

# RHETORIC VERSUS REALITY IN ARBITRATION JURISPRUDENCE: HOW THE SUPREME COURT FLAUNTS AND FLUNKS CONTRACTS

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## I

### INTRODUCTION

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

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1. 9 U.S.C. §§ 1–307 (2006). New York adopted a state arbitration act in 1920, on which the FAA is based. See KATHERINE V.W. STONE & RICHARD A. BALES, *ARBITRATION LAW* 30 (2d ed. 2006).

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

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

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

5. As Judge Benjamin Cardozo wrote during the period just after the FAA was passed:

Reflecting this contractual basis of arbitration, the FAA declares that any “written provision” agreeing to resolve designated disputes by arbitration in any “contract evidencing a transaction involving commerce” is “enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>6</sup> The statute targeted commercial actors, which often reneged on signed arbitration agreements,<sup>7</sup> and also aimed to uphold similar commitments made in non-commercial arbitration agreements.<sup>8</sup> Despite that clarity and context, the Supreme Court in recent decades heralds the FAA as stating a sweeping national policy favoring arbitration that preempts contrary state law.<sup>9</sup>

True, in some older cases, the Court rightly stressed that the FAA’s primary purpose was reversing judicial hostility to arbitration and enforcing contractual commitments to arbitrate.<sup>10</sup> Although some detect continued judicial aversion to arbitration, pervasive hostility died generations ago, yet today’s Court often speaks as if such hostility were a daily threat to civil society. While championing this national policy, the Court has insisted that it is only enforcing contracts in accordance with contract law. But, although the Court’s holdings since the 1980s may sometimes show greater fidelity to contracts than previously,<sup>11</sup> there is a discernable gap between its rhetoric about that fidelity and what the Court actually does.

The Court’s arbitration jurisprudence stimulates intense debate in a vast literature on many interrelated subjects. For example, critics object to the lack

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

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

6. 9 U.S.C. § 2 (2006).

7. See Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 266 (2007) (“The paradigmatic commercial problem addressed by the FAA was that of a ‘shirking vendor,’ unwilling to pay a bill or perform a contractual obligation.”).

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

9. E.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 275 (1995); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983). See discussion *infra* text accompanying notes 20–27 (discussing *Moses Cone*).

10. E.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985); *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

11. The Court enforced arbitration contracts despite federal statutory protections previously seen to require litigation rather than arbitration. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985) (enforcing the arbitrability of antitrust claims under the Sherman Act); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 224 (1987) (given national policy favoring arbitration agreements, claims under the Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act can be arbitrated) (distinguishing *Wilko v. Swan*, 346 U.S. 427 (1953)); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 477 (1989) (stating “agreement to arbitrate claims under the Securities Act of 1933 is enforceable and resolution of the claims only in a judicial forum is not required”) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (statutory claims generally).

of judicial attention given to the limits of arbitration,<sup>12</sup> while proponents stress its virtues.<sup>13</sup> Overlooked in this vast literature is the rhetoric–reality gap: the difference between the Court’s incantations about arbitration as contract—and its purported application of contract law—and the reality that its jurisprudence imposes on private parties, impinges on freedom both *of* contract and *from* contract, intrudes upon state contract law, and changes and distorts actual contract-law doctrine. This article documents that gap and explores its causes and consequences.

The most likely cause can be stated simply: a national policy favoring arbitration over litigation and federal law over state law is constitutionally suspect unless based on voluntary assent of the people, meaning a basis in contract; but contracts that choose state law or that channel disputes into litigation instead of arbitration are incongruent with that policy and disfavored. The rhetoric of contracts is a device to portray the national policy as legitimate, even while departures from the rhetoric in practice are necessary to implement the policy. After first documenting the rhetoric–reality gap, this article explores this and other possible explanations for it, before considering why the gap matters, highlighting costs to judicial legitimacy and doctrinal coherence, and noting how it gives contract law a bad name.

## II

### DOCUMENTING THE RHETORIC–REALITY GAP

It is well known that, in pivotal cases in recent decades, courts applied the Supreme Court’s early interpretation of the FAA to hold that virtually all arbitration agreements in most contracts are governed by federal law. Most famously, in *Southland Corp v. Keating*,<sup>14</sup> the Court found that the FAA was a substantive statute establishing federal law, also applicable in state courts,<sup>15</sup> and

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12. *E.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Barbara Black, *Is Securities Arbitration Fair to Investors?*, 25 PACE L. REV. 1 (2004); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992); Sarah Rudolph Cole, *Fairness in Securities Arbitration: A Constitutional Mandate?*, 26 PACE L. REV. 73 (2005); Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: *The Average Consumer’s Experience*, 67 LAW & CONTEMP. PROBS. 55 (2004); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROB. 75 (2004); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2010).

13. *E.g.*, Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006). Additional examples of aspects of these scholarly debates are noted in an online version of this paper.

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

15. This amounted to a functional overruling of *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956), which viewed the FAA as procedural, not substantive.

preempts any state law that obstructs the FAA's objectives,<sup>16</sup> which the Court said announced "a national policy favoring arbitration."<sup>17</sup> Less appreciated, though, is how the Court's jurisprudence since then increasingly eclipses the role of contracts and contract law with a radically different body of law. Although the Court insists it is simply enforcing contracts and applying contract law,<sup>18</sup> its rhetoric about that has escalated while its fidelity has proportionally declined. Often the rhetoric–reality gap is vast and can appear to reflect conscious choice, though sometimes it appears to be a simple misunderstanding of contract law.<sup>19</sup> In any event, the species of law the Court actually applies is so

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16. *Southland*, 465 U.S. at 16. In *Southland*, franchisees filed a class action lawsuit against a franchisor asserting various theories, including violations of state franchise statutes. The company invoked an arbitration clause in each of the contracts. California courts debated whether arbitration applied to the statutory violation claim because a related state statute rendered invalid any contract term that might waive statutory protections of franchisees. The Supreme Court declared that the FAA applied and preempted the California law because it "undercut the enforceability of arbitration agreements." *Id.*

17. The Court began making such bold statements in *Moses H. Cone Memorial Hospital*, 460 U.S. 1 (1983), discussed *infra* text accompanying notes 20–23, and has exuberantly repeated them for decades. Only two limitations appear: the contract must be within the statute's scope, principally involving commerce, and an agreement to arbitrate is subject to any grounds in law or equity as would invalidate any contract. The Court wrote: this "broad principle of enforceability" of agreements to arbitrate should not be "subject to any additional limitations under state law." *Southland*. The Court claimed to find support for its sweeping expansion in the legislative history of the FAA, but scholars challenge its accuracy. See IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT §10.53 (1994) (calling it a "pillar of sand"). Justice O'Connor dissented, objecting to federalizing this field of law. She stressed that the FAA and kindred state statutes had long been understood by contracts law scholars as procedural, not substantive, leaving contract law intact. *Southland*, 465 U.S. at 27 n.13 (O'Connor, J., dissenting) (citing 6 S. WILLISTON & G. THOMPSON, LAW OF CONTRACTS § 368 (rev. ed. 1938)). Though O'Connor ultimately capitulated to the Court's persistence, citing *stare decisis*, *Allied-Bruce*, discussed *infra*, the results continue to be debated. Compare Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (opining that *Southland* was fundamentally erroneous and has caused extensive damage to arbitration law and practice) with Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002). Though many opinions and Justices have forged headlong into federal preemption of state law in this field, Justice Thomas, devotee of federalism, steadfastly dissents from preemption; Justice Scalia often echoes the objection but has retreated somewhat; Justice O'Connor once steadfastly opposed preemption but eventually relented. Chief Justice Rehnquist steered colleagues toward federalism.

18. See Stephen J. Ware, *Arbitration and Unconscionability after Doctor's Associates*, 31 WAKE FOREST L. REV. 1001, 1006 (1996) ("While the substance of the Court's arbitration decisions over the last twenty years has been remarkably faithful to the contractual approach, the Court's rhetoric has been even more supportive of the principle that arbitration law is a part of contract law.").

19. A good example appears in Justice Scalia's dissent in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995), which protested federalization but stressed *stare decisis*. Scalia suggested that for parties who had relied on *Southland Corp. v. Keating*, 465 U.S. 1 (1984), which he considered erroneous, "rescission of the contract for mistake of law would often be available." *Allied-Bruce*, 513 U.S. at 285 (Scalia, J., dissenting) (citing CORBIN ON CONTRACTS § 616 and RESTATEMENT (SECOND) OF CONTRACTS § 152). The authorities Scalia cited for this proposition do not support the assertion—nor would others. Contract law allows rescission based on mutual mistake of a material fact that is a basic assumption of a contract. It is not obvious that a binding precedent of the Supreme Court, later overruled, qualifies. An old-fashioned view even held that mistakes about law are not grounds to rescind a contract. See E. ALLEN FARNSWORTH, CONTRACTS 679, § 9.2 (2d ed. 1990) ("Some courts have denied relief [in mistake of law cases but] the modern view is that the existing law is part of the

alien to actual contract law as to defy the repeated assurances that arbitration is fundamentally about contracts or contract law.

#### A. Interpretive Presumptions and Limited Choice of Law

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

In 1983, the Court invented a presumption favoring arbitration. Despite declaring that arbitration is contractual, Justice Brennan in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*<sup>20</sup> asserted that the FAA “requires a liberal reading of arbitration agreements” and “is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state . . . policies to the contrary”<sup>21</sup> and “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”<sup>22</sup>

Though such assertions do not exist in the common law of contracts,<sup>23</sup> there are doctrinal grounds that could justify them. Among the methods of interpretation elaborated in Arthur Corbin's definitive treatise, for example, these assertions could be classified as a method of contract construction in the public interest—stressing congruence not with particular intentions of specific parties but with general judicial notions of public policy.<sup>24</sup> More generously, the Court might be seen as establishing a default rule to deal with ambiguity, at least in the sense that parties can avoid the result by avoiding ambiguity.<sup>25</sup> But the Court did not provide any such analysis. Indeed, neither the *Moses Cone* Court's rhetoric about contracts nor its presumption was relevant to the issue

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state of facts at the time of agreement. Therefore, most courts will grant relief for such a mistake, as they would for any other mistake of fact.”) But what's wrong with Justice Scalia's statement is not about the difference between a mistake of law or fact. It is about the state of the law existing at the time of contract formation. At that time, the parties did not mistakenly apprehend the state of the law. Under Scalia's model, they were not mistaken at all. The Court was mistaken.

20. 460 U.S. 1 (1983).

21. *Id.* at 24 (quoted in, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)).

22. *Id.* at 24–25 (quoted in, e.g., *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)).

23. See Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 704–705 (1996) (noting how foreign these ideas are to contract law).

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

25. See Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 29, 32, 34 (2003); see also *infra* text accompanying notes 45–58 (noting Justice Breyer's attempts to defend some of the Court's jurisprudence using contract law's default-rule theory).

the Court faced.<sup>26</sup> Even so, the dicta influenced the Court's arbitration jurisprudence, simultaneously declaring freedom of contract while imposing a national policy favoring arbitration.<sup>27</sup>

For a few years, it remained possible for parties to opt out of the FAA and choose the law of a particular state, as suggested by 1989's *Volt Information Sciences, Inc. v. Stanford University*.<sup>28</sup> This case addressed a construction contract naming California the applicable law. The relevant statute allowed courts to stay arbitration pending litigation among third parties in order to avoid the risk of potentially inconsistent rulings on like facts. Amid a payment dispute, the contractor wanted to arbitrate, but the owner wanted to litigate against the contractor and others not party to the arbitration agreement. In a rare and never-repeated show of restraint, the Supreme Court agreed with the California court's ruling for the owner. Federal policy favors arbitration and requires interpreting contracts accordingly, but there is no policy or rule about particular arbitration procedures.<sup>29</sup> For the same reasons, state law was not preempted, Chief Justice Rehnquist's opinion concluded.

*Volt's* respect for contract and choice of law was short-lived, however, truncated in a nearly identical case six years later, *Mastrobuono v. Shearson Lehman Hutton, Inc.*<sup>30</sup> A standard-form securities-brokerage contract chose New York law and directed arbitration under industry rules. After customers won an arbitration award of punitive damages, the broker wanted it vacated because, under New York law, arbitrators lacked the authority to award punitive damages.<sup>31</sup> The Court refused, in an opinion by Justice Stevens, saying the contract did not manifest intention to include New York's law limiting arbitrators' power to award punitive damages. The Court perceived a conflict between the choice of New York law, so limiting arbitrator power, and the securities arbitrator's rules allowing punitive awards.<sup>32</sup> In fact, there was no conflict. The choice of New York law could easily mean no punitive damages could be awarded in arbitrations that the contract said would be used to resolve disputes. Indeed, that was the brokerage firm's simple and compelling argument, which would be deferential to New York law and faithful to the contract.

Though stating that arbitration is a matter of contracts and contract law, the Court instead chose a convoluted approach that first created ambiguities in the

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26. The issues concerned the finality and appealability of judgments.

27. See *Sternlight*, *supra* note 23, at 660–61, 674 (“[T]he Court significantly recharacterized the policy and purpose of the FAA, proclaiming the myth that commercial arbitration . . . should be favored regardless of the parties' intentions.”).

28. 489 U.S. 468 (1989).

29. *Id.* at 477.

30. 514 U.S. 52 (1995).

31. See *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 834 (N.Y. 1976) (“The law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State.”).

32. *Mastrobuono*, 514 U.S. 52.

contract and then applied federal arbitration jurisprudence, along with a modicum of state contract law, to resolve them. Standard contract-law principles<sup>33</sup> and conflict-of-laws rules<sup>34</sup> hold that a choice of law incorporates into a contract the law of the named jurisdiction—including rules barring arbitrators from awarding punitive damages. But the Court decided that a choice of law could mean less than that and that the relevant law's scope could be limited, including by ignoring arcane rules like a state law denying arbitrators the power to award punitive damages. Presto: the contract contained an ambiguity.<sup>35</sup>

To resolve the ambiguity, the Court used three principles. The first was a fair rendering of contract law, construing ambiguities against the drafter, the brokerage.<sup>36</sup> The second was a strained rendering of another contract-law principle, harmonizing all terms of a contract, which the Court thought required denying effect to part of the New York law to uphold a broader scope of the arbitration clause. But the opposite reading is equally consistent with that principle. The Court's third, and most striking, ground was the expanding federal arbitration law hatched in *Moses Cone*: “[A]mbiguities as to the scope of the arbitration clause [are] resolved in favor of arbitration.”<sup>37</sup> The upshot is to require crystal clarity on terms restricting arbitration power, even in a standard-form adhesion contract.<sup>38</sup> The common law requires no such clarity, and it is a stretch to contend that the Court's interpretive gymnastics are merely supplying a default rule that parties can readily reverse at will. Worse, a basic principle of contract law is to interpret similar contracts similarly, yet *Mastrobuono* does not square with *Volt*. *Mastrobuono* silently overruled *Volt*—and, thus, diminished respect for states, contracts, and contract law—putting the Court's novel national policy favoring arbitration ahead of the country's longer-standing tradition favoring freedom of contract.

The Court's 1995 *Allied-Bruce Terminix Co. v. Dobson*<sup>39</sup> opinion completed the diminution of parties' abilities to choose the applicable law—despite the

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

34. RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 186 cmt. b; 187(1); 187(3) cmt. b, c, h; cmt. a–j, Reporter's Note; 207.

35. In dicta, the Court suggested that, if the contract were silent about punitive damages, silence would manifest no intention to bar them and they would be allowed because the FAA would preempt New York's law barring them. *Mastrobuono*, 514 U.S. at 59. Why this is so is not clear. The Court assumed that a state law limiting remedies available in arbitration was anti-arbitration, unsurprising given the Court's enthusiasm for expansive readings of the FAA. But such a law is not obviously anti-arbitration. Punitive damages are allowed in tort actions but not for breach of contract, and there are considerable differences between procedural and substantive rules of law on the one hand and the law of remedies on the other.

36. For the two contract-law principles, the Court rightly drew upon state law (of New York, the applicable law selected in the contract, as well as of Illinois, where the contract was formed), along with the Restatement (Second) of Contracts. *Mastrobuono*, 514 U.S. at 62–63.

37. *Id.* at 62.

38. See WILLISTON, CONTRACTS, *supra* note 33, § 15.11.

39. 513 U.S. 265 (1995).

Court's rhetoric stressing freedom of contract. Justice Breyer's opinion addressed the FAA's scope, capturing contracts that "evidenc[e] a transaction involving [interstate] commerce."<sup>40</sup> The issue was whether to read this as a directive from Congress about the population of contracts within its reach or as a reference to parties' intentions about the scope of the deals they make. The case concerned a contract between a homeowner and a termite-protection provider. The Alabama Supreme Court denied that the FAA applied, considering the local nature of the contract and lack of any indication that the parties contemplated the transaction involving interstate commerce.<sup>41</sup>

The U.S. Supreme Court reversed, deciding that "contemplation of the parties" is not the test for whether the FAA applies.<sup>42</sup> The Court instead stated a test solely based on its declarations about what constitutes interstate commerce. It took this position by reaffirming *Southland's* preemption a decade earlier, despite twenty state attorneys general filing amicus briefs to overrule it.<sup>43</sup> The Court invoked *stare decisis* and the statute's recently discovered national policy favoring arbitration. But the ruling gets contract law backwards. Contract law is all about contemplation of parties. Aside from narrow technical corners such as the statute of frauds,<sup>44</sup> contract law is not about statutory directives channeling agreements into baskets for legislatively ordained treatment or courts setting default rules that parties are not allowed to change. Despite stern proclamations that its arbitration jurisprudence is all about contracts and contract law, the Court curtailed private autonomy to opt out of the Court's national policy in favor of state law.

## B. Clarity of Intention

Even in the rare cases when the Court tries to imagine what the contracting parties actually intended, or would have intended had they thought about an issue, its national policy retains a strong presence. The result is jurisprudence ringing of classical contract-law rhetoric worked into forms that make contract law a tool of social control. For example, in *First Options of Chicago, Inc. v. Kaplan*,<sup>45</sup> the Court addressed an agreement between a company and a securities firm containing an arbitration clause. A dispute had arisen between individuals who had not signed the agreement, who wished to litigate, and the securities firm, which wanted to arbitrate. At issue was whether a court or

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40. 9 U.S.C. § 2 (2006); *Allied-Bruce*, 513 U.S. at 265.

41. As a result, Alabama law applied, which then barred arbitration. *Allied-Bruce Terminix Co. v. Dobson*, 628 So.2d 354 (Ala. 1993).

42. See *Allied-Bruce*, 513 U.S. at 266 ("For several reasons, this 'commerce in fact' interpretation is more faithful to the statute than the 'contemplation of the parties' test adopted below and in other courts.").

43. See *id.* at 272 ("[W]e find it inappropriate to reconsider [*Southland*, which] is by now well-established law."); *supra* text accompanying note 14.

44. Even such technical statutory directives are subject to considerable ameliorating doctrines, such as part performance. See *infra* note 113.

45. 514 U.S. 938 (1995).



arbitrator decides if the arbitration clause governs. Reciting standard rhetoric, the Court said that determination “turns upon what the parties agreed about *that* matter,”<sup>46</sup> usually by applying “ordinary state-law principles that govern the formation of contracts.”<sup>47</sup> Having recited the rhetoric, the Court retreated with an “important qualification”[:] courts cannot assume parties agreed to arbitrate such questions absent “clear and unmistakable” evidence of that intention.<sup>48</sup>

The holding in *First Options* creates a special rule of federal arbitration jurisprudence alien to contract law: amid ambiguity about who decides whether an arbitration clause governs, doubts are resolved in favor of the courts. That special rule differs from the Court’s special rule of arbitration interpretation, invented in *Moses Cone* and extended in *Mastrobuono*, resolving ambiguities in the scope of a clause in favor of arbitration. Justice Breyer distinguished the cases using hypothetical-bargain analysis popular among contract-law theorists.<sup>49</sup> He supposes that parties to agreements with arbitration clauses “likely gave at least some thought to the scope of arbitration” so that, given a national policy favoring arbitration, the Court demands clarity to show parties did *not* intend arbitration—as in *Moses Cone* and *Mastrobuono*.<sup>50</sup> In contrast, “who (primarily) should decide arbitrability” is “rather arcane” and “[a] party often might not focus upon that question.”<sup>51</sup> After reverting to contract rhetoric—under “the principle that a party can be forced to arbitrate only those issues it has specifically agreed to submit to arbitration”<sup>52</sup>—the Court insisted on “clear and unmistakable” evidence of that intent, inventing a standard alien to contract law and of such limited use in law generally as to bewilder rather than enlighten.<sup>53</sup>

Despite the attempt at using contract theory’s hypothetical-bargain analysis, its use underscores weaknesses in the Court’s jurisprudence, not strengths in Breyer’s engagement. The analysis supposes that people forming contracts with arbitration clauses make degrees of calculation about matters closely related. The Court does not justify its belief that there are significant differences between whether an issue will be resolved by arbitration and whether a court or arbitrator decides fights over that. Both are arcane. Parties often will give neither issue the slightest thought. Those giving thought to one can as likely be supposed to have given thought to the other. The *First Options* Court’s analysis

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46. *Id.* at 943.

47. *Id.* at 944.

48. *Id.* (quoting a case from the context of labor arbitration, *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643 (1986) (refusing to compel arbitration of labor dispute though possibly within scope of collective bargaining agreement)).

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

50. *First Options*, 514 U.S. at 945 (internal quotation omitted).

51. *Id.*

52. *Id.*

53. *See id.* at 944 (“Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.”).

also departed from contract law when applying its new test to the facts. In deciding that the reluctant parties had not “clearly and unmistakably” vested the arbitrator with decision-making power, the Court concentrated not on the terms of the agreement, but on post-contractual conduct.<sup>54</sup>

In *Howsam v. Dean Witter Reynolds, Inc.*, the Court saw the obverse of *First Options*, finding requisite “clear and unmistakable” intent.<sup>55</sup> A dispute under a brokerage contract requiring arbitration posed a threshold issue of whether an arbitrator or court should decide if, under industry arbitration rules, a time limitation for bringing claims applied or had run. As usual, the Court recited rhetoric (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit”)<sup>56</sup> then added qualifications (“[There is a] liberal federal policy favoring arbitration agreements”<sup>57</sup> with a heightened clarity standard about the “who decides” issue<sup>58</sup>). The Court elaborated its hypothetical-bargain analysis from *First Options*, this time finding clear and unmistakable intent bound up in the contract’s structure and language. In this exercise, however, the Court drew inferences less about what parties would want under the common law of contracts, and more about what they would want given the Court’s FAA jurisprudence—while making it no clearer what the imported and rarely-used concept of “clear and unmistakable” means.

Again, the hypothetical-bargain analysis is a nice touch, but proves more rhetorical than real, as indicated by Justice Thomas’s concurring opinion in *Howsam*. He stressed that “arbitration is a matter of contract”—and he really meant it.<sup>59</sup> As the Court held in *Volt*, under the FAA, courts must enforce agreements to arbitrate just as they would enforce what Justice Thomas called “ordinary contracts”—in “accordance with their terms.”<sup>60</sup> *Volt*’s holding directs courts to choice of law clauses in agreements containing arbitration clauses and tells courts to enforce them. The *Howsam* contract chose the law of New York, whose highest court construed a nearly identical agreement to mean the decision was for an arbitrator, not a court.<sup>61</sup> Justice Thomas is thus clear: state contract law governs, not federal arbitration jurisprudence. On inspection, therefore, the Court’s *Howsam* opinion emerges as characteristically opaque: expressing fealty to contract law while advancing arbitration jurisprudence

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54. *Id.* at 946.

55. 537 U.S. 79 (2002).

56. *Id.* at 83.

57. *Id.*

58. *See id.* (“Although the Court has also long recognized and enforced a ‘liberal federal policy favoring arbitration agreements,’ it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, i.e., the ‘question of arbitrability,’ is ‘an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.’”) (internal citation omitted).

59. *Id.* at 87 (Thomas, J., concurring).

60. *Id.*

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

expressing a national policy favoring arbitration over freedom of contract.

### C. Federal Severing of Private Contracts

The common law of contracts takes a contextual approach to determining the effects of one clause's invalidity on the rest of a contract.<sup>62</sup> The Court's federal arbitration jurisprudence imposes a severability rule so that the existence of an arbitration clause—even in a fraudulent, illegal, or unconscionable bargain—leaves determinations of the bargain's validity for arbitration, not the courts. The Court minted this tool in *Prima Paint Co. v. Flood & Conklin Manufacturing Co.*,<sup>63</sup> in which a business buyer sued its seller to rescind a contract based on fraud, and the seller invoked the contract's arbitration clause. The seller won because the Court made a stunning move: it severed the arbitration clause from the rest of the contract. The Court observed that the buyer challenged the contract as a whole as fraudulently induced, but did not specifically challenge the arbitration clause.<sup>64</sup> So the arbitration clause stood, and the Court directed the fraud claim to arbitration.<sup>65</sup> Nothing in the contract authorized the Court to do so, and the common law of contracts warrants the opposite.

Despite controversy,<sup>66</sup> the Court repeatedly embraces its severability invention. In *Buckeye Check Cashing, Inc. v. Cardegna*,<sup>67</sup> a borrower objected to usurious terms as illegal under Florida law, and the lender invoked an arbitration clause. The Florida Supreme Court held the entire contract void, including its arbitration clause.<sup>68</sup> The U.S. Supreme Court reversed, citing *Prima Paint's* federal procedure to sever the arbitration clause from the rest of the contract. Justice Scalia also announced: “The issue of the contract’s validity is different from the issue whether any agreement . . . was ever concluded”<sup>69</sup>—

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62. See E. ALLEN FARNSWORTH, *CONTRACTS* 679 § 5.7–5.9 (2d ed. 1990); RESTATEMENT (SECOND) OF CONTRACTS § 184; Mark Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 42, 46–48 (1995).

63. 388 U.S. 395 (1967).

64. *Id.* at 406.

65. The basis for this invention of federal arbitration jurisprudence, which is not based on state contract law, was the FAA. Section 4 outlines procedures to compel arbitration and stay litigation—when the court, after a hearing, is “satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.” 9 U.S.C. § 4 (2006). When reviewing an application to stay under FAA section 3, the Court found that section 3 limits the court’s consideration to issues “relating to the making and performance of the agreement to arbitrate.” *Prima Paint*, 388 U.S. at 404 (analyzing 9 U.S.C. § 3 in light of 9 U.S.C. § 4).

66. See, e.g., Richard L. Barnes, *Prima Paint Pushed Compulsory Arbitration Under the Erie Train*, 2 BROOK. J. CORP. FIN. & COM. L. 1 (2007); Richard C. Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819 (2003); Stephen J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107 (2007). For a resounding defense of the severability doctrine, based in part on the policies favoring arbitration, but mostly on earnest attempts to anchor it in traditional contract-law doctrine, see also Rau, *supra* note 25.

67. 546 U.S. 440 (2006).

68. *Cardegna v. Buckeye Check Cashing Inc.*, 894 So. 2d 860 (Fla. 2005).

69. *Cardegna*, 546 U.S. at 442 n.1.

meaning essentially that courts can decide questions about contract formation, such as whether a party had contractual capacity. But nothing in contract law makes any such distinction to disempower courts to decide the legality of a contract. *Buckeye* thus sustains an invention of uncertain congruity with contract law, and of certain incongruity with the Court's stern declarations that it never holds people to arbitration agreements to which they did not assent.<sup>70</sup>

The apotheosis of the separation of arbitration jurisprudence from contract law using severability is *Rent-A-Center, West, Inc. v. Jackson*.<sup>71</sup> An employee-at-will signed an employment application containing nothing but an agreement to arbitrate disputes and related rules, including a meta-clause directing that arbitration would resolve whether that agreement to arbitrate was valid. The employee sued for unlawful discrimination and alleged that the agreement was unconscionable because its arbitration rules were obnoxious.

Justice Scalia took the familiar formula, starting with incantations: arbitration is a matter of contract; the FAA puts arbitration clauses on an equal footing with other contracts; courts must enforce arbitration agreements in accordance with their terms; and agreements to arbitrate are, like other contracts, subject to defenses "such as fraud, duress, or unconscionability."<sup>72</sup> The rhetoric restated, the Court then applied federal arbitration jurisprudence, not contract law, and severed the clause. In a rare show of candor, however, the Court acknowledged that the source of its rule is federal arbitration jurisprudence.<sup>73</sup> Despite that acknowledgement, the Court insisted that its holding "merely reflects the principle that arbitration is a matter of contract."<sup>74</sup>

#### D. Dealing with Silence by Federal Judicial Fiat

Contractual silence is a vexing problem in the common law that has at least twice bedeviled the Supreme Court's arbitration jurisprudence as well. In *Green Tree Financial Corp. v. Bazzle*,<sup>75</sup> Justice Breyer's opinion returned to the issue of "who decides" and what "clear and unmistakable" intent means. The arbitration clause at issue in *Bazzle* was silent about whether arbitration may take the form of class arbitration. The South Carolina Supreme Court held that its contract law takes such silence to permit class arbitration.<sup>76</sup> The U.S.

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70. *E.g.*, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

71. 130 S. Ct. 2772 (2010).

72. *Id.* at 2776 (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)) (citing *Buckeye*, 546 U.S. at 443; *Volt*, 489 U.S. at 478).

73. *Rent-A-Center*, 130 S. Ct. at 2780 n.4 ("The severability rule is a 'matter of substantive federal arbitration law,' and we have repeatedly 'rejected the view that the question of 'severability' was one of state law, so that if state law held the arbitration provision not to be severable a challenge to the contract as a whole would be decided by the court.'").

74. *Id.* at 2777 (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003); *Howsam*, 537 U.S. at 83–85; *First Options*, 514 U.S. at 943).

75. 539 U.S. 444 (2003).

76. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2003).

Supreme Court reversed because the state court wrongly thought that question was for the judiciary when—as a matter of federal arbitration jurisprudence, particularly in light of *Howsam*—it was for the arbitrator to decide (the Court finding “clear and unmistakable” party intention).<sup>77</sup>

*Bazzle* confused people (as much of the Court’s arbitration jurisprudence does). That confusion manifested when the Court chastised arbitrators for being confused and rebuked them for allegedly not following the law. *Stolt-Neilsen S.A. v. AnimalFeeds International Corp.*<sup>78</sup> involved a commercial shipping contract with a standard arbitration clause. A customer wanted to use class arbitration to air allegations that the shipping company illegally fixed prices for many years. The two agreed that their contract did not say one way or the other whether class arbitration was authorized. So they asked arbitrators to rule on the meaning of that silence.<sup>79</sup> The arbitrators held a hearing, took testimony, and researched the law and industry practice. Their written report concluded that the clause authorized class arbitration, citing the clause, custom in the shipping industry, and general arbitration practice plus contract law precedents from New York and elsewhere.<sup>80</sup> The shipping company objected and sued to have that ruling vacated.

The Court vacated the award, accusing the arbitrators of exceeding their power under the FAA.<sup>81</sup> The Court recited the full litany of its incantations—nearly every specimen of contract rhetoric the Court has used to characterize its arbitration jurisprudence since 1983: arbitration-clause interpretation is a matter of state contract law;<sup>82</sup> “arbitration ‘is a matter of consent, not coercion’”;<sup>83</sup> the FAA’s purpose is to make arbitration clauses enforceable according to their terms;<sup>84</sup> arbitrators derive power from contract;<sup>85</sup> and arbitration procedures can be freely designed because arbitration is a consensual matter.<sup>86</sup> Justice Alito then wrote that it is “clear from our precedents and the contractual nature of arbitration that courts and arbitrators give effect to these contractual limitations [and we] must not lose sight of the

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77. *Bazzle*, 539 U.S. at 452.

78. 130 S. Ct. 1758 (2010).

79. *Id.* at 1761.

80. *Id.*

81. *Id.* at 1770. Section 10(a)(4) of the FAA authorizes federal courts to vacate awards when arbitrators exceed their powers. 9 U.S.C. § 10(a)(4) (2006).

82. *Stolt-Neilsen*, 130 S. Ct. at 1773.

83. *Id.* (quoting *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

84. *Id.* (citing *Volt*, 489 U.S. at 479; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 58 (1995)).

85. *Id.* at 1774 (citing *AT&T Techs., Inc. v. Commc’ns Workers*, 475 U.S. 643, 648–49 (1986); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960)).

86. *Id.* (quoting *Mastrobuono*, 514 U.S. at 57) (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Volt*, 489 U.S. at 479). Conspicuously, the Court failed to cite an opinion from its prior term contradicting its hyperbole about how important contracts and contract law really are in the Court’s arbitration jurisprudence, *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009), discussed *infra* text accompanying notes 90–95.

purpose of the exercise: to give effect to the intent of the parties.”<sup>87</sup>

Despite saying all of that, the Court never showed how a contract-law analysis would apply to the case or yield a result different from what the arbitrators reached under New York contract law. Instead, after acknowledging that sometimes it is appropriate to supply missing terms to agreements otherwise sufficiently definite to be binding,<sup>88</sup> it simply declared that the difference between “arbitration” and “class arbitration” is too vast to imply such a term. This is not a statement of contract law, of course, but of federal-arbitration-law opinion, for which the Court cited no authority. The Court’s thick and stirring rhetoric about its devotion to contract law makes its reliance on perceived differences between direct and class arbitration pale by comparison.

#### E. The Death of Contract and the Denial of Death

Under the common law of contracts, people are usually free to make bargains on any terms they wish and to have those terms enforced. That is the essence of freedom of contract. Contract law’s third-party-beneficiary doctrine recognizes that strangers may enforce contracts only in narrow circumstances when parties to contracts have manifested intention to grant them that right. This doctrine exquisitely illustrates a corollary principle called freedom *from* contract.<sup>89</sup> The Court’s arbitration jurisprudence gives short shrift to both fundamental principles, though proclaiming devotion to them.

In *Arthur Andersen LLP v. Carlisle*,<sup>90</sup> clients sued professional advisors after a tax shelter the advisors fashioned was held illegal. Contracts between the clients and a management firm had arbitration clauses; but the firm was bankrupt, so that party and its contracts were out of the case. Still, the advisors invoked those contracts, to which they were not parties, to seek a stay. Lower courts denied the stay given that the advisers were strangers to the contracts. In an opinion by Justice Scalia, the Court reversed.

The opinion begins with the familiar incantations—arbitration agreements are contracts that federal law puts on equal footing with other contracts, and state law governing contracts generally applies to determine what contracts are enforceable.<sup>91</sup> It added that the FAA directs courts to stay litigation in the face of arbitration clauses found binding under state law.<sup>92</sup> The Court declared that the lower courts erred in holding that strangers to contracts cannot obtain stays under arbitration clauses because, it said, state law allows “a contract to be enforced by or against nonparties to the contract through ‘assumption, piercing

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87. *Stolt-Nielsen*, 130 S. Ct. at 1774–75.

88. *Id.* at 1775 (citing RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979)).

89. *E.g.*, Richard Speidel, *Contract Theory and Securities Arbitration: Wither Consent?*, 62 BROOK. L. REV. 1335, 1337 (1996).

90. 129 S. Ct. 1896 (2009).

91. *Id.* at 1902.

92. *Id.*

the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.”<sup>93</sup>

The Court did not explore how any of those theories could give the advisors rights against the clients under the latter’s agreements with the management firm. None of the listed theories work. The only theory the advisors asserted was estoppel, the equitable doctrine available to do justice when legal principles fail, but that was unlikely to be applicable on the facts. So the Court simply declared that third-party-beneficiary law might be a sufficient ground and reversed on that basis. But that was an even wilder stretch because there was no evidence that the clients intended for the advisors to have rights under their contracts with the management firm. Although state contract law on third-party beneficiaries varies slightly from state to state, all at minimum require the third party to prove that the contract parties intended them to have rights.<sup>94</sup> The Court’s assertions that arbitration is a matter of contractual consent, not coercion, thus fall flat.<sup>95</sup>

The clearest declaration of the death of contract in federal arbitration jurisprudence is *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>96</sup> The Court in *Hall Street* declared that parties are not allowed by contract to supplement FAA grounds for judicial review of arbitration awards. The FAA states the grounds courts may invoke to vacate or modify an award, including fraud, arbitrator misconduct, or (as in *Stolt-Neilsen*) an arbitrator’s exceeding his powers.<sup>97</sup> The parties in *Hall Street* provided by contract that awards under the arbitration agreement they assented to would be subject to judicial review for erroneous conclusions of law. The arbitrator drew such an erroneous conclusion, and the party it harmed sought judicial review. The Supreme Court refused to enforce

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93. *Id.* at 1902 (quoting WILLISTON ON CONTRACTS § 57:19, 183).

94. *Compare* *Wilson v. Waverlee Homes*, 954 F. Supp. 1530 (M.D. Ala. 1997) (applying Alabama law to require intention of the parties to benefit a stranger), *abrogated on other grounds*, *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1271–72 (11th Cir. 2002), *with* *E.I. DuPont de Nemours v. Rhone Poulenc Fiber & Resin*, 269 F.3d 187 (3d Cir. 2001) (applying Delaware law to require not only intention to benefit but also either intention to make a gift or to discharge a debt and for that point to be a material part of the exchange).

95. Nor could the Court avoid that criticism by blaming the statute, as it tried to do when writing: “If a written arbitration provision is made enforceable against (or for the benefit of) a third party under state contract law, the statute’s terms are fulfilled.” *Arthur Andersen*, 129 S. Ct. at 1902. Professors Stone and Bales put the point presciently in their casebook without adverting directly to *Arthur Andersen*, wondering whether third-party-beneficiary status should be determined by state contract law or by special federal law congruent with federal preemption and liberal federal-arbitration policy. *See* STONE & BALES, *supra* note 1, at 418. They ask if the federal presumption favoring arbitration commands that states grant third-party-beneficiary status “whenever there is a colorable claim” to that standing and then ask, poignantly, “If so, what happens to the bedrock principle that arbitration is grounded in consent of the parties?” *Id.* The *Arthur Andersen* case, like the dozen others considered in this article, raises the issue of whether that “bedrock principle” is more rhetorical than real.

96. 552 U.S. 576 (2008); *see* Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1105 (2009) (“This decision constitutes arguably the most significant constraint on party autonomy in arbitration that the Court has imposed.”).

97. 9 U.S.C. § 10 (2006); *see supra* note 81 (summarizing grounds the FAA authorizes courts to use to vacate awards).

that contract, demolishing contractual freedom,<sup>98</sup> despite forty years of proclaiming that its arbitration jurisprudence rests on contract and is intended to enforce contracts. The Court thus shows both the death of contract at its hands and its denial of that death.

A final example is *AT&T Mobility v. Concepcion*,<sup>99</sup> in which the issue was whether California unconscionability law applies to “any contract” within the meaning of the FAA as the Court construes it. The case involved a form contract about which a consumer claimed a fraud of thirty dollars and sought to wage a class arbitration—which a contract clause barred. California contract law classified as unconscionable such procedurally adhesive clauses that can be used to prevent people from banding together to challenge crooked practices that involve stealing small sums from large numbers of people.<sup>100</sup> The Court said the FAA preempted that contract law.

The case showed that the Court’s rhetoric is at war with itself: rhetoric from pure nineteenth-century freedom of contract suggests upholding the bar because the clause is in the written agreement; rhetoric about state contract law suggests striking the bar because the written agreement is invalid. The Court’s opinion, however, was oblivious to this tension. Instead, the Court followed its usual course, offering an opinion rich with empty rhetoric about arbitration being a creature of contract. At the same time, the Court was more explicit than ever that what matters in these cases is the Court’s powerful national policy strongly favoring a particular form of arbitration over other methods of dispute resolution.

The Court could not accept the validity of California contract law because it did not advance its favored national policy. Justice Scalia gave a new definition of that national policy, again combining two conflicting ideas while pretending they are in harmony: “to ensure the enforcement of arbitration agreements according to their terms, so as to facilitate informal, streamlined proceedings.”<sup>101</sup> The opinion fights tirelessly but unsuccessfully to prove that it has not made up this new version of the national policy. It struggles strenuously but unsuccessfully to persuade that there is no conflict between its devotion to arbitration and basic principles of Anglo-American contract law.

The Court commits contradictions that manifest a lack of understanding of contract law and even life. Most strikingly, on one page Justice Scalia observes that consumer contracts are totally “adhesive” today,<sup>102</sup> yet, on the very next page, he strikes the California law because the aggregate actions it ordains are

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

99. 131 S. Ct. 1740 (2011).

100. *E.g.*, *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124 (2d Cir. 2010) (reviewing and applying California unconscionability doctrine to arbitration clause in consumer-finance contract), *vacated and remanded*, 131 S.Ct. 2989 (2011).

101. *AT&T Mobility*, 131 S. Ct. at 1743.

102. *Id.* at 1750.



not “consensual.”<sup>103</sup> The passages are oblivious to how difficult it is to conceive of an adhesion contract as consensual. There may be ways to reconcile these propositions, but it would require much-more-honest confrontation with the fact that it is the national policy favoring arbitration alone that is driving things—not contract, not freedom, not volition, and not consent.

Nor did Justice Breyer’s dissenting opinion address or appreciate the gap between what the Court says and what it does about contracts in its arbitration jurisprudence. It instead fights the majority on the statute’s purpose concerning arbitration as a national policy, on the differences between arbitration and litigation, and on the differences between direct and class arbitration.<sup>104</sup> Only Justice Thomas, as usual, offered any serious effort to engage in contract-law discussion and analysis. He struggled to map the statute onto the law of contracts. He took the statutory text literally, though, treating the word “revocation” in its savings clause to recognize only those defenses to arbitration agreements that affect the making of a contract rather than its enforceability or validity.<sup>105</sup> This enabled him to concur. Though flawed, it is a far better ground than the majority offered because it is faithful to contracts and contract law.

### III

#### EXPLAINING AND ASSESSING THE RHETORIC–REALITY GAP

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

#### A. Doctrinal Explanations

Scholars could defend the Court’s arbitration jurisprudence by reinterpreting it in different ways, loosely classifiable as doctrinal. Doctrinal explanations might assert that: (1) there is less difference than appears between rhetoric and reality, or between any gap the Court shows and gaps prevalent in other areas of law or the general law of contracts; or (2) contract law’s default rule theory explains the Court’s jurisprudence, including any perceived

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103. *Id.* at 1750–51.

104. *Id.* at 1757–59.

105. *Id.* at 1753–55.

differences between what it says and what it does. However, neither retelling of the Court's arbitration jurisprudence is compelling. Instead, the best doctrinal account is less an explanation than another anomaly requiring explanation: the Court's rhetoric reflects nineteenth-century classical contract law, whereas its applications evince a caricature of late-twentieth-century, post-realist contract law that Grant Gilmore called "contorts" in his famously enigmatic book, *The Death of Contract*.<sup>106</sup>

### 1. Rhetoric and Reality

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

At a more particular level, it is possible to claim that a peculiarly vibrant rhetoric–reality gap pervades contract law. Besides freedom of contract, judges routinely proclaim mantras in contract law supporting such principles as that no punitive damages are allowed, that mutuality is required, and that party autonomy is the standard. Yet judges do periodically award damages greater than necessary to compensate for breach of contract (such as to "punish willful breach"); case analysis shows that mutuality is often lacking when binding contracts are found; and party autonomy has faded into the deep background amid the past century's proliferation of standardized forms. To that extent, the Court's arbitration jurisprudence may replicate national contract-law jurisprudence.

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

On the other hand, a variation on this explanation might question whether the gap portrayed in part II is exaggerated because of contract law's breadth and capaciousness. After all, contract law governs an infinite variety of deals. That often requires tailoring general doctrines to particular contexts, such as

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106. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

transactions in goods, land sales, construction contracts, or consumer exchanges. The Court's adaptation of general contract law to the special context of arbitration may simply advance a grand tradition—still about freedom of contract, warranting the rhetoric—but with applications that differ slightly from applications in other contexts. Some of the Court's rules may be explained in these terms, particularly its rules for interpreting ambiguous expressions—construing doubtful clauses to favor arbitration though insisting on clear and unmistakable evidence of intent to have arbitrators decide threshold questions.<sup>107</sup>

But many of the Court's arbitration-law doctrines depart from general contract law so considerably that they achieve a different purpose—one in the service of social control, not freedom of contract. Examples are the Court's announcing federal rules in *Allied-Bruce* declaring which contracts are within the FAA's scope,<sup>108</sup> expanding the enforcement rights of strangers to contracts under *Arthur Andersen*,<sup>109</sup> and denying party autonomy to contract for judicial review of arbitration awards as stated in *Hall Street*.<sup>110</sup> The rules more clearly advance the purpose of a national policy committed to arbitration than a national policy committed to freedom of contract—while denying doing that—as evidenced in the Court's approach to choice of law clauses in such cases as *Mastrobuono*<sup>111</sup> and in its severability rule stated in cases such as *Prima Paint*, *Buckeye*, and *Rent-A-Center*.<sup>112</sup> Thus, there remains something unusual about the rhetoric–reality gap in the Court's arbitration jurisprudence requiring further explanation.

## 2. Default-Rule Theory

Another doctrinal explanation for the Court's jurisprudence, and its gap between rhetoric and reality, reinterprets the jurisprudence in terms of default-rule theory in contract law. This framework appreciates that no contract can be perfectly complete given transaction costs and limitations of human foresight. One function of contract law is to provide rules that apply when a contract does not address an issue or that apply no matter what, courtesy of public policy. Most contract-law default rules can be changed (such as risk of loss to goods in

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107. *Compare* *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), *with* *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995). *See supra* text accompanying notes 20–27 (discussing *Moses Cone*); *supra* text accompanying notes 45–54 (discussing *First Options*).

108. *See supra* text accompanying notes 39–44 (discussing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995)).

109. *See supra* text accompanying notes 90–95 (discussing *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009)).

110. *See supra* text accompanying notes 96–98 (discussing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)).

111. *See supra* text accompanying notes 30–38 (discussing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)).

112. *See supra* text accompanying notes 67–70 (discussing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)); *supra* text accompanying notes 71–75 (discussing *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010)).

transit or the destruction of a contract's subject matter); the few that cannot (such as the compensation principle or the statute of frauds) exhibit a strong and readily identifiable rationale consistent with fundamental principles of contract law and accompanied by ameliorating doctrines to avoid harsh results in particular cases.<sup>113</sup>

The strongest examples supporting the default-rule explanation of the Court's jurisprudence are the Court's express statements of this approach in cases such as *Howsam* and *First Options*. In those cases, the Court is explicit in using hypothetical-bargain analysis and stating that the Court's goal is to "align probable expectations with the understood comparative expertise of institutional arbitrators in interpreting their own rules."<sup>114</sup> But, aside from being rare for that feature, the talk remains more rhetorical rather than real; the rest of the Court's arbitration rules tend to be statements of judicial fiat in the name of the national policy favoring arbitration, without regard to presumed or probable party intent.

Exquisitely, *Allied-Bruce* denies that party contemplations matter when determining whether the Court's national policy or state law should govern, favoring a determination based on what the Court declares to involve interstate commerce.<sup>115</sup> Another strong example negating the default-rule explanation is the Court's express denial of this approach in *Hall Street*. Interpreting the FAA, the Court refused to validate a contract clause authorizing a court to review whether an arbitration award rested on erroneous legal premises.<sup>116</sup> This denial of freedom of contract illustrates how default-rule theory simply crumbles as an explanation of the Court's jurisprudence and its rhetoric-reality gap.<sup>117</sup>

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

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

114. See *supra* text accompanying notes 45–58 (noting Justice Breyer's attempts to defend some of the Court's jurisprudence using contract law's default-rule theory).

115. See *supra* text accompanying notes 39–44 (discussing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995)).

116. See *supra* text accompanying notes 96–98 (discussing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)).

117. Some language toward the end of the *Hall Street* opinion obliquely suggests some possibility of altering the Court's rule by reference to general principles of state law discussed in *Volt*, but that escape route is neither explicated nor highly reliable.

such as *Mastrobuono* do not promote free party choice over whether a particular state's law or the Court's FAA law should govern. That is not exactly consistent with default-rule theory.

*Arthur Andersen* cannot be squared with default-rule theory. The opinion expands the Court's presumption favoring arbitration by finding that parties who signal will to arbitrate anything agree to arbitrate everything. Conceiving of the case in default-rule terms, Professor Rau suggests this analogy: If you expressly agree to arbitrate about the sale of fruit, then you implicitly agree to arbitrate about whether the sale of tomato is a sale of fruit.<sup>118</sup> The analogy may be persuasive in principle, but does not justify *Arthur Andersen*.

The question in *Arthur Andersen* was whether a party may be compelled to arbitrate an issue, not against a party it made that agreement with, but against a party with whom it made no such agreement. That is not analogous to the fruit-tomato example. Indeed, in compelling that arbitration, the Court distinguished its rhetoric suggesting it does not compel people to arbitrate issues they did not agree to arbitrate. The result is greater reluctance to compel arbitration about classifying tomatoes under an agreement to arbitrate about fruit and a greater willingness to compel arbitration against a stranger to a contract so long as that contract had an arbitration clause.<sup>119</sup>

Even if the default-rule theory of the Court's arbitration jurisprudence retains some purchase, another weakness in that conception is how many of the Court's default rules tend to be sticky. True, if classified as default rules, some are easy to contract around, such as avoiding ambiguity or using an adjective to modify the word arbitration if intending to authorize particular forms of arbitration, such as class arbitration. But it is much more difficult to circumvent other default rules, such as by selecting a law other than the FAA or by providing that no third parties can enforce an arbitration clause.

The logic, if not the language, of the Court's opinions indicate a stickiness not common in general contract-law default rules. As a contrast, consider such routine subjects as the default rule setting a reasonable time, which may be contracted around simply by stating dates and times. The Court's arbitration default rules, as a class, are more akin to warranty law that can only be disclaimed by following particular procedures, especially using unambiguous and specific language.<sup>120</sup> These rules are more familiar in the law of torts than

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118. See Alan Rau, *Arbitral Jurisdiction and the Dimensions of Party "Consent,"* 24 ARB. INT'L 199 (2008).

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

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

they are in the law of contracts, inviting a final doctrinal view of the Court's jurisprudence better classified as *contorts* than contracts.

### 3. Contorts

A final way to classify the Court's arbitration jurisprudence is as classical in rhetoric, but post-realist in application. The Court reflects two contending strands of contract law, one exuberantly and classically reflecting autonomy, the other consciously and modernly injecting a role for society in contracts and contract law. Contract law is rooted deeply in party autonomy and freedom and was historically unshackled by status-based impositions that distinguish contract from tort law. These deep roots and this vital distinction loom large in the Court's rhetoric about arbitration jurisprudence. Another view of contracts recognizes its distinction from tort as far more blurry and its roots in party autonomy often overstated. This view was charmingly dubbed "contorts" by Grant Gilmore in his controversial caricature of modern contract law, *The Death of Contract*.<sup>121</sup> This concept is more congruent with the Court's real applications in its arbitration jurisprudence, rhetoric aside.

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

### B. Legalistic Accounts

A likely explanation for the rhetoric–reality gap is that it is a tool to cover an inherent conflict in the Court's arbitration jurisprudence. The Court insists that there is a national policy favoring arbitration over litigation. That entails a policy disfavoring trial by jury as guaranteed by the Constitution along with other procedural due process.<sup>122</sup> To validate that national policy requires respecting such constitutional rights and associated traditions. It demands some voluntary basis to direct people to arbitration instead of the courthouse. That means contracts.<sup>123</sup> But, if parties have true freedom of contract, they could

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121. GILMORE, *supra* note 106.

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

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

interfere with that national policy. People could freely agree to levels of judicial review over arbitration awards,<sup>124</sup> be free from strangers asserting mandates to arbitrate disputes,<sup>125</sup> and easily escape the clutches of federal law, in favor of their chosen state law.<sup>126</sup> Allowing such a full range of contractual freedom would impede a national policy favoring arbitration. The tension thus induces rhetoric about contracts.

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

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

An additional explanation for the rhetoric–reality gap is the statutory basis of the Court's jurisprudence. The FAA was motivated by judicial reluctance to enforce contracts. The text of the statute speaks of contracts. The Court's talk of anchoring its application of the statute in contract law thus makes obvious sense. But it does not explain why the Court fashioned a separate federal arbitration law, distinct from the common law of contracts, and it certainly does not explain the rhetoric–reality gap. The choice to develop a different body of law is explicable, ultimately and simply, by the Court's determination that there

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That prospect ups the ante favoring contractual rhetoric.

124. *Contra* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008). *See supra* text accompanying notes 96–98.

125. *Contra* Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1902 (2009). *See supra* text accompanying notes 90–95.

126. *Contra* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). *See supra* text accompanying notes 39–44 (discussing *Allied-Bruce*); *supra* text accompanying notes 30–38 (discussing *Mastrobuono*).

should be a national policy favoring arbitration. Once that policy was declared, a new set of tools, not merely those found in general contract law, was necessary to implement it. The rhetoric compensates for the need to be faithful not only to the statute—and the Constitution and federalism—but to the Court's determination of the national policy it expresses. Again, though a partial explanation for the gap, this legalistic account is not definitive. After all, it suggests that the Justices consciously cultivate the rhetoric–reality gap. But evidence is scarce to support such disingenuous calculation. So the legalistic accounts are probably incomplete and further explanation warranted.

### C. Institutional Stories

A credible institutional explanation for the rhetoric–reality gap is the Justices' lack of interest in the subtleties required when grappling with contract law in the arbitration context. One version of this explanation suggests that the Court may think it is enforcing contracts according to the common law of contracts, supplemented with federal rules that are also contractual. The Justices occasionally cite contract-law authority.<sup>127</sup> In clear cases of departures, especially with its severability rule, the Court stresses forthrightly that it is developing and applying substantive arbitration law based on the FAA.<sup>128</sup> In others, such as the Court's presumptions concerning the question of “who decides” whether an issue is subject to arbitration, it even uses the tools of hypothetical bargain to struggle with contract-law terrain.<sup>129</sup> But those citations, admissions, and struggles are sparse. Most of the Court's citations in its arbitration opinions are to its own previous opinions, not to material on the common law of contracts or state contract law.

Another version of this explanation is more fundamental—that the Court is not equipped to attend to the required subtleties of the common law of contracts. There is a good deal of evidence to support this take. The Court has historically acknowledged its comparative disadvantage in matters of the common law, including contracts, which can vary among the states.<sup>130</sup> The Court has few occasions to immerse the Justices in the common law of contracts because it is rarely the court of last resort to address contract-law issues. This setting contrasts with the Court's routine and deep engagement in the fields that form most of its docket, such as constitutional law, federal courts,

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

128. *E.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010). *See supra* text accompanying notes 67–70 (discussing *Buckeye*); *supra* text accompanying notes 71–753 (discussing *Rent-A-Center*).

129. *E.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). *See supra* text accompanying notes 45–54 (discussing *First Options*); *supra* text accompanying notes 55–620 (discussing *Howsam*).

130. *See, e.g.*, *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (describing the Court as an “outsider[]” lacking the common exposure to local law which comes from sitting in the jurisdiction”).



administrative law, and statutory and regulatory interpretation. Leading students of the Court's arbitration jurisprudence detect a comparative lack of serious interest in the subject.<sup>131</sup>

The most cynical explanation for the rhetoric–reality gap is that the judiciary is a primary beneficiary of the Court's discernment of a national policy favoring arbitration. Federal judges, especially Justices of the Supreme Court, may be uncomfortable as primary marketers of such a national policy. The Court might just find it easier to wrap the product and pitch in slogans of contracts and contractual freedom—while exercising the powerful leverage of federal law to guarantee the product's marketing success.

Finally, it is difficult to attribute the rhetoric–reality gap to ideology, since all the Justices contribute to the gap. Indeed, scholars stress that the Justices share the perception of a national policy favoring arbitration and the resulting pro-arbitration bias pulsing through its jurisprudence.<sup>132</sup> In early cases developing this national policy, in the 1980s, there was divergence on ideological grounds between the Justices as to federalism—a majority willing to invade state territory while a conservative minority resisted on federalism grounds—notably Justices O'Connor and Rehnquist in the 1980s and Justices Scalia and Thomas later.<sup>133</sup> That initial rallying charge was led by another conservative, Justice Burger, and gradually all but Justice Thomas capitulated to federalization.<sup>134</sup> That said, opinions by Justices Thomas and Rehnquist concerning federalism exhibit the narrowest gap between the rhetoric of contracts and the reality.<sup>135</sup>

Though ideology does not explain the rhetoric–reality gap, it does influence its shape. Justice Brennan, liberal lion, wrote the Court's most forceful

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131. *E.g.*, Alan Scott Rau, “*Separability*” in the *United States Supreme Court*, STOCKHOLM INT'L ARB. REV., 13 (06/2006), available at <http://ssrn.com/abstract=893601> (referencing opinions by Justice Scalia); Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 486 (2006) (referencing opinion by Justice Souter). The Court receives plenty of briefs and could read the substantial literature about all aspects of the issues. But lawyers and scholars involved likewise have not stressed the rhetoric–reality gap, nor given the Court reason to redress it. Much of the Court's jurisprudence, as with the literature, uses vocabulary unique to arbitration cases. The vocabulary is not only alien to the common law of contracts but sometimes suggests a subordination of contracts and contract law to arbitration and national policy. A pervasive, though modest, example of the subordination rhetoric is how the Court refers to contract law as providing “background principles.” Though this phrase is commonly used among contract-law scholars to designate default rules that parties can tailor in particular settings, the Court's use suggests those default rules are subordinate to what it declares to be the principles of federal arbitration law.

132. *E.g.*, Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383 (2008); Siegel, *supra* note 3, at 1142–43.

133. *See supra* notes 17 & 19.

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

135. *See supra* text accompanying notes 60–62.

assertions of federal pro-arbitration policy in *Moses Cone*.<sup>136</sup> Then-Justice Rehnquist, a conservative, objected to Justice Brennan's opinion: "In its zeal to provide arbitration for a party it thinks deserving, the Court has made an exception to established rules of procedure"<sup>137</sup>—not an objection to FAA jurisprudence, but an acknowledgement of zealotry's role in protecting a favored party class. Likewise, Justice Rehnquist, devotee of federalism, deferred to state law in *Volt*.<sup>138</sup> In contrast, Justice Stevens, a liberal less moved by states' rights, withheld deference in *Mastrobuono* on analytically identical facts.<sup>139</sup> Stevens empathized with consumers, including securities-brokerage customers, and leaned over backwards in *Mastrobuono* to allow them an award of punitive damages. Justice Thomas, die-hard conservative, dissented. But the majority opinions in *Volt* and *Mastrobuono* stated the standard contract rhetoric and then applied federal arbitration jurisprudence discordantly.

Justice Breyer wrote the Court's principal opinions on the clarity of threshold intent about "who decides."<sup>140</sup> These opinions portray a moderate judge offering a nuanced approach, finding room for judicial oversight of arbitration. They commanded assent among the Justices.<sup>141</sup> In contrast, Justice Scalia wrote the Court's recent opinions on the severability doctrine.<sup>142</sup> Those reflect a conservative judge taking a formal approach committed to the arbitrator's power. They prompted dissents by liberal Justices, like Stevens, who are more willing to use policing tools such as unconscionability. But all these, and other opinions—by Justices Alito, Breyer, Ginsberg, Scalia, Souter and Stevens—first venerated contract law and then applied arbitration jurisprudence in ways at odds with contract law.<sup>143</sup> So there is little doubt that

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136. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). *See supra* text accompanying notes 20–27.

137. *Id.* at 30 (Rehnquist, J., dissenting).

138. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). *See supra* text accompanying notes 28–29.

139. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). *See supra* text accompanying notes 30–38.

140. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). *See supra* text accompanying notes 45–54 (discussing *First Options*); *supra* text accompanying notes 55–62 (discussing *Howsam*).

141. *First Options* was unanimous and *Howsam* nearly unanimous, with only Justice Thomas filing a concurring opinion.

142. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010). *See supra* text accompanying notes 67–70 (discussing *Buckeye*); *supra* text accompanying notes 71–75 (discussing *Rent-A-Center*).

143. Justice Alito, a conservative, strained himself in *Stolt-Neilsen* to prevent class actions against businesses over the liberal Justice Ginsburg's dissent, which called the majority out for benefiting big business on terms that may not apply to help consumers, with both opinions making the same points about contractual freedom and contract law and then burying that in conflicting federal arbitration jurisprudence. *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). *See supra* text accompanying notes 78–88. Justice Scalia's majority opinion in *Arthur Andersen*, taking an expansive view of third-party-beneficiary law, prompted a dissent joined by the liberal Justice Stevens, the conservative Justice Roberts, and the moderate Justice Souter—and all show the gap. *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009). *See supra* text accompanying notes 90–95. Justice Souter's majority opinion in *Hall Street*, denying contractual freedom to expand judicial review of arbitration

ideology plays a role in how the Justices approach federal arbitration jurisprudence and how they perceive, describe, and apply contract law principles. But the rhetoric–reality gap transcends the ideological spectrum, making this at best a partial explanation for the character of the gap.

Nor is it the case that the Justices are faithful to or disagree about a particular theory of contract law or school of contract-law thought—such as classical, formalist, realist, anti-formalist, neo-formalist, or anything else. Far from struggling to classify contract law into such categories, the Court elides them, sallying forth to state and apply versions of contract law that suit its national policy favoring arbitration.<sup>144</sup> Indeed, the persistence and widening of the rhetoric–reality gap is likely also due to there being no higher court that can correct the Supreme Court, even in matters outside its bailiwick, such as contract law. The story helps to underscore the beauty of the common law as a system. It seems highly unlikely that a group of nine judges, sitting on high and hearing a handful of cases annually over a few decades, will produce law as appealing as that produced in contract-law jurisprudence over centuries by up to fifty state supreme courts plus England’s high courts over tens of thousands of cases.

#### D. Costs

Scholarly debate concerning federal arbitration jurisprudence is dominated by disagreement about the comparative efficacy of arbitration compared to litigation.<sup>145</sup> What is at stake is the fairness and efficiency of the process. By studying federal arbitration jurisprudence from the perspective of contract rhetoric versus reality, a different set of problems appears. These concern the effects of a federal jurisprudence that is often wrong and misleading about contracts and contract law. The rhetoric–reality gap produces abstract costs of illegitimacy; defiance or distortion; incoherence; and misperception.

Any gap between what judges or other public officials do and what they say creates risk to the legitimacy of the official and the official’s actions. The rhetoric–reality gap in federal arbitration jurisprudence exposes several legitimacy problems. The talk of freedom of contract obscures how the primary engine of this jurisprudence is the Court’s discernment of a national policy favoring arbitration. This policy has nothing to do with freedom of contract or with the exquisitely apolitical body of contract law,<sup>146</sup> but has everything to do

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awards, prompted two dissents—one by the liberal Justice Stevens and joined by the conservative Justice Kennedy, and one by the moderate Justice Breyer. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). See *supra* text accompanying notes 96–98.

144. The only version of such a theory that the Court tends to embrace is the notion of “contorts.” See *supra* Part III.A.3. But that is not so much a school of thought as it is a critical account of certain trends in common-law jurisprudence evident in the period before 1970.

145. See *supra* notes 12–13 and accompanying text.

146. See David A. Hoffman & Tess Wilkinson-Ryan, *Breach is for Suckers*, 63 VAND. L. REV. 1003, 1011 (2010) (“[C]ontract law is usually considered to be the most technical and least political of the first-year law courses . . .”).

with judicial power and institutional prerogatives.<sup>147</sup> It is also by definition a national rather than state policy; the talk of deference to state contract law as a gesture to federalism not only makes the assertion hypocritical but invalidly mutes valid federalism objections to the Court's usurpation of the field.

A related risk of perceived illegitimacy is that the Court's pronouncements may provoke state defiance.<sup>148</sup> The Supreme Court faces rebuke from state courts, which thumb their noses at the Court,<sup>149</sup> or state legislatures, which sometimes leave on the books statutes that would be illegal under its precedents.<sup>150</sup> Obviously, such state objections to federal invasion may exist even if the Court's rhetoric were faithful to its applications. But it seems likely that the gap between rhetoric and reality fortifies state objections; it invites states to explain why, under contract law as state officials know it—unlike how the Supreme Court develops it—the state is correct and the Court wrong. State officials may have a duty to resist usurpations of constitutionally protected state prerogatives, including those that federal law purports to preempt under the FAA.<sup>151</sup>

On the other hand, some states simply knuckle under, declaring the Court's opinions the law of the land and withdrawing contrary state opinions after being rebuked.<sup>152</sup> Though not all states defy the federal regime, those following it often cause the problem of distortion. Before *Prima Paint*,<sup>153</sup> leading state courts held that defenses asserting fraud in the inducement were for courts to decide, not arbitrators. Among these was New York, leader in contract law, including in arbitration cases.<sup>154</sup> The grounds were straightforward principles of contract law: The arbitration clause was not severable from the principal contract. Similar results and reasoning appeared elsewhere.<sup>155</sup> *Prima Paint* led New York to

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147. See Anthony Niblett, *Tracking Inconsistent Judicial Behavior* (unpublished manuscript) (July 31, 2010), available at [www.ssrn.com/abstract=1434685](http://www.ssrn.com/abstract=1434685).

148. See David A. Straus, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1866 (2005) ("To question the legitimacy of something—a constitution, a statute, a legal regime—is to question whether it is entitled to obedience.").

149. See generally *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); see Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139 (2005) (discussing the tension between a federal act telling states not to treat arbitration clauses differently from general contract provisions and a state statute limiting the enforceability of arbitration provisions).

150. See STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* 20, 39 n.126 (2d ed. 2007) (listing examples of existing state laws from California, Colorado, Georgia, New York, Rhode Island, South Carolina, South Dakota, Tennessee and Vermont, which are likely preempted under the Supreme Court's cases).

151. See generally David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y 129 (2004).

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

153. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). See *supra* text accompanying notes 63–66.

154. E.g., *Wrap-Vertsier Corp. v. Plotnick*, 143 N.E.2d 366 (N.Y. 1957).

155. E.g., *Am. Airlines v. Louisville & Jefferson Cnty. Air Bd.*, 269 F.2d 811, 816–17 (11th Cir. 1959); *Kulukundis Shipping v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942) (Jerome Frank, J.).

switch and to instead follow the federal rule.<sup>156</sup> The grounds were a more adventuresome principle of arbitration policy: Following contract law “defeats . . . two of arbitration’s primary virtues, speed and finality.”<sup>157</sup>

The Court’s jurisprudence has prompted the distortion of state law in other states, too, including in California. The state’s high court likewise construed the California arbitration statute to distinguish sharply between arbitration clauses and the broader contracts of which they usually are part.<sup>158</sup> The court’s rationale was the same: putting arbitration policy above freedom of contract. In dissent, Justice Mosk declared the court’s approach to be putting the cart before the horse, showing “resupination: logic and procedure turned upside down.”<sup>159</sup> Mosk was more persuaded by the “irrefutable dissent” in *Prima Paint* and the few state courts that held out against the sweep of the federal rule.<sup>160</sup> Mosk stressed that, if arbitration is really a matter of contract, then courts must take seriously—and not merely rhetorically—basic principles, including that “one of the essential elements of a contract [is] that the parties enter into it knowingly and consensually, not through fraud, duress, menace, undue influence, or mistake.”<sup>161</sup>

The gap and challenges to jurisprudential legitimacy pose additional practical problems of doctrinal incoherence, both within federal jurisprudence and collaterally on the law of contracts. The Court’s jurisprudence is often confusing, especially concerning questions such as “who decides”<sup>162</sup> and what “clear and unmistakable” means.<sup>163</sup> The confusion is likely at least a partial product of the Supreme Court’s assertions that contracts and contract law dominate with applications showing that a national federal policy favoring arbitration dominates. Indeed, the concept of “clear and unmistakable” simply does not appear as an interpretive principle or presumption anywhere in the law of contracts.<sup>164</sup> Worse, other courts are nevertheless tempted by the

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

157. *Id.* The court thought its new-found approach more compatible with both “the initial intent of the parties as well as legislative policy” and further justified because it aligned state law with the federal rule. It stressed its belief that “no party” agrees to arbitration’s scope “based on whether the contract in question involves interstate commerce.” *Id.* The Supreme Court echoed that sentiment in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995). *See supra* text accompanying notes 39–44.

158. *Ericksen v. 100 Oak St.*, 673 P.2d 251, 257 (1983).

159. *Id.* at 258 (Mosk, J., dissenting).

160. *E.g.*, *George Engine Co. v. S. Shipbuilding Corp.*, 350 So. 2d 881, 884–85 (La. 1977).

161. *Ericksen*, 673 P.2d at 260 (Mosk, J., dissenting).

162. *See, e.g.*, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). *See supra* text accompanying notes 75–78.

163. *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). *See supra* text accompanying notes 45–54 (discussing *First Options*); *supra* text accompanying notes 55–62 (discussing *Howsam*).

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

Supreme Court's lead to adapt statements of presumptions about contractual intent from the arbitration context to the general context of contracts.<sup>165</sup>

A cumulative variation of all these problems is the problem of misperception. The Court's rhetoric, taken literally, gives contract law a bad name. For example, Professor Linda Mullenix wrote: "[T]he supremacy of contract law over long-established jurisdictional doctrines has significantly eroded certain fundamental litigation rights."<sup>166</sup> This lays the blame for infirmities in the Court's jurisprudence on contract law. But it is not the "supremacy of contract law" that is responsible for any such infirmities that may exist. It is the rhetorical invocation of notions of contracts while really using a different batch of arbitration jurisprudence.

#### IV

#### CONCLUSION

My initial motivation for writing this article was receipt in early 2010 of a reprint of an Illinois Law Review article by noted arbitration scholar Thomas Stipanowich, apparently sent to contract-law teachers nationally.<sup>167</sup> In a comprehensive review of the state of arbitration law and practice, the piece criticized editors of Contracts casebooks for paying too little attention to arbitration, especially for how the attention given was often extremely negative.<sup>168</sup> As a contract-law teacher for twenty years, the point resonated with me.<sup>169</sup> With modest exceptions, contract-law books and courses have not generally given arbitration much in-depth treatment, and the treatment is often in the context of illustrating doctrines like unconscionability or lopsided terms not comporting with reasonable expectations of a community. The piece thus stimulated my interest in arbitration.

I began following pending Supreme Court cases on the subject and scrutinizing those handed down in preceding terms. I found the Court's talk about contracts and contract law intriguing because it made it sound as if arbitration were at the center of contract law and contract law at the center of arbitration law. This idea made it seem irresponsible for me, Contracts-casebook editors, and other teachers to leave arbitration at the margins of the Contracts course or outside it altogether. Alas, the truth is that contracts and

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

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

167. Thomas J. Stipanowich, *Arbitration: the "New Litigation"*, U. ILL. L. REV., 2010, at 1.

168. *Id.* at 50.

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

contract law have so little to do with what happens in arbitration jurisprudence, particularly compared to Court rhetoric, that it would confuse or mislead students taking Contracts to provide it as an illustration. To that extent, arbitration thus deserves the glancing treatment in the Contracts course, warranting treatment in a separate one.<sup>170</sup>

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

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170. One prominent casebook, IAN AYRES & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* (7th ed. 2008), does devote a short chapter to contractual aspects of federal arbitration jurisprudence, but a survey of teachers who use the book and of syllabi available online shows that the materials are rarely covered.