadvertently exacerbate the prejudice against the employee: for instance, the Due Process Protocol suggestion that employers pay most of the arbitration fees has been followed, but having employers pay the entire fee has been shown to increase repeat player bias.<sup>135</sup>

A better solution would be a training process set up by the major arbitration association—ideally in a joint effort—to ensure that employment arbitrators understand how to manage their arbitration hearings fairly: mere guidelines are not useful without training on how to properly implement those procedures and to recognize when the procedures need adjusting to balance the scales. Beyond this would be not only mandating training on equitable procedures, but also mandating training regarding cultural and racial bias: most employment arbitrators are white and male and rather old,<sup>136</sup> and mediators and arbitrators, just like most human beings, are susceptible to implicit bias.<sup>137</sup> There are strategies to help people become conscious of these biases and learn how to mitigate their impact on one’s decision-making. Such trainings use a variety of techniques from interactive classroom exercises to self-administered online modules, but one scholar had suggested using virtual reality and avatars to train prosecutors about conducting proper *Brady* disclosures.<sup>138</sup> Such methods could be imported to train arbitrators. Lower-income employees will often be not-white and may have trouble

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134. *Guidelines for Standards of Professional Responsibility For Arbitrators in Mandatory Employment Arbitration*, NATIONAL ACADEMY OF ARBITRATORS, <https://naarb.org/guidelines/> [<https://perma.cc/3WTT-D7W6>] (hereinafter, “*Guidelines*”); *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, NATIONAL ACADEMY OF ARBITRATORS, <https://naarb.org/due-process-protocol/> [<https://perma.cc/IE4M-AHWQ>] (hereinafter, “*Due Process Protocol*”).

135. *Supra* note 9; Colvin, *supra* note 5, at 14 (noting that 97% of employers pay all arbitration fees). Beyond that, procedural parity is still not procedural parity: repeat players understand how this procedure works and can use that to their advantage. Employees however do not have such luck and so are less equipped to navigate an arbitration proceeding, and likely their attorneys lack the same level of experience as the attorneys for the employer.

136. Sarah R. Cole, *Diversity Among Arbitrators*, AM. BAR ASS’N 5 (2018) (noting that JAMS reported only 22% of its panelists were female and only 9% were people of color; further noting that PIABA found that in 2013-14, 78% of arbitrators were white males with an average age of 66).

137. Carol Izumi, *Implicit Bias and Prejudice in Mediation*, SMU L. REV. 681, 682–83 (2017).

138. See Kate E. Bloch, *Harnessing Virtual Reality to Prevent Prosecutorial Misconduct*, 38 GEO. J. LEGAL ETHICS 1 (2018).

participating in an arbitration proceeding, either due to a language barrier (which may not be remedied since some employers do not provide translation services) or simply because the arbitral forum is very different from whatever they have experienced in their lives. An arbitrator must be conscious of these biases to best approximate the “correct” result.

To complement this, the NAARB and other arbitration associations could engage in outreach to minority bar associations, deliberately seeking to replenish the aging population of white male arbitrators with people of color and women: if there are more black and Latinx arbitrators, then concerns about racial and cultural bias may be diminished. However, that only works if the actual arbitral panel is diverse: employers may systematically avoid selecting arbitrators who are not white to increase their chances of victory (and the employee may be none the wiser). Arbitration associations may want to consider requiring a panel of arbitrators (as opposed to one single arbitrator) and requiring that at least one member of the panel be a woman or a person of color.

NAARB and other arbitration associations could also unilaterally force a higher burden of proof on the employer, such as a clear and convincing standard. There may be some concern that the preponderance of the evidence standard (as seems to be the norm in arbitration) allows for too much leeway in the discretion of the arbitrator. While an arbitrator could theoretically fake being convinced at a clear and convincing standard (meaning they just side with the employer even if they did not meet the standard), such a standard would at least force the arbitrator to develop a more robust opinion should they come out in favor of the employer. This functions as a presumption that the employer should not have taken a particular action unless the employer can justify their reasoning (a system of mandatory presumptions for a variety of scenarios may also suffice, but it is unclear what that would actually look like). Ideally, this would raise employer loss rates and help employees who have a legitimate claim but may not be able to articulate it well since the employer must now do most of the explaining.

Lastly, arbitration associations may want to consider mandating that all employment arbitrators have a law degree (and maybe even a certain amount of litigation experience). This may cut against the arguments raised earlier regarding cultural and racial bias (since most lawyers are white and male),<sup>139</sup> but it does ensure that the arbitrators (who may currently be anyone, provided they have undergone the qualifying procedures to be placed on the roster) have a base knowledge of procedure and fundamental fairness, which would allow them to be fairer to the employees. There are many ways in which arbitrators may self-regulate to create an efficient and fair procedure for employment arbitration, so should the FAA remain applicable in state courts and maintain expanse as wide as the Commerce Clause, all hope is not lost because arbitrators themselves could

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139. *Supra* note 136.

counter the biases that make people want to eliminate employment arbitration in the first place.

#### IV. CONCLUSION

In an ideal world, Congress would clarify the intent of the FAA: it is a poorly written statute with an ambiguous and hotly contested legislative history. Because the FAA was passed unanimously, there was not much debate over the finer points of the law, although the explicit addition of the § 1 exemption is telling. The Court has taken advantage of these ambiguities time and time again to craft a federal policy greatly divorced from the original intent of those who drafted the FAA. The FAA’s coverage should not be read as coterminous with the Commerce Clause: The phrase “involving commerce” indicates that the FAA is limited to contracts in the flow of commerce and does not reach contracts which merely affect commerce. This narrower interpretation is still consistent with the purpose of the FAA because arbitration clauses in contracts in the flow of commerce are still put on the same level as other clauses in those contracts, and a definitional analysis and glossing of the legislative history support this conclusion as well. As a result, § 2 only applies to maritime contracts and contracts involving commerce, which includes some forms of contracts of employment; however, the § 1 exemption exempts all these contracts of employment that would otherwise have been covered by § 2. As such, the FAA could not possibly apply to employment contracts.

Once again, I find this argument particularly convincing, but it is reassuring to have other options to combat employment arbitration. Overturning *Southland* would open up a wide range of defenses in state jurisdictions less amenable to arbitration, and arbitrators themselves have the power to hold themselves accountable to a higher standard when arbitrating in the non-collective bargaining context. Whether courts one day find these preceding arguments or those espoused by the Ninth Circuit and the dissenters in *Circuit City Stores* persuasive, the Federal Arbitration Act does not authorize compulsory private sector non-union arbitration. There are no insurmountable textual obstacles to the elimination of employment arbitration, though it might take some creative thinking to get over that hill.