

# JUDICIAL RESISTANCE TO MANDATORY ARBITRATION AS FEDERAL COMMANDEERING

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## Abstract

This Article argues that the current doctrine of preempting state substantive law in favor of the Federal Arbitration Act (FAA) contravenes core federalism principles generally, the Tenth Amendment specifically, and well-established anti-commandeering and federalism doctrine. These authorities are all concerned with a core federalism principle: state sovereignty.

The states retained sovereignty when they joined the Union. The Tenth Amendment expressly enshrines this retention. Modern federal court doctrine, which imposes federal arbitration law on the states, encroaches on retained state sovereignty by preempting state substantive law. This is erroneous regardless of whether Congress enacted the FAA as a rule of federal judicial procedure or as an exercise of its substantive Commerce Clause power. Encroaching on the states' retained sovereignty, as the FAA does, violates the fundamental federalism principle and opens a path toward disrupting the power balance between the state and federal governments that James Madison considered crucial to protecting individual liberty.

When one sovereign comes to dominate in a federalist system, that government begins to lose its federalist character. Consequently, conflict about the FAA is no dry procedural dispute—it is a battle over the republic's core principles. State courts should continue to serve their federalist role and fight in their corners, and the United States Supreme Court should revisit its FAA interpretation.

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INTRODUCTION .....	1398
I.    ARBITRATION IN CALIFORNIA COURTS.....	1400
A. <i>The FAA Was Not Intended to Overturn State Law</i> .....	1402
B. <i>The Supreme Court Made the FAA a Substantive                 Limit on State Law</i> .....	1405
II.   THE FAA HAS AN <i>ERIE</i> PROBLEM .....	1408
III.  THE FAA HAS A COMMANDEERING PROBLEM.....	1417
A. <i>The Anti-Commandeering Doctrine Shields                 State Courts from Federal Arbitration                 Policy Enforcement Duty</i> .....	1419
B. <i>Judicial Federalism Should Compel Respect                 for State Courts</i> .....	1425
CONCLUSION.....	1428

#### INTRODUCTION

This Article challenges the United States Supreme Court's current interpretation of the Federal Arbitration Act (FAA),<sup>1</sup> which suffers from two defects: it is interpreted beyond its intended scope and, as interpreted, it commandeers state judicial power. The legislative history shows that Congress intended the FAA to be only a procedural measure. Yet the Supreme Court has interpreted the FAA as a substantive jurisdiction-granting law and applies it to preempt substantive state contract law.<sup>2</sup> This interpretation contradicts the legislative intent.

Even if the Court's read on legislative intent is correct, the law as applied violates the anti-commandeering doctrine. That doctrine holds that it is beyond the federal government's legislative power to force states to implement federal programs.<sup>3</sup> This Article argues that there exists a point at which a statute's preemptive effect raises commandeering concerns and that the FAA has crossed that line. Because federal courts assume that Congress intended its statutes to have a lawful rather than unconstitutional scope, and because it would be unconstitutional for Congress to force states to implement a federal arbitration program, the FAA should not be so interpreted.

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1. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2012)).

2. See *infra* Section I.C.

3. See *infra* notes 171-79 and accompanying text.

This problem has become acute with the rising popularity of private arbitration as a substitute for judicial trials, especially in employment and consumer-protection cases.<sup>4</sup> Employers and merchants include arbitration clauses in take-it-or-leave-it agreements that parties seldom read (much less have an opportunity to negotiate) before accepting. While some argue that arbitration offers a faster, cheaper alternative to a full-length trial, others complain that these provisions deprive them of their day in court without any real opportunity to object.<sup>5</sup>

State and federal courts have reacted with conflict: federal courts embrace arbitration under the FAA,<sup>6</sup> while state courts (California particularly) fight the compulsion to adopt the federal arbitration model.<sup>7</sup> The Supreme Court has lauded the “liberal federal policy favoring arbitration agreements”<sup>8</sup> and has promised to “rigorously enforce” that policy at every opportunity.<sup>9</sup> States have been less welcoming. California, for example, has repeatedly attempted to resist FAA encroachment over the past decade—but to no avail.<sup>10</sup> This Article’s proposal would resolve the resulting friction.

That friction occurs when a party moves to compel arbitration in a state court. The Supreme Court reads the FAA to force state courts to implement federal policy objectives by surrendering state judicial power to private arbitral tribunals.<sup>11</sup> Though the prohibition on discrimination against federal claims by state courts is well established,<sup>12</sup> the FAA neither grants federal jurisdiction nor establishes a separate cause of action.<sup>13</sup> Even so, the Supreme Court has held that the FAA preempts contrary state law.<sup>14</sup> This Article makes three challenges to that interpretation:

- The Court’s categorization of the FAA as substantive rather than procedural under *Erie Railroad Co. v.*

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4. See Peter B. Rutledge, *Whiter Arbitration?*, 6 GEO. J.L. & PUB. POL’Y 549, 554–55 (2008).

5. See Matthew J. Stanford, Note, *Odd Man Out: A Comparative Critique of the Federal Arbitration Act’s Article III Shortcomings*, 105 CALIF. L. REV. 929, 930–31 (2017).

6. See 9 U.S.C. §§ 1–16.

7. See *infra* Section III.A.

8. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

9. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

10. See *infra* notes 213–38 and accompanying text.

11. See *infra* Section I.C.

12. See, e.g., *Testa v. Katt*, 330 U.S. 386, 394 (1947).

13. See *infra* notes 101–03 and accompanying text.

14. See *infra* Section I.C.

*Tompkins*<sup>15</sup> is historically dubious and contrary to *Erie*'s federalism-preserving objective.

- The Court's own judicial-federalism and anti-commandeering doctrines favor greater deference to state court decisions concerning arbitration agreements.
- Recently failed attempts to limit the FAA's reach by California courts<sup>16</sup> warrant reconsideration in light of these deferential principles.

This Article proceeds in three parts. Part I reviews the current state of FAA arbitration law and shows how California law governing this procedure—and more importantly, state contract law—are largely irrelevant to its application. Part II discusses the FAA against the backdrop of the U.S. Supreme Court's decision in *Erie* and argues that the Court wrongly categorized the FAA as substantive rather than procedural law. Part III applies judicial-federalism and anti-commandeering rules to arbitration and argues that these doctrines elevate the states' power to regulate arbitration agreements relative to the federal government. Finally, this Article argues that the FAA's commandeering effect is now a Tenth Amendment issue and, as such, states may rely on their retained sovereignty powers to resist federal demands to apply the FAA.

## I. ARBITRATION IN CALIFORNIA COURTS

The California Constitution affirms the civil jury trial as “an inviolate right” that must be expressly waived.<sup>17</sup> California law places strict limits on such waivers.<sup>18</sup> For example, implied waivers are invalid.<sup>19</sup> A waiver is valid only if it is “unambiguous and unequivocal, leaving no room for doubt as to the intention of the parties.”<sup>20</sup> And even then, the public policy favoring trial by jury is so strong that courts retain considerable discretion to revoke otherwise valid waivers.<sup>21</sup> In theory, the California Supreme

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15. 304 U.S. 64 (1938).

16. *E.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469–71 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

17. CAL. CONST. art. I, § 16.

18. *See* CAL. CIV. PROC. CODE § 631(a) (West 2019).

19. *Walton v. Walton*, 36 Cal. Rptr. 2d 901, 904–05 (Ct. App. 1995).

20. *See Trizec Props., Inc. v. Superior Court*, 280 Cal. Rptr. 885, 887 (Ct. App. 1991), *overruled in part by Grafton Partners v. Superior Court*, 116 P.3d 479, 485 (Cal. 2005).

21. *See* CIV. PROC. § 631(g); *Gann v. Williams Bros. Realty, Inc.*, 283 Cal. Rptr. 128, 131 (Ct. App. 1991).

Court, in its role as final arbiter of its state constitution,<sup>22</sup> could hold that the state's constitutional civil-jury-trial right overrides any contrary statutory provision<sup>23</sup> and even insulate that holding from Supreme Court review.<sup>24</sup>

Arbitration complicates this analysis. In 1961, the California Legislature adopted the California Arbitration Act (CAA).<sup>25</sup> The CAA makes written agreements to arbitrate existing or future disputes “valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.”<sup>26</sup> Though the CAA embodies a “policy favoring arbitration,” this predisposition by no means displaces the requirement of a bona fide agreement to do so.<sup>27</sup> Nor does any state policy support arbitrating matters not covered by an otherwise valid agreement to arbitrate.<sup>28</sup> And California courts retain the power to quash arbitration clauses based on “general contract law principles.”<sup>29</sup>

Before the FAA assumed its current form, the California Supreme Court had applied the CAA and interpreted arbitration agreements according to California contract law with minimal concern for preemption.<sup>30</sup> And California courts used contract doctrines like adhesion and unconscionability to police the CAA. For example, in *Graham v. Scissor-Tail, Inc.*,<sup>31</sup> the California Supreme Court acknowledged the CAA and still applied California contract law principles to find an

22. See *Nougues v. Douglass*, 7 Cal. 65, 69–70 (1857).

23. See *Bourland v. Hildreth*, 26 Cal. 161, 179 (1864); *People ex rel. Smith v. Judge of the Twelfth Dist.*, 17 Cal. 547, 551 (1861).

24. The Supreme Court “will not review judgments of state courts that rest on adequate and independent state grounds.” *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (citing *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)). To employ this doctrine, a state's highest court need only explicitly state that its decision relies on a state constitutional provision independent of federal law, which is adequate to support the judgment on its own. See *Eustis v. Bolles*, 150 U.S. 361, 366 (1893).

25. Act effective Sept. 15, 1961, ch. 461, 1961 Cal. Stat. 1540 (codified as amended at CIV. PROC. §§ 1280–1294.2).

26. CIV. PROC. § 1281.

27. *Victoria v. Superior Court*, 710 P.2d 833, 834, 838 (Cal. 1985).

28. *Id.* at 838.

29. *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 303 (Ct. App. 2004) (quoting *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 432 (Ct. App. 2004)).

30. See, e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130, 152 (Cal. 2011) (finding no FAA preemption of the public policy against Berman-hearing waivers), *vacated*, 565 U.S. 973 (2011); *Gentry v. Superior Court*, 165 P.3d 556, 562–70 (Cal. 2007) (holding a class-arbitration waiver unenforceable where the class action was key to the vindication of statutory rights); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 992–93 (Cal. 2003) (finding no FAA preemption of state cost-sharing standards); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000) (limiting arbitrability of claims under a state employment statute using a factor-based test).

31. 623 P.2d 165 (Cal. 1981).

arbitration clause unconscionable and unenforceable.<sup>32</sup> It reached that decision despite the argument made that federal law preempts all arbitration matters—which the court rejected.<sup>33</sup>

The near-century following the FAA’s passage has seen the steady aggrandizement of arbitration to the point that state statutes like the CAA, and state contract law in general, have faded into irrelevance.<sup>34</sup> Today, the CAA lives in the FAA’s preemptive shadow, and the basic conflict between FAA preemption and state contract law continues. The California Supreme Court maintains that it can test arbitration agreements for unconscionability under state law.<sup>35</sup> While the California Supreme Court acknowledges that the U.S. Supreme Court held in *AT&T Mobility LLC v. Concepcion*<sup>36</sup> that the FAA limits the states’ ability to regulate arbitration agreements, it reads *Concepcion* as reaffirming “that the FAA does not preempt ‘generally applicable contract defenses, such as fraud, duress, or unconscionability’” and so *Concepcion* does not bar applying unconscionability rules to arbitration agreements.<sup>37</sup> Yet, the states should not be reduced to this last resort of state contract law defenses because Congress never intended the FAA to override state law.

#### A. *The FAA Was Not Intended to Overturn State Law*

Passed in 1925, the FAA was enacted to “revers[e] centuries of judicial hostility to arbitration agreements” by leveling the playing field between arbitration agreements and ordinary contracts.<sup>38</sup> The FAA (like

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32. *Id.* at 175–77 (“We thus return to the narrow question here before us: Is the contract we here consider, insofar as it requires the arbitration of all disputes arising thereunder before the A.F. of M., to be deemed unconscionable and unenforceable? The answer to this question, we have concluded, must clearly be yes.”). *Graham* is now described as “explaining the older approach to finding unconscionability.” *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1013 (Cal. 2018).

33. *Graham*, 623 P.2d at 178 (“While we have no reason to question the primacy of federal substantive law in areas of paramount federal concern under national labor legislation, we have considerable doubt whether the instant case may be said to be within such an area. Moreover, and assuming that it is, we do not believe that the applicable federal law has been established or elaborated to an extent which would require us to conclude that it is contrary to our significant and uniform rule of state policy applicable to arbitration clauses generally.”).

34. See Stanford, *supra* note 5, at 939–42.

35. See, e.g., *Baltazar v. Forever 21, Inc.*, 367 P.3d 11–16 (Cal. 2016) (determining an arbitration agreement’s enforceability under the law of unconscionability); see also *De La Torre*, 422 P.3d at 1021 (“[T]he Legislature has enacted into statute the unconscionability doctrine, making it a limitation to the enforcement of contracts in California.”).

36. 563 U.S. 333 (2011).

37. *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 745–46 (Cal. 2015) (quoting *Concepcion*, 563 U.S. at 339).

38. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 225–26 (1987) (alteration in original) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974)).

the CAA nearly four decades later) ultimately came to enshrine “a national policy favoring arbitration.”<sup>39</sup> Yet, unlike its California analogue, the FAA did not attain its modern-policy character overnight. Instead, its drafters sold the new statute as a small fix for federal courts,<sup>40</sup> whose doctrine of “ouster” had invalidated arbitration agreements regardless of their enforceability under state law.<sup>41</sup> Testifying before Congress, Julius Cohen, one of the architects of the FAA, explained that the bill “establishes a procedure in the Federal courts for the enforcement of arbitration agreements” without undermining “the right of each State to decide for itself what contracts shall or shall not exist under its laws.”<sup>42</sup> He assured Congress that the validity of the contracts containing such agreements would remain “a question of the substantive law of the jurisdiction wherein the contract was made.”<sup>43</sup>

Judicial resistance to the new federal statute was immediate. In the half-century following the FAA’s passage, courts routinely denied arbitrators the power to resolve statutory claims.<sup>44</sup> In *Wilko v. Swan*,<sup>45</sup> for instance, the Supreme Court upheld a provision of the Securities Act of 1933<sup>46</sup> requiring a judicial forum, repudiating a challenge that the claim at issue was subject to an arbitration agreement.<sup>47</sup> The Court found that arbitration did not provide a sufficiently accountable mode for protecting the rights covered by the Act.<sup>48</sup> Then, in *Barrentine v. Arkansas-Best Freight System, Inc.*,<sup>49</sup> the Court deemed arbitrators ill-equipped to hear Fair Labor Standards Act of 1938<sup>50</sup> claims because arbitrators lack both the public law expertise and the remedial power that courts of law possess.<sup>51</sup> The arbitral role was specifically relegated to interpreting contracts and enabling party intent.<sup>52</sup>

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

40. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 103 (2006).

41. See Stanford, *supra* note 5, at 933–34.

42. *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 37 (1924) (statement of Julius Cohen).

43. *Id.* See generally Moses, *supra* note 40 (discussing the hearings leading up to the adoption of the FAA).

44. See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 451 (2011).

45. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

46. Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)).

47. *Wilko*, 346 U.S. at 433–35.

48. See *id.* at 435–36.

49. 450 U.S. 728 (1981).

50. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19 (2012)).

51. *Barrentine*, 450 U.S. at 743–45.

52. *Id.* at 744.

The Court's early resistance to the arbitrability of civil rights matters is especially pertinent. In *Alexander v. Gardner-Denver Co.*,<sup>53</sup> the Court unanimously held that courts, not arbitrators, have the "final responsibility" to enforce Title VII of the Civil Rights Act of 1964,<sup>54</sup> the federal employment-antidiscrimination statute.<sup>55</sup> After surveying the law's unique procedural makeup and policy purpose, the Court rejected the notion that judges and arbitrators are indistinguishable.<sup>56</sup> The Court instead drew a neat line between the two. For "the law of the shop," an arbitrator would suffice.<sup>57</sup> Certainly this was consistent with the Court's time-honored view that labor arbitrators possess special knowledge of unexpressed norms and customs that are relevant to interpreting labor agreements.<sup>58</sup> But "the law of the land" (resolving statutory or constitutional questions) remained within the exclusive purview of the courts.<sup>59</sup> *Alexander* and *McDonald v. City of West Branch*<sup>60</sup> are of only historical interest now, but they show the sharpness of the shift and maybe still represent the right course.

When the Court decided *McDonald* a decade later, it retained its unanimity in pressing the issue still further.<sup>61</sup> Writing for the Court, Justice Brennan found civil rights claims (in this case, under 42 U.S.C. § 1983) clearly incompatible with arbitration, accordingly refusing to give arbitral awards preclusive effect.<sup>62</sup> "In addition to diminishing the protection of federal rights," he warned in a footnote, "a rule of preclusion might have a detrimental effect on the arbitral process."<sup>63</sup> This competency-based division of adjudicative power was necessary not only to the interests discussed in *Alexander*, but to those of the parties themselves. That is, ensuring the integrity of arbitral awards preserves its appeal as an alternative form of dispute resolution.

Unfortunately, the Court soon abandoned this line of cases and changed course toward giving the FAA its present preemptive effect.

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53. 415 U.S. 36 (1974).

54. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.); *Alexander*, 415 U.S. at 56.

55. See 42 U.S.C. §§ 2000e to -17.

56. *Alexander*, 415 U.S. at 56-58.

57. *Id.* at 57.

58. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

59. *Alexander*, 415 U.S. at 57.

60. 466 U.S. 284 (1984).

61. *Id.* at 285.

62. *Id.* at 292.

63. *Id.* at 292 n.11.



### B. *The Supreme Court Made the FAA a Substantive Limit on State Law*

Shortly after *McDonald*, the Court altered course. Despite the limited congressional aim of placing arbitration agreements and ordinary contracts on the “same footing,”<sup>64</sup> the FAA has steadily come to embody a doctrine that far exceeds this modest remedy. Section 2 of the FAA affirms the validity of arbitration clauses, “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>65</sup> In other words, as the Court still professes, arbitration should be treated as nothing more than “a matter of contract.”<sup>66</sup> Theoretically, then, arbitration clauses are still voidable under “generally applicable contract defenses, such as fraud, duress, or unconscionability.”<sup>67</sup> Not so in reality. The most recent example is the Supreme Court’s 7–1 decision in *Kindred Nursing Centers Ltd. Partnership v. Clark*,<sup>68</sup> where it rejected a state’s attempt to subject arbitration agreements to a heightened “clear-statement” standard:

A court may invalidate an arbitration agreement based on “generally applicable contract defenses” like fraud or unconscionability, but not on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a “law prohibit[ing] outright the arbitration of a particular type of claim.” And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.<sup>69</sup>

The Court has steadily eroded state contract law to accommodate the FAA’s expansion. Insofar as it poses an “obstacle” to Congress’s purported policy objectives, state law must give way.<sup>70</sup> This is so notwithstanding the absence of an “express pre-emptive provision” or any evidence of “congressional intent to occupy the entire field of arbitration.”<sup>71</sup> By including § 2, Congress “withdrew the power of the states to require a judicial forum for the resolution of claims which the

64. H.R. REP. NO. 68-96, at 1 (1924).

65. 9 U.S.C. § 2 (2012).

66. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

67. *Id.* at 68 (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

68. 137 S. Ct. 1421 (2017).

69. *Id.* at 1426, 1428–29 (alteration in original) (citations omitted) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 341, (2011)).

70. *Volt Info. Scis., Inc. v. Bd. of Trs. of LeLand Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

71. *Id.*

contracting parties agreed to resolve by arbitration.”<sup>72</sup> Or so the Court divined. Thus, states must not accord arbitration clauses “suspect status.”<sup>73</sup>

Therefore, even though state contract law defenses remain technically available, the Court’s application of the FAA against anything that discriminates against arbitration nullifies those defenses. In *Concepcion*, for example, California doctrine considered all class action waivers unenforceable because they were unconscionable.<sup>74</sup> Rather than deferring to this rule as permissibly invalidating an arbitration agreement based on the “generally applicable contract defense[]” of unconscionability, the Court held that this was a defense that applied only to arbitration or that derived its meaning from the fact that an agreement to arbitrate is at issue.<sup>75</sup> According to the Court, “[a]lthough § 2’s saving clause preserves generally applicable contract defenses,” it does not preserve state-law rules that obstruct “the accomplishment of the FAA’s objectives.”<sup>76</sup> This reduces the saving clause to a fiction because any application of a state contract defense to bar arbitration is an obstacle to arbitration. Indeed, the Court acknowledged that this result is a natural conclusion of its FAA doctrine: “[T]he FAA’s pre-emptive effect might extend even to grounds traditionally thought to exist ‘at law or in equity for the revocation of any contract.’”<sup>77</sup>

This rule has wreaked considerable havoc. Despite its earlier holdings in *McDonald* and *Alexander*, the Supreme Court has since invalidated state laws requiring judicial forums for wage and other statutory claims.<sup>78</sup> In both instances, the Court found that requiring a judicial forum contravened Congress’s intent for the FAA to forbid states from lessening the enforceability of arbitration agreements.<sup>79</sup> Contracts agreeing to apply state law fared no better. The Court initially signaled that choice-of-law clauses manifested an intent to apply state rather than federal arbitration rules.<sup>80</sup> It then reversed course in *Mastrobuono v. Shearson Lehman*

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

73. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

74. *Concepcion*, 563 U.S. at 340; *see id.* at 341 (“California prohibits waivers of class litigation as well.”).

75. *Id.* at 339, 352 (quoting *Casarotto*, 517 U.S. at 687) (holding that California’s *Discover Bank* rule is preempted by the FAA because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress).

76. *Id.* at 343.

77. *Id.* at 341 (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

78. *See Perry*, 482 U.S. at 491; *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

79. *See Perry*, 482 U.S. at 490–91; *Keating*, 465 U.S. at 10.

80. *See Volt Info. Scis., Inc. v. Bd. of Trs. of LeLand Stanford Univ.*, 489 U.S. 468, 479 (1989).

*Hutton, Inc.*,<sup>81</sup> where it held that an agreement to apply a private arbitrator's rules overrides any "special rules" of state law that might have otherwise limited the arbitrator's power.<sup>82</sup> The upshot: state law is suspect if it attempts to limit the arbitrator's role.

The Court has made even the severability of arbitration clauses from otherwise fraudulent contracts a substantive federal law issue, further corroding state power. When a contract term is ambiguous, many states (including California) apply the Restatement, which resolves such ambiguities against the drafter.<sup>83</sup> But the Supreme Court requires a different approach when arbitration is involved.<sup>84</sup> Purportedly channeling the 1925 Congress, the Court declared the severability of arbitration provisions "a matter of substantive federal arbitration law."<sup>85</sup> As a result, claimants challenging a contract's validity must nevertheless proceed to arbitration if that contract contains an arbitration clause.<sup>86</sup> Like the contract's potential invalidity, state law to the contrary holds no sway.<sup>87</sup>

California's final line of defense was the arbitration clauses themselves. The U.S. Supreme Court has held that "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.'"<sup>88</sup> This is hardly controversial: the question of arbitrability should be a judicial question if the claim is that the arbitration clause is unconscionable. As a contractual matter, it only makes sense that parties be required to arbitrate those disputes that the agreement actually covers. But the custom of inserting or incorporating by reference private arbitrator rules, a custom blessed by the Court, has hollowed out this principle.

For example, in *Rent-A-Center, West, Inc. v. Jackson*,<sup>89</sup> an employer moved to compel arbitration of a former employee's discrimination claim.<sup>90</sup> The employee had signed an agreement to arbitrate as a condition of his employment, and language in the provision gave the arbitrator "exclusive authority" to resolve agreement-related disputes, including the

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81. 514 U.S. 52 (1995).

82. *Id.* at 63–64.

83. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981); see also CAL. CIV. CODE § 1654 (West 2019) (applying a rule that is similar to the Restatement).

84. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443–46 (2006).

85. *Id.* at 445.

86. *Id.* at 449.

87. *Id.* at 447–49.

88. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (alteration in original) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)).

89. 561 U.S. 63 (2010).

90. *Id.* at 65.

contract's "enforceability."<sup>91</sup> Unconcerned with the employee's unconscionability argument, the Court concluded that the parties had delegated the arbitrability question to the arbitrator.<sup>92</sup> Like any other contract, the Court reasoned, "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement" covered by the FAA's supposedly restorative framework.<sup>93</sup>

The resulting landscape is rather absurd: to achieve the FAA's remedial mission, the Court has completely divorced arbitration agreements from the ostensibly governing state law. Consequently, arbitrators are left with virtually unchecked power in many situations. This contravenes congressional intent and the Court's own *Erie* doctrine; in fact, the FAA's historical context and the Court's decision in *Erie* urge the contrary view. By failing to account for the FAA's unique (and, following *Erie*, arguably obsolete) policy objectives, the Court transformed a procedural fix for obstinate federal courts into a substantive federal right to be enforced in state courts nationwide. This Article turns next to the implications of characterizing the FAA as substantive rather than procedural, and then explains why this approach is erroneous.

## II. THE FAA HAS AN *ERIE* PROBLEM

As currently read, the FAA is a jurisdictional anomaly. The FAA itself does not provide a basis for federal jurisdiction, so there is no substantive federal law claim for an FAA violation.<sup>94</sup> This requires a federal court considering an FAA issue to find some other basis for the necessary Article III jurisdiction: either another substantive federal claim or diversity.<sup>95</sup> Diversity jurisdiction, of course, depends on the parties' citizenship, so it neither creates nor requires a federal claim.<sup>96</sup> And under *Erie* there can be no federal common law basis for employing the FAA as a substantive federal law claim.<sup>97</sup> That leaves federal preemption as the only way to make the FAA into a substantive federal law claim. But as discussed above, Congress did not state an intent to occupy the arbitration field or otherwise to broadly preempt state law.<sup>98</sup> How, then, can the FAA be a means for preempting state substantive contract law?

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91. *Id.* at 65–66.

92. *Id.* at 68–72.

93. *Id.* at 69–70.

94. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

95. *See id.*

96. *See* 28 U.S.C. § 1332 (2012).

97. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

98. *See supra* note 71 and accompanying text.

The Supreme Court has never confronted the *Erie* doctrine's effect on the FAA. "The *Erie* [decision] has come to stand for the principle that the federal government cannot use the accident of diversity jurisdiction as a basis for making substantive law"<sup>99</sup>—that is, the state-imposed rules that govern a case's outcome. The *Erie* doctrine applies here because of the FAA's § 4, which provides that a party may move to compel arbitration in "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties."<sup>100</sup> At first glance this might be read as a jurisdiction-granting provision, but that impression does not survive closer scrutiny.

In *Moses Cone H. Memorial Hospital v. Mercury Construction Corp.*,<sup>101</sup> the Court described § 4 as "something of an anomaly" because it does not provide an independent basis for federal jurisdiction.<sup>102</sup> Instead, by its plain terms, § 4 requires some other basis for federal court jurisdiction.<sup>103</sup> The Court nevertheless insisted that the statute had wrought "a body of federal substantive law" concerning the regulation and enforcement of arbitration agreements.<sup>104</sup> At the same time, the Court acknowledged that either diversity of citizenship or some non-FAA federal question must be present for federal courts to exercise jurisdiction.<sup>105</sup> This structure left much of the enforcement of arbitration agreements to state courts. Indeed, to the Court, state courts were indispensable to the achievement of the FAA's legislative purpose.<sup>106</sup> Yet the Court remained dubious of state courts' obligation to compel arbitration under § 4.<sup>107</sup> Thus, the Court reasoned that federal intervention might be necessary to defend the law's policy aims "where otherwise appropriate."<sup>108</sup> Reconciling *Mercury Construction* with the current state of FAA law is a real conundrum. Does it mean that, absent party diversity

99. Stanford, *supra* note 5, at 943–44.

100. 9 U.S.C. § 4.

101. 460 U.S. 1 (1983).

102. *Id.* at 25 n.32.

103. *Id.*

104. *Id.*

105. *Id.*

106. *See id.* at 26 n.34 ("[T]he state courts have almost unanimously recognized that the stay provision of § 3 applies to suits in state as well as federal courts . . . This is necessary to carry out Congress' intent to mandate enforcement of all covered arbitration agreements; Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court.").

107. *See id.* at 26 ("[S]tate courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act. It is less clear, however, whether the same is true of an order to compel arbitration under § 4 of the Act." (footnote omitted)).

108. *Id.* at 25 n.32, *cited with approval* in *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

or a non-FAA federal question, state courts still have jurisdiction over arbitration clauses? Theory would say yes, but reality teaches otherwise: state courts are essentially given the false choice of either enforcing arbitration agreements or watching federal courts enforce them by collateral attack (*Mercury Construction*)<sup>109</sup> or direct appeal (*Southland Corp. v. Keating*).<sup>110</sup>

And when is federal court intervention to defend the FAA's policy aims justified? This is a particularly sharp question considering the likely impact *Erie* had on the FAA, which was passed in an era of expansive federal judicial power. The seminal case of that period was *Swift v. Tyson*,<sup>111</sup> in which Justice Story declared that federal courts exercising diversity jurisdiction were not bound by the common law of the states in which they sat: state court decisions "are, at most, only evidence of what the laws are; and are not of themselves laws."<sup>112</sup> Accordingly, the Judiciary Act of 1789's<sup>113</sup> requirement that federal courts apply "the laws of the several states" extended only to statutory law, reducing state court decisions to mere persuasive authority.<sup>114</sup> And so began the era of the federal general common law, during which Congress enacted the FAA.<sup>115</sup>

Then came *Erie*. In the near-century following *Swift*, the Court had witnessed the fallout from Justice Story's opinion. A more egregious example was that of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,<sup>116</sup> in which a company reincorporated in another state simply to take advantage of what had become a more business-friendly federal common law applied in diversity matters.<sup>117</sup> When the Court affirmed this tactic,<sup>118</sup> the outrage reached a fever pitch. Far from achieving the uniformity that Justice Story had envisioned, the *Swift* doctrine had instead cultivated considerable uncertainty in the administration of legal rights, promoted gamesmanship among parties, and exacerbated the type of forum-based discrimination that *Swift* had

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109. See *supra* notes 101–08 and accompanying text.

110. See *Southland Corp. v. Keating*, 465 U.S. 1, 5–6, 17 (1984).

111. 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

112. *Id.* at 18.

113. Ch. 20, 1 Stat. 73.

114. *Swift*, 41 U.S. (16 Pet.) at 18–19 (quoting Judiciary Act of 1789 § 34).

115. The fact that the FAA was enacted before the *Erie* decision potentially affects this analysis. Enacting the FAA during the pre-*Erie* federal common law period could explain why Congress neither expressly created a substantive federal claim nor included an express federal preemption provision—it assumed federal courts would apply federal common law. But following *Erie*, no such federal common law FAA claim can exist; given this state of the law, the only rational way to read § 2 is to mean state common law.

116. 276 U.S. 518 (1928).

117. *Id.* at 523–24.

118. See *id.* at 529–31.

hoped to halt.<sup>119</sup> Writing for the Court in *Erie*, Justice Brandeis declared: “There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.”<sup>120</sup> Almost echoing Justice Holmes’s disdain for the view of the common law as some “brooding omnipresence,”<sup>121</sup> the Court in *Erie* rejected Justice Story’s grand vision and barred the continued use of the accident of diversity to subvert state law.<sup>122</sup>

In overruling *Swift*, the *Erie* decision restored a sense of equilibrium to the federalist model.<sup>123</sup> It reinforced the integrity of substantive areas of law that the Constitution had reserved to the states—including the law of contract. Of course, Congress remains free to pass federal procedural rules that apply in diversity matters even when they differ from their state analogues.<sup>124</sup> Even procedural rules that arguably alter the contours of substantive rights can be permissible.<sup>125</sup> Nevertheless, it is the states, not the federal government, that remain the principal drivers of their local commercial destinies. In sum, *Erie* is far more than a choice-of-law principle limiting the implications of diversity jurisdiction—it is a bulwark of state sovereignty.<sup>126</sup> Following that watershed return to

119. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73–77 (1938).

120. *Id.* at 78.

121. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

122. See *Erie*, 304 U.S. at 78.

123. See *id.* at 78–80.

124. *Hanna v. Plumer*, 380 U.S. 460, 472–74 (1965).

125. See *id.*

126. See *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (citing *Erie*, 304 U.S. 64) (“[C]omity and respect for federalism [generally] compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.”); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 517 (1988) (Brennan, J., dissenting) (“*Erie* was deeply rooted in notions of federalism, and is most seriously implicated when . . . federal judges displace the state law that would ordinarily govern with their own rules of federal common law.”); *Hanna*, 380 U.S. at 474 (Harlan, J., concurring) (“I have always regarded [*Erie*] as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems.”); Adam N. Steinman, *What is the Erie Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 316 (2008) (“The ‘fallacy underlying the rule declared in *Swift v. Tyson*’ was the idea that the mere existence of *jurisdiction* included the power to impose judicially created federal law standards in derogation of state law substantive rights.” (footnote omitted) (quoting *Erie*, 304 U.S. at 79)); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); Richard A. Epstein & Mario Loyola, *Saving Federalism*, NAT’L AFF., at 3, 17–18 (2014) (“[T]he Court must once again begin . . . to preserve meaningful state sovereignty over some part of the purely internal commerce of the states; and to ensure the

federalist respect for state law, what exactly is the basis for federal court intervention in a state lawsuit to defend the policy aims of a federal procedural statute?

At first, the Court did treat the FAA as a procedural regulation. During the *Swift* era, the Court had no occasion to classify the FAA as substantive or procedural. Then in 1956, the Court decided *Bernhardt v. Polygraphic Co. of America*,<sup>127</sup> where the Court rejected the U.S. Court of Appeals for the Second Circuit's application of the FAA as a procedural statute to a diversity matter in which state law would have required a different outcome.<sup>128</sup> Noting the state-law nature of the underlying cause of action, the Court concluded that it was bound by its recapitulation of *Erie* in *Guaranty Trust Co. v. York*<sup>129</sup> that "the federal court enforcing a state-created right in a diversity case is . . . in substance 'only another court of the State.'"<sup>130</sup> Writing for the Court, Justice Douglas explained that proceeding before an arbitral tribunal might cause a "radical difference" in the case's outcome,<sup>131</sup> summoning the Court's early resistance to the FAA in *Wilko*.<sup>132</sup> The Court accordingly held that the enforceability of the arbitration agreement was ultimately a question of state law.<sup>133</sup>

Regardless of whether the Court was right on the procedural versus substantive debate, this was the right result under *Erie*.<sup>134</sup> And § 4 of the FAA makes it clear that jurisdiction includes arbitration disputes between diverse parties.<sup>135</sup> Thus, an arbitration matter should be the same as any other diversity action: federal law supplies the procedure and state

separation of state and federal government operations. Without judicial protection for the checks and balances at the heart of our Constitution, those checks and balances will continue to dissolve.").

127. 350 U.S. 198 (1956).

128. *Id.* at 202.

129. 326 U.S. 99 (1945).

130. *Bernhardt*, 350 U.S. at 203 (quoting *Guaranty Tr.*, 326 U.S. at 108).

131. *Id.*

132. See *Wilko v. Swan*, 346 U.S. 427, 435–38 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

133. *Bernhardt*, 350 U.S. at 203–04.

134. And for our purposes, the substantive/procedural distinction may not matter because *Erie* compels the same result in either case: "*Erie* involved the constitutional power of federal courts to supplant state law with judge-made rules. In that context, it made no difference whether the rule was technically one of substance or procedure; the touchstone was whether it 'significantly affect[s] the result of a litigation.'" *Shady Grove Orthopedic Assocs., PA v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010) (plurality opinion) (alteration in original) (quoting *Guaranty Tr.*, 326 U.S. at 109).

135. See 9 U.S.C. § 4 (2012) ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action . . . of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.").



substantive law governs enforceability. Yet the Court balked a decade later in *Prima Paint v. Flood & Conklin Manufacturing Co.*,<sup>136</sup> which, like *Bernhardt*, involved another state-law claim brought under federal diversity jurisdiction.<sup>137</sup> Rather than affirm *Bernhardt*, the Court characterized its earlier holding as limiting the FAA to “apply only to . . . two kinds of contracts . . . , namely those in admiralty or evidencing transactions in ‘commerce.’”<sup>138</sup> Meeting this standard with minimal effort, the Court made short work of the remaining *Erie* concern. Bypassing *Bernhardt*’s substantive classification of the FAA, the Court found no *Erie* issue at all.<sup>139</sup> “Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate,” Justice Fortas announced.<sup>140</sup> Obviously it may. “Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power.”<sup>141</sup> Nothing else mattered.

Joined by Justices Douglas and Stewart, Justice Black dissented.<sup>142</sup> Noting the less-than-conclusive evidence that Congress passed the FAA using its Commerce Clause authority,<sup>143</sup> Justice Black took aim at the Court’s incomplete *Erie* analysis. *Bernhardt*’s classification of the FAA as substantive left courts just two options: either the FAA was passed under Congress’s authority (defunct after *Erie*) to enact federal general law applicable in diversity matters or the FAA was an exercise of the Commerce Clause power (as the majority found), thus avoiding an *Erie* issue altogether.<sup>144</sup> Neither motive was “clear beyond dispute.”<sup>145</sup> After all, the legislative history suggested that Congress enacted the FAA as a procedural rule under its Article I, Section 8 power “[t]o constitute Tribunals inferior to the supreme Court.”<sup>146</sup> The same history likewise indicated a lack of interest in preempting state law or creating a new basis for federal question jurisdiction.<sup>147</sup> Relying on the FAA’s judicially

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136. 388 U.S. 395 (1967).

137. *See id.* at 398.

138. *Id.* at 401.

139. *Id.* at 405.

140. *Id.*

141. *Id.* at 406.

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

143. *Id.* at 409–10.

144. *Id.* at 417.

145. *Id.* (quoting *id.* at 395 (majority opinion)).

146. U.S. CONST. art. I, § 8, cl. 9; *see Prima Paint*, 388 U.S. at 417–20 (Black, J., dissenting).

147. *Prima Paint*, 388 U.S. at 420 (Black, J., dissenting).

forged pro-arbitration policy, the majority chose the latter view. But this, the dissent declared, was little more than “judicial legislation.”<sup>148</sup>

This is where the train left the track. *Prima Paint* misreads *Bernhardt* by construing the FAA as presenting no *Erie* problem. As this Article argued above, the FAA was intended only to clarify a federal court’s diversity jurisdiction.<sup>149</sup> Federal courts have jurisdiction in two broad primary categories, federal question and diversity:

The district courts of the United States, as we have said many times, are “courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.” In order to provide a federal forum for plaintiffs who seek to vindicate federal rights, Congress has conferred on the district courts original jurisdiction in federal-question cases—civil actions that arise under the Constitution, laws, or treaties of the United States. In order to provide a neutral forum for what have come to be known as diversity cases, Congress also has granted district courts original jurisdiction in civil actions between citizens of different States, between U.S. citizens and foreign citizens, or by foreign states against U.S. citizens.<sup>150</sup>

The FAA does not create a federal cause of action, and there is no historical evidence that Congress exercised its Commerce Clause power when enacting a rule for the federal courts. That only leaves diversity, where federal courts are required to apply state substantive law:

Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it a generation of rules of substantive law. As *Erie* read the Rules of Decision Act: “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.” Under the *Erie* doctrine, federal courts

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148. *Id.* at 425.

149. See *supra* text accompanying notes 134–41.

150. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (citations omitted) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). Removal to federal district court is permitted for “any civil action brought in a State court of which the district courts of the United States have original jurisdiction.” 28 U.S.C. § 1441(a) (2012). Removal thus depends on whether the case originally could have been filed in federal court. See *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 8 (1983). District courts have original jurisdiction under the federal question statute over cases “arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. “It is long settled law that a cause of action arises under federal law only when the plaintiff’s well-pleaded complaint raises issues of federal law.” *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

sitting in diversity apply state substantive law and federal procedural law.<sup>151</sup>

So framed, how can the FAA be read to displace state contract law? Following *Prima Paint*, it was indeed unclear just how far the FAA could legitimately displace state contract law. At least *Bernhardt* and *Prima Paint* had established that the accident of diversity made no difference regardless of whether the FAA was intended to be procedural or substantive. But these cases left one major question unanswered: what about cases where federal courts have no diversity jurisdiction?

The Court confronted that question in *Southland*. This case came to the Court's docket via 28 U.S.C. § 1257, which provides for review of state court decisions that implicate the validity of federal statutes.<sup>152</sup> As the Court had done in *Wilko* nearly three decades earlier, the California Supreme Court held in *Southland*'s underlying case (*Keating v. Superior Court*<sup>153</sup>) that a state financial statute required a judicial forum.<sup>154</sup> Though "certain principles" undergirding the FAA warranted a departure from longstanding forum norms, the California Supreme Court ultimately found that state regulations giving the judiciary the last word prevailed.<sup>155</sup>

The U.S. Supreme Court reversed.<sup>156</sup> In a 7–2 decision, Chief Justice Burger, citing no authority, wrote: "In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."<sup>157</sup> Not quite.<sup>158</sup> As discussed above, the Court had previously recognized legislative exceptions to the FAA.<sup>159</sup> More importantly, the Court had intimated in *Bernhardt* that the FAA was passed as a regulation of federal judicial procedure. Rather than shed the outcome-determinative character that had threatened to limit the FAA's reach in *Bernhardt*, the Court in *Southland* effectively held that the Act was both substantive and procedural.<sup>160</sup> So long as an arbitration clause was part of a contract

151. *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426–27 (1996) (footnote omitted) (citation omitted) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

152. *Southland Corp. v. Keating*, 465 U.S. 1, 6 (1984).

153. 645 P.2d 1192 (Cal. 1982), *rev'd in part sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

154. *See id.* at 1203–04.

155. *Id.*

156. *Southland*, 465 U.S. at 17.

157. *Id.* at 10.

158. *But see* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 163 (2002) (arguing that *Southland* correctly concluded that Congress passed the FAA under the Commerce Clause).

159. *See supra* Section I.B (discussing statutory claims that are not subject to the FAA).

160. *See Southland*, 465 U.S. at 11–13.

involving commerce (noncommercial contracts are rare, to say the least), no state law could stand in the way of its enforcement, save for the few contract defenses that the Court had not already declared inapplicable to the FAA.<sup>161</sup> After all, the Chief Justice reiterated, the FAA was passed to eradicate “old common-law hostility toward arbitration” and to make up for states’ “failure” to adequately enforce arbitration agreements.<sup>162</sup> *Southland* expressly held that the FAA is substantive federal law: “The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause.”<sup>163</sup> By regulating arbitration agreements, California was venturing into Congress’s domain.

This conclusion has three flaws. First, to read the FAA so broadly contradicts the statutory text, which provides for the invalidation of arbitration clauses only “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>164</sup> Properly read, the FAA only requires federal courts to make arbitration agreements subject to the same rules as any other contract. And even in contract disputes between parties from different states—that is, cases involving interstate commerce—state law typically determines “[t]he rights and duties of the parties.”<sup>165</sup> The Court’s sweeping holding in *Southland* defies this basic presumption and impairs state power to govern contracts.

Next, as Justice O’Connor observed in her *Southland* dissent, the majority’s suggestion that the FAA was a congressional response to *state* resistance to arbitration agreements is historically dubious.<sup>166</sup> Indeed, the legislative history suggests that Congress passed the FAA to address the *Swift*-era forum shopping—a problem created by *federal* courts—that by 1925 had reached its zenith.<sup>167</sup> It was not state but federal resistance to arbitration that the FAA had aimed to rectify.<sup>168</sup> (And of course, that forum-shopping problem has since been otherwise resolved).

Finally, even if one accepts the FAA as substantive federal law adopted under the Commerce Clause, *Southland* did little to resolve the *intrastate* nature of nonremovable contract disputes brought in state court

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161. *See id.*

162. *Id.* at 14.

163. *Id.* at 11.

164. 9 U.S.C. § 2 (2012).

165. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971); *see* Guaranty Tr. Co. v. York, 326 U.S. 99, 108–09 (1945) (“[S]ince a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.”).

166. *See Southland*, 465 U.S. at 33–35 (O’Connor, J., dissenting).

167. *Id.* at 34–35.

168. *Id.*

between citizens of the same state. True, the Court has read the Commerce Clause power expansively.<sup>169</sup> But not even the most liberal application of those cases would support a view of that power that includes enacting the FAA as a commerce power exercise.

In sum, the Court's treatment of the FAA as substantive law raises serious *Erie* concerns.<sup>170</sup> The FAA's distended scope is only made possible by disregarding the federalism principle that lies at *Erie*'s core, paving the way for an FAA that Congress never passed. *Erie*'s historical context more convincingly casts the FAA as a modest remedial statute for federal courts sitting in diversity, not as a regulatory behemoth designed to swallow up every state's law of contract. The next Part explains how California's efforts to retain control over its own law of contract have boomeranged and instead been used by the Court to propel the FAA's continued expansion.

### III. THE FAA HAS A COMMANDEERING PROBLEM

Even if the Court's interstate commerce interpretation is reasonable, the FAA's reach into intrastate transactions creates a federalism problem because it commandeers state courts. California courts have jurisdiction over contract disputes between California citizens with a California choice-of-law provision. In that scenario there is no basis for Article III jurisdiction: the parties are not diverse, and no substantive federal claim is implicated. Yet under the Court's current reading of the FAA, Congress intended to supersede state court jurisdiction in such cases. Reading the FAA as a substantive federal law matter both preempts contrary state law and divests state court jurisdiction to hear the case. The Court's anti-commandeering doctrine should operate here to prevent this federalism problem.

Federalism is a core design principle of the U.S. Constitution intended by its drafters to contain federal encroachment.<sup>171</sup> James Madison

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169. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552 (2012) (opinion of Roberts, C.J.) (rejecting the Patient Protection and Affordable Care Act individual mandate as regulation of *existing* commercial activity); *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942) (permitting federal regulation of wheat production for personal use given its interstate impact).

170. See Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1313–18 (1985) (discussing *Erie*'s impact on courts' understanding of the FAA).

171. See ANDREW NOLAN ET AL., CONG. RESEARCH SERV., FEDERALISM-BASED LIMITATIONS ON CONGRESSIONAL POWER: AN OVERVIEW 1 (2018), <https://fas.org/sgp/crs/misc/R45323.pdf> [<https://perma.cc/Y4YK-4ES5>]. The 1789 Constitution closely mirrors Madison's vision, and it should since he drafted much of it. See RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 188 (1971) (noting that Madison drafted the "Virginia Plan," which provided "the basic framework for the document that became the Constitution of the United States").

described the federal government's powers as "few and defined."<sup>172</sup> Conversely, the states' powers would be "numerous and indefinite."<sup>173</sup> The limiting principle of federalism is baked into the Constitution's design: the first three articles assign limited federal powers to three competing branches; the first nine amendments check federal power by protecting specific and unenumerated rights; and the Tenth Amendment reserves powers not given to the federal government "to the States respectively, or to the people."<sup>174</sup> In other words, "all is retained which has not been surrendered."<sup>175</sup> Both anti-commandeering doctrine and judicial federalism derive from this first principle of constitutional federalism.

The anti-commandeering and judicial-federalism doctrines arose to maintain this division of power and to ensure that federal power remained limited.<sup>176</sup> On the federal side, the anti-commandeering doctrine compels self-restraint on federal courts considering whether state courts can be required to enforce federal policy.<sup>177</sup> And on the state side, Madison encouraged states and local governments to resist federal overreach through "refusal to cooperate with the officers of the Union."<sup>178</sup> States could limit federal power by simply refusing to be made into instruments of the federal government.

By enlisting state courts to enforce federal law notwithstanding the territorial right of states to govern contracts, the FAA's current interpretation effectively compels states such as California to implement and enforce a federal regulatory regime. This violates the anti-commandeering rule because it blurs the line between state and federal courts to a degree long held impermissible by the Court in other contexts.<sup>179</sup> And it contravenes fundamental federalism principles by forcing states not simply to enforce the FAA in their own courts but to relinquish their longstanding power to adjudicate state common law.

The anti-commandeering and judicial-federalism doctrines can supply the limiting principles that the modern arbitration doctrine desperately needs. As discussed above, the present void is largely attributable to its uncertain legislative footing. It is unclear whether Congress intended the

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172. THE FEDERALIST NO. 45 (James Madison).

173. *Id.*

174. U.S. CONST. amend X.

175. *United States v. Darby*, 312 U.S. 100, 124 (1941); *see also* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers.").

176. *See* NOLAN ET AL., *supra* note 171.

177. *See id.*

178. THE FEDERALIST NO. 46 (James Madison).

179. *See, e.g.,* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018); *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 174–75 (1992).

FAA to regulate interstate commerce or judicial procedure. The Supreme Court employs it for both purposes. And the Court has read the statute to the exclusion of contrary state contract law, even when there is no original federal jurisdiction in the matter. As it stands, the FAA permits unlimited federal encroachment into state common and statutory law, state court jurisdiction, and state sovereignty. The Constitution was not designed to permit federal courts to draft state courts into federal service—Madison designed it to *prevent* that from happening. The anti-commandeering and judicial-federalism doctrines should prevent the FAA from divesting state courts of jurisdiction over state contract law matters.

A. *The Anti-Commandeering Doctrine Shields State Courts from Federal Arbitration Policy Enforcement Duty*

The Supreme Court’s anti-commandeering doctrine bars the federal government from forcibly conscripting states to implement federal policy.<sup>180</sup> Rooted in the Tenth Amendment, this federalism doctrine protects state sovereignty by policing “the vertical separation of powers between the state and federal governments.”<sup>181</sup> The anti-commandeering doctrine should prevent the FAA from forcing state legislatures and courts to implement federal arbitration policy.

The anti-commandeering doctrine preserves the constitutional design decision “to withhold from Congress the power to issue orders directly to the States.”<sup>182</sup> “The Constitution limited but did not abolish the sovereign powers of the States, which retained ‘a residuary and inviolable sovereignty.’”<sup>183</sup> And the legislative powers granted to Congress are enumerated, not unlimited, with all other legislative power reserved to the states.<sup>184</sup> Because Congress has no enumerated legislative power to directly order the states, the anti-commandeering doctrine recognizes this limit on congressional authority.<sup>185</sup> Four contemporary examples demonstrate that the anti-commandeering framework should apply to limit the FAA.

The first is *New York v. United States*.<sup>186</sup> There, New York leveled a Tenth Amendment challenge against the federal Low-Level Radioactive

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180. See *Printz*, 521 U.S. at 935 (“Congress cannot compel the States to enact or enforce a federal regulatory program.”).

181. Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 548–49 (2012).

182. *Murphy*, 138 S. Ct. at 1475.

183. *Id.* (quoting THE FEDERALIST NO. 39 (James Madison)).

184. *Id.* at 1476.

185. *Id.*

186. 505 U.S. 144 (1992).

Waste Policy Amendments Act of 1985.<sup>187</sup> The Act pressed states to develop waste-disposal programs using a set of federally orchestrated incentives.<sup>188</sup> Writing for the Court, Justice O'Connor agreed with New York concerning the federally mandated ultimatum to either adopt Congress's disposal framework or take title to and become liable for all low-level radioactive waste generated within that state's borders.<sup>189</sup> "Either type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments."<sup>190</sup>

The *New York* decision stands for the principle that states must have the option to opt out of enforcing federal policy without penalty. Congress could not force states to subsidize waste generators or require them to implement federal legislation—even considering Congress's otherwise permissible regulation of this activity under the Commerce Clause.<sup>191</sup> To be sure, Congress retains "substantial powers" to directly regulate national issues, even in spheres of "intimate concern to the States."<sup>192</sup> But when it comes to participating in the enforcement of those powers, states must have a legitimate choice.

*Printz v. United States*<sup>193</sup> built upon this principle. The issue in *Printz* was whether the Brady Handgun Violence Prevention Act,<sup>194</sup> which required state and local police to temporarily administer background checks for aspiring handgun owners, ran afoul of the constitutional principle announced in *New York*.<sup>195</sup> The Court held that the Act was contrary to Madison's vision of state governments that responded to their citizens rather than to the commands of the limited federal government.<sup>196</sup> Just as Congress could not order states to adopt federal policy in *New York*, it could not evade this restriction by ordering state officers and agents to do the same.<sup>197</sup>

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187. Pub. L. No. 99-240, 99 Stat. 1842 (1986) (codified as amended at 42 U.S.C. §§ 2021b–21j (2012)), *invalidated in part by* *New York v. United States*, 505 U.S. 144 (1992); *see New York*, 505 U.S. at 151, 154.

188. *See New York*, 505 U.S. at 150–54.

189. *Id.* at 175.

190. *Id.*

191. *See id.* at 174–77.

192. *Id.* at 162.

193. 521 U.S. 898 (1997).

194. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. §§ 921–22 (2012)), *invalidated in part by* *Printz v. United States*, 521 U.S. 898 (1997).

195. *See Printz*, 521 U.S. at 902–04.

196. *See id.* at 919–22.

197. *Id.* at 935.



The third case is *National Federation of Independent Business v. Sebelius*.<sup>198</sup> After examining the Patient Protection and Affordable Care Act's (ACA)<sup>199</sup> Medicaid provision requiring states to expand the program or forfeit all associated grants, a plurality of the Court stated that this was unduly coercive.<sup>200</sup> Though the ACA's use of federal funds to encourage state behavior that it could not compel was constitutionally permissible, conditioning the continued receipt of existing funding on such behavior was not.<sup>201</sup> Likening Congress's Spending Clause power to a contract, Chief Justice Roberts explained that a knowing, voluntary acceptance of the terms of conditional funding was imperative: "Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."<sup>202</sup> To that end, the Court expanded its anti-commandeering doctrine to include both direct and indirect coercion as improper means of encouraging states to adopt federal policy objectives.<sup>203</sup> The Medicaid expansion's retroactive conditioning of continued funding ran afoul of this added protection.<sup>204</sup> This was no longer an incentive—it was a penalty.

Finally, the recent decision in *Murphy v. National Collegiate Athletic Association*<sup>205</sup> shows that federal law constraining state legislative action constitutes commandeering.<sup>206</sup> In *Murphy*, New Jersey challenged the Professional and Amateur Sports Protection Act (PASPA),<sup>207</sup> which forbade states to authorize betting on competitive sporting events.<sup>208</sup> New Jersey argued that PASPA commandeered the states because it regulated a state's exercise of its lawmaking power by barring states from changing their laws prohibiting sports gambling.<sup>209</sup> The Court agreed, holding that the PASPA provision prohibiting state authorization of sports gambling violated the anti-commandeering rule because it unequivocally dictated what a state legislature may and may not do, placing state legislatures

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198. 567 U.S. 519 (2012).

199. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.), *invalidated in part by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

200. *See Sebelius*, 567 U.S. at 575–85 (plurality opinion).

201. *Id.* at 578–80.

202. *Id.* at 577.

203. *See id.* at 578.

204. *Id.* at 579–80.

205. 138 S. Ct. 1461 (2018).

206. *See id.* at 1478.

207. Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified as amended at 28 U.S.C. §§ 3701–04 (2012)), *invalidated by* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

208. *Murphy*, 138 S. Ct. at 1468, 1471.

209. *Id.* at 1471.

under direct congressional control.<sup>210</sup> “It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”<sup>211</sup>

As currently interpreted, the FAA violates the anti-commandeering doctrine developed in these cases because it similarly constrains state legislatures (and by extension, state courts). By requiring state courts to enforce arbitration agreements regardless of state contract law, the FAA arguably presents a more extreme example of federal overreach than those struck down in *New York*, *Printz*, *Sebelius*, and *Murphy*. The Court’s reading of the FAA does not merely encourage states to adopt federal guidelines—it requires nothing less. Indeed, the current FAA doctrine uses the threat of Supreme Court intervention to coerce state courts to nullify their own statutory and common law rules governing contracts that involve arbitration. The FAA does not merely preclude contrary state law or resolve state–federal conflicts, it forces FAA preemption of even purely intrastate contract matters on unwilling state legislatures and courts. This makes modern arbitration doctrine “fundamentally incompatible with our constitutional system of dual sovereignty.”<sup>212</sup>

California is a regular target of such commandeering. For example, in *Concepcion*, the U.S. Supreme Court overruled the California Supreme Court’s holding in *Discover Bank v. Superior Court*.<sup>213</sup> The so-called *Discover Bank* rule had stated that class action waivers in consumer contracts of adhesion were unconscionable and unenforceable in certain circumstances.<sup>214</sup> *Concepcion* was one such case.<sup>215</sup> When cellphone subscribers filed a class action lawsuit, AT&T moved to compel individual arbitration proceedings for each subscriber, citing an arbitration clause in the company’s standard service agreement.<sup>216</sup> The subscribers countered with *Discover Bank*,<sup>217</sup> which found that a similar “scheme to deliberately cheat large numbers of consumers out of individually small sums of money” rendered the clause unenforceable.<sup>218</sup>

210. *Id.* at 1478.

211. *Id.*

212. *See* *Printz v. United States*, 521 U.S. 898, 935 (1997).

213. 113 P.3d 1100 (Cal. 2005), *abrogated by* *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *see* *Concepcion*, 563 U.S. at 352.

214. *See* *Discover Bank*, 113 P.3d at 1110.

215. *See* *Concepcion*, 563 U.S. at 336 (involving a consumer contract with a class action waiver).

216. *See id.* at 336–37.

217. *Id.*

218. *See* *Discover Bank*, 113 P.3d at 1110.

The U.S. Supreme Court held that California's *Discover Bank* rule is preempted.<sup>219</sup>

The Court substituted its understanding of California contract law for that of the state's highest court.<sup>220</sup> Describing the *Discover Bank* rule as "classifying most collective-*arbitration* waivers in consumer contracts as unconscionable" and thus contrary to the FAA's pro-arbitration policy, the Court quickly dismissed the California contract rule as antagonistic to arbitration.<sup>221</sup> The Court paid no mind to the rule's regular application in the non-arbitral context or to its statutory origin.<sup>222</sup> The law's potentially disproportionate impact on arbitration clauses sufficed.<sup>223</sup> *Concepcion* illustrates, to a worrying degree, the demotion of state courts from "ultimate expositors of state law"<sup>224</sup> to mere conduits for federal appropriation of state contract law—not to mention the nullifying effect on the statutes that the underlying lawsuits aim to enforce.<sup>225</sup>

*DIRECTV, Inc. v. Imburgia*<sup>226</sup> provides another and more far-reaching example. There, consumers sued in state court claiming that early termination fees in satellite service contracts violated California law.<sup>227</sup> A provision in each contract voided the arbitration clause if the "law of your state" considers class-arbitration waivers unenforceable.<sup>228</sup> The California Court of Appeal thus found that the parties had elected to apply California law, which still included *Discover Bank* when the contracts

219. See *Concepcion*, 563 U.S. at 352.

220. Cf. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law and [the Court is] bound by their constructions except in extreme circumstances . . . ." (citations omitted)).

221. *Concepcion*, 563 U.S. at 340, 346–48 (emphasis added).

222. See *id.* at 341–43.

223. *Id.* at 342. The Court has since referred to this as "a sort of 'equal-treatment' rule for arbitration contracts." See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (quoting *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017)).

224. *McElroy v. Holloway*, 451 U.S. 1028, 1031 (1981) (Rehnquist, J., dissenting) (quoting *Mullaney*, 421 U.S. at 691) ("[S]tate courts are the ultimate expositors of state law . . . and . . . [federal courts] are bound by their constructions." (second and third alterations in original) (quoting *Mullaney*, 421 U.S. at 691)); see also *Greenough v. Tax Assessors*, 331 U.S. 486, 497 (1947) ("In so adjudging, [state courts] are the final judicial authority upon the meaning of their state law."); *Mich. Cent. R.R. Co. v. Powers*, 201 U.S. 245, 290–91 (1906) ("The unconstitutionality of a statute may depend upon its conflict with the constitution of the State or with that of the United States. If conflict with the state constitution is the sole ground of attack, the Supreme Court of the State is the final authority . . .").

225. The Court reaffirmed its holding in *Concepcion* two years later in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013), a case which originally began making its way through the courts as *Concepcion* was being decided.

226. 136 S. Ct. 463 (2015).

227. *Id.* at 466.

228. *Id.*

were executed.<sup>229</sup> The U.S. Supreme Court reversed again.<sup>230</sup> Though the parties likely understood “law of your state” to include *Discover Bank*, *Concepcion* had since been decided.<sup>231</sup> According to the Court, “law of your state” only encompassed *valid* state law.<sup>232</sup> *Discover Bank* had, however, been valid law at the contracts’ execution. And as the Court of Appeal observed, there remained a separate statutory ban on class waivers in consumer cases—a ban that *Concepcion* never addressed.<sup>233</sup> These competing interpretations convinced the Court of Appeal that the clause was ambiguous, which favored the plaintiffs’ interpretation.<sup>234</sup>

The Supreme Court thought otherwise.<sup>235</sup> Once again substituting its own interpretation of California contract law, the Court deemed the clause unambiguous and the Court of Appeal’s interpretation preempted.<sup>236</sup> Justice Ginsburg observed in dissent: “Today, the Court holds that consumers lack not only protection against unambiguous class-arbitration bans in adhesion contracts. They lack even the benefit of the doubt when anomalous terms in such contracts reasonably could be construed to protect their rights.”<sup>237</sup>

More fundamentally, the Court had seized another state judicial function. Beyond defenses to enforcement, the FAA now required that courts observe a sufficiently pro-arbitration interpretation of the contract itself.<sup>238</sup>

229. *See Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 195 (Ct. App. 2014), *rev’d*, 136 S. Ct. 463 (2015).

230. *Imburgia*, 136 S. Ct. at 471. The California Supreme Court denied review. *Id.* at 467.

231. *Id.* at 468–69.

232. *Id.* at 469. As the Court understood it, California contract law incorporates a presumption of post hoc amendment—that is, “law of your state” encompasses changes to the law following a contract’s execution, including the U.S. Supreme Court’s overruling of *Discover Bank* in *Concepcion*. *See id.*

233. *See Imburgia*, 170 Cal. Rptr. 3d at 195–96.

234. *Id.* at 195–96; *see also* CAL. CIV. CODE § 1654 (West 2019) (“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.”); RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981) (“In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”).

235. *Imburgia*, 136 S. Ct. at 469, 471.

236. *Id.*

237. *Id.* at 476 (Ginsburg, J., dissenting).

238. *See id.* at 471 (majority opinion) (“California’s interpretation of the phrase ‘law of your state’ does not place arbitration contracts ‘on equal footing with all other contracts.’ For that reason, it does not give ‘due regard . . . to the federal policy favoring arbitration.’” (alteration in original) (citation omitted) (first quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); and then quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989))).

The anti-commandeering doctrine is intended to check even the most generous assessment of legislative intent. As the final word on its own law of contract,<sup>239</sup> California retains the right as an independent sovereign to limit the expenditure of its resources to enforce the FAA.<sup>240</sup> This is especially true where, as here, the federal statute stands at odds with state law that presumptively controls this area of the law. Although “Congress may legislate in areas traditionally regulated by the States,” federal incursion into such spaces must be clear and deliberate.<sup>241</sup> But state courts were scarcely a concern of the 68th Congress, whose primary aim in passing the FAA was ending the federal ouster and revocability doctrines that preceded it.<sup>242</sup> Congress intended that the FAA be a fix for federal procedure rather than the slow, quiet preemption of contract law that the Court has since accomplished.<sup>243</sup> Absent a congressionally ordained basis for preemption, the Court’s interpretation of the FAA commandeers state governments to impose federal arbitration policy. Even if Congress had broader aims, the anti-commandeering doctrine requires that states be given a legitimate choice when it comes to committing state resources to the enforcement of federal policy. And yet, as the recent line of FAA cases shows, the states have no choice in the matter.

The next Section shows how federalism protects state judiciaries from being dragooned.

### B. *Judicial Federalism Should Compel Respect for State Courts*

Judicial federalism is the constitutional vision of two separately independent yet interconnected judiciaries in the United States.<sup>244</sup> It balances the Supremacy Clause with state sovereignty: it bars state discrimination against federal causes of action,<sup>245</sup> while preserving state autonomy to set the standards to which state-court litigants must adhere.<sup>246</sup> In balancing these parallel judicial universes, the Supreme Court has never used judicial federalism to overturn substantive state law. On the contrary, only procedural state rules that undermine substantive

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239. See *Volt Info. Scis.*, 489 U.S. at 474 (“[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.”).

240. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) (plurality opinion).

241. See *Gregory v. Ashcroft*, 501 U.S. 452, 460–64 (1991).

242. See *Horton*, *supra* note 44, at 444–45.

243. See *id.* at 445–46.

244. Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511, 514 (2011); accord *Clafin v. Houseman*, 93 U.S. 130, 137 (1876) (“The [state and federal courts] together form one system of jurisprudence . . .”).

245. See, e.g., *Testa v. Katt*, 330 U.S. 386, 389–94 (1947).

246. See, e.g., *Herb v. Pitcairn*, 324 U.S. 117, 120 (1945).

federal claims are preempted.<sup>247</sup> This doctrine applies to the FAA in two ways: it should limit preemption to only state procedures that disfavor arbitration claims, and it should preserve state substantive contract law.

The Court has consistently limited its discrimination-against-federal-claims rule to state procedures. For example, in *Brown v. Western Railway of Alabama*,<sup>248</sup> a state court dismissed a personal injury claim against a railroad under the Federal Employers' Liability Act (FELA)<sup>249</sup> for failure to state a claim.<sup>250</sup> Because state courts dismissing FELA claims on state procedural grounds meant different results would occur in state and federal courts, the U.S. Supreme Court held that Georgia's pleading rules discriminated against federal claims: "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."<sup>251</sup> In *Felder v. Casey*,<sup>252</sup> a state court dismissed a plaintiff's 42 U.S.C. § 1983 claim based on Wisconsin's procedural notice-of-claim statute.<sup>253</sup> The U.S. Supreme Court reversed, holding that the notice-of-claim statute compromised § 1983's important remedial purpose of compensating constitutional rights denials by states: "Federal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'"<sup>254</sup> And when, in *Haywood v. Drown*,<sup>255</sup> another state court dismissed a § 1983 claim based on a state law divesting state courts of jurisdiction, the Court again rejected the state's attempt to avoid enforcing disfavored claims.<sup>256</sup>

These cases establish a rule that only state procedural rules that undermine federal claims are preempted. Yet the Court's FAA doctrine uses the same underlying concern (discrimination against federal claims) to overturn substantive state law. That rule should not apply to the FAA. Assuming that a defendant lacks the right to remove under 28 U.S.C. § 1441, a motion to compel arbitration in state court does not involve a federal claim. The text of the FAA<sup>257</sup> makes the absence of an independent federal claim abundantly clear: the FAA does not provide

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247. See *Southland Corp. v. Keating*, 465 U.S. 1, 31 (1984) (O'Connor, J., dissenting) ("It is settled that a state court must honor federally created rights and that it may not unreasonably undermine them by invoking contrary local procedure.").

248. 338 U.S. 294 (1949).

249. Pub. L. No. 60-100, 35 Stat. 65 (1908) (current version at 45 U.S.C. §§ 51-60 (2012)).

250. *Brown*, 338 U.S. at 294-95.

251. *Id.* at 298-99.

252. 487 U.S. 131 (1988).

253. *Id.* at 135-37.

254. *Id.* at 141-42, 150 (quoting *Brown*, 338 U.S. at 298-99).

255. 556 U.S. 729 (2009).

256. See *id.* at 731-32, 737-42.

257. See 9 U.S.C. § 4 (2012).

the kind of federal claim that was at issue in cases where the Court applied the so-called antifrustration principle. Because that scenario presents no question of a state procedural rule discriminating against a federal claim, the other side of the judicial-federalism coin should apply: respect for state sovereignty requires leaving state substantive law intact.

The opposite result, however, has occurred with respect to the FAA. Cases like *Concepcion* and *Imburgia* have dramatically reshaped the law of contract in California and other states in which courts have attempted to protect their state's judicial power. Even generally applicable contract defenses have been gutted if they so much as threaten a disproportionate impact on the enforceability of arbitration clauses.<sup>258</sup> Federal courts have used the FAA to hollow out state autonomy in an area of law long reserved to state authority. Judicial federalism has never permitted such a result.

Finally, judicial federalism has at times protected federal statutes with clearly discernible, state-oriented corrective objectives. Congress passed FELA for the "remedial" purpose of protecting interstate railroad workers whose injuries and deaths were not compensable in state courts due to common law barriers to recovery.<sup>259</sup> And Congress passed 42 U.S.C. § 1983 "to interpose the federal courts between the States and the people, as guardians of the people's federal rights"—that is, as a much-needed antidote for the states' then-demonstrable constitutional shortcomings.<sup>260</sup> The FAA, by contrast, was passed to address *federal* judicial aversion to arbitration and to reduce *Swift*-era forum shopping but not to impose a new law of contract upon the states.<sup>261</sup> Indeed, by 1925, the federal government was trying to catch up to the states that had already adopted their own arbitration statutes.<sup>262</sup> Taken together, these distinctions should limit the impulse to consider the Court's FAA jurisprudence as merely a passive manifestation of judicial federalism.

Beyond the obvious absence of its invocation in a single FAA case, a close examination of the Court's use of judicial federalism outlines a limited-use rule for state procedural hurdles that threaten to undermine federal statutes with state-oriented remedial purposes. The FAA does not fall under this rule's federal-claim-protection umbrella. Absent that, judicial federalism compels greater deference to state courts concerning the contractual legitimacy of arbitration agreements.

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258. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011).

259. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542–43 (1994).

260. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

261. *See Southland Corp. v. Keating*, 465 U.S. 1, 34–35 (1984) (O'Connor, J., dissenting).

262. *See id.*

## CONCLUSION

Congress passed the FAA to put arbitration agreements “on equal footing with all other contracts.”<sup>263</sup> It reaffirmed the status quo<sup>264</sup> by adding arbitration agreements to an existing body of law that had been and (at least theoretically) continues to be in the states’ domain. The FAA never purported to federalize the law of contract or to limit states’ ability to require a judicial forum for statutes of public import. Nor did it invalidate generally applicable contract defenses. Yet that is how the Supreme Court reads it.

The Court’s modern expansion of the FAA has eroded state authority over their respective contract laws, blurred the line between substance and procedure to avoid inconvenient legislative history, and (most egregiously) conscripted state judiciaries and legislatures alike to enforce the Court’s aggressive vision of the policy it espouses. California is but one example: as a frequent target of FAA challenges, California contract law and public policy have been subordinated to the indiscernible will of a Congress long past.<sup>265</sup>

This should not be. By examining the Court’s doctrines of anti-commandeering and judicial federalism, this Article shows that even assuming Congress passed the FAA as an exercise of its Commerce Clause power, these doctrines limit the Court’s ability to force state courts to administer federal policy. To be sure, state courts may not use procedure to discriminate against federal rights. Yet the FAA does not create a new right. Meanwhile, its position along the substantive–procedural divide remains hotly contested. The FAA’s commandeering effect has accordingly traversed beyond mere historical revisionism and into Tenth Amendment territory. This does not mean that states are forbidden to apply the Court’s version of the FAA. It does, however, suggest that they are equally at liberty to refuse.

The view that this Article urges does not send arbitration law back to the 1920s. With interstate parties in a federal diversity case, state substantive contract and arbitration laws will apply (as they should) and disputes over which state’s laws should apply will be resolved with choice-of-law provisions (as they commonly are). In a dispute between intrastate parties, state arbitration and contract law apply because there is neither federal question nor diversity jurisdiction. All is as it should be. At least, it will be when a majority of the Court reads this Article and reconsiders modern FAA doctrine accordingly.

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263. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

264. *See* 9 U.S.C. § 2 (2012) (“[S]ave upon such grounds as exist at law or in equity for the revocation of any contract.”).

265. Naturally, a legislative fix is preferable. But because it is politically unrealistic to expect one, this Article’s solution is the best presently available.