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# The Federal Arbitration Act and Section 2's "Involving Commerce" Requirement: The Final Step Towards Complete Federal Preemption Over State Law and Policy

*Allied-Bruce Terminix v. Dobson*<sup>1</sup>

## I. INTRODUCTION

In 1609, Lord Coke held agreements to arbitrate revocable at will at any time prior to the issuance of an award.<sup>2</sup> For three-hundred years following Lord Coke's decision, a similar mindset pervaded the judicial psyche of both England and the United States, requiring legislative action to overcome the dilemma.<sup>3</sup> Even after the enactment of the Federal Arbitration Act ("FAA" or "Act"), passed by Congress to combat judicial hostility to arbitration, courts continued to jealously guard their jurisdiction from non-traditional dispute resolution forums.<sup>4</sup> Under Section 2 of the FAA, courts must enforce agreements to arbitrate contained in contracts which evidence a transaction "involving commerce."<sup>5</sup> Although Congress has broad authority under the Commerce Clause to regulate interstate activity, courts refused to apply the FAA to the full extent of Congress' commerce powers.<sup>6</sup> The United States Supreme Court responded to the inconsistency by holding state courts bound by the FAA,<sup>7</sup> but ambiguity remained regarding which contracts actually satisfied Section 2's "involving commerce" test. Lower federal courts and state courts have applied different standards to determine this issue, yielding inconsistent results.

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1. 115 S. Ct. 834 (1995).

2. *Vynor's Case*, 4 ENG. REP. 302 (1609).

3. *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

4. *Id.*

5. 9 U.S.C. § 2 (1988).

6. Zhaodong Jiang, *Federal Arbitration Law & State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 482 (1990).

7. *Southland*, 465 U.S. at 16.

## II. FACTS AND HOLDING

In 1991, Steven and Jan Gwin wished to sell their home in Fairhope, Alabama, to Michael and Wanda Dobson. Earlier that year, Steven Gwin purchased a lifetime "Termite Protection Plan" from the local office of Allied-Bruce Terminix Companies, a franchise of Terminix International ("Terminix").<sup>8</sup> As part of the agreement to buy the house, the Gwins were required to present a statement that a licensed pest control company had inspected the house and observed no active infestation of termites or damage from infestation.<sup>9</sup> Due to the pre-existing contract with the Gwins, Terminix agreed to perform the inspection and present the required statement.<sup>10</sup> The Gwins assigned their existing contract with Terminix to the Dobsons pursuant to the house purchase agreement.<sup>11</sup> A clause in the agreement with Terminix expressly provided that "any controversy or claim between [the parties] arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration."<sup>12</sup>

After the closing and in the course of remodeling the home, the Dobsons uncovered an active termite infestation.<sup>13</sup> Although Terminix attempted to remedy the situation, the Dobsons were ultimately dissatisfied.<sup>14</sup> They brought an action in the Baldwin Circuit Court against the Gwins, alleging fraud, and against Terminix, alleging fraud and breach of contract.<sup>15</sup> Relying on the arbitration clause in the contract, Terminix moved to stay the proceedings and to compel all claims to be submitted to arbitration pursuant to Section 2 of the

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8. *Terminix*, 115 S. Ct. at 835. Terminix International is a limited partnership with its principal place of business in Memphis, Tennessee. *Allied-Bruce Terminix v. Dobson*, 628 So. 2d 354 (Ala. 1993).

9. *Id.* at 354.

10. *Id.*

11. Respondent's Brief at \*4, *Allied-Bruce Terminix v. Dobson*, No. 93-1001, 1994 WL 381849 (U.S. Oct. 4, 1994).

12. Petitioner's Opening Brief, at \*3-4, *Allied-Bruce Terminix v. Dobson*, No. 93-1001, 1994 WL 198822 (U.S. Oct. 4, 1994). The full text of the arbitration clause in the contract provides:

The purchaser and Terminix agree that any controversy or claim between them arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration. Such arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association before three arbitrators appointed by the American Arbitration Association. The arbitration award shall be final and binding on both parties. Judgment upon such arbitration award may be entered in any court having jurisdiction.

*Id.* at \*4.

13. *Id.*

14. *Id.*

15. *Dobson*, 628 So. 2d at 355.

Federal Arbitration Act.<sup>16</sup> In a summary opinion, the circuit court denied the motion and Terminix appealed to the Supreme Court of Alabama.<sup>17</sup>

In their appeal, Terminix argued that the arbitration agreement should be enforced, despite Alabama law making predispute arbitration agreements unenforceable,<sup>18</sup> because the contract with the Dobsons involved interstate commerce.<sup>19</sup> If the contract involved interstate commerce, Terminix argued the FAA would preempt the Alabama anti-arbitration law because the United States Supreme Court in *Southland Corp. v. Keating*<sup>20</sup> held the regulatory function of the FAA coincides with the commerce power of Congress.<sup>21</sup> To support their position, Terminix argued that the broad "slightest nexus" test,<sup>22</sup> providing that the FAA governs if a contract has a slight connection with interstate commerce, should be applied.<sup>23</sup> In addition, Terminix argued that the contract with the Dobsons involved commerce because they are an out-of-state entity and some of the materials used to fulfill the contract were brought to Alabama from out-of-state.<sup>24</sup>

The Supreme Court of Alabama; however, never reached Terminix's "slightest nexus" argument because the court rejected that test in favor of a more narrow standard.<sup>25</sup> The threshold question asked by the court was not whether the contract actually involved interstate commerce, but whether, at the time the parties entered into the contract, they contemplated substantial interstate activity.<sup>26</sup> As evidence that the parties contemplated substantial interstate activity when executing the contract, Terminix cited testimony from Steven Gwin, the Dobson's predecessor in interest, stating he preferred to do business with a national company, such as Terminix.<sup>27</sup> In addition, Terminix noted that the

16. *Id.* 9 U.S.C. §§ 1 - 14 (1988).

17. Petitioner's Opening Brief, at \*5, *Allied-Bruce Terminix v. Dobson*, No. 93-1001, 1994 WL 198822 (U.S. Oct. 4, 1994).

18. ALA. CODE § 8-1-41(3) (1994). This statute states in relevant part: "The following obligations cannot be specifically enforced: . . . (3) An agreement to submit a controversy to arbitration . . ." *Id.*

19. *Dobson*, 628 So. 2d at 355.

20. 465 U.S. 1 (1984).

21. *Dobson*, 628 So. 2d at 355.

22. This test was first set out in *Ex Parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272, 1275 (Ala. 1986), *overruled by Ex Parte Jones*, 628 So. 2d 316, 318 (Ala. 1993).

23. *Dobson*, 628 So. 2d at 355.

24. *Id.*

25. *Id.*

26. *Id.* The "contemplation of the parties" test first appeared in a concurring opinion by Chief Justice Lumbard in *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir.) (Lumbard, C.J., concurring), *cert. denied*, 368 U.S. 817 (1961). This test was explicitly adopted by the Alabama Supreme Court in *Ex Parte Warren*, 548 So. 2d 157 (Ala.), *cert. denied*, 493 U.S. 998 (1989).

27. *Dobson*, 628 So. 2d at 355-56.

contract itself was executed in Memphis, Tennessee, and contained a statement purporting to subject it to federal regulation.<sup>28</sup>

Comparing applications of the "contemplation of the parties" test from other jurisdictions to the instant case, the court determined that the evidence adduced by Terminix was insufficient to establish contemplation of substantial interstate activity by the parties when they entered into the contract.<sup>29</sup> In an earlier decision, the court held a mere showing of diversity among the parties failed to invoke the FAA under the earlier "slightest nexus" test and would certainly fail the newer standard.<sup>30</sup> Likewise, a bald statement in the contract that Terminix adheres to any applicable federal law falls short of demonstrating that the parties contemplated substantial interstate activity when entering into the contract.<sup>31</sup> Although some of the materials used by Terminix to fulfill their duties under the contract may have come from other states, the court determined the interstate character of these transactions could not reasonably be said to have notified the Dobsons of the interstate nature of the contract when it was executed.<sup>32</sup> In general, the court found the contract's provisions failed to establish a sufficient connection to interstate commerce and to manifest the parties' contemplation of

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28. *Id.* at 356.

29. *Id.* The court broke down the cases decided by other jurisdictions into three categories: cases involving contracts for large construction projects; cases involving contracts for smaller construction projects; and those involving personal service contracts. *Id.* The North Carolina Supreme Court, applying the *Warren* test ("contemplation of the parties") to a large construction contract, held that facts evidencing diversity of citizenship were insufficient to support a finding that the parties contemplated substantial interstate activity. *Id.* (citing *Burke County Pub. Sch. Bd. of Educ. v. Shaver Partnership*, 279 S.E.2d 816, 822 (N.C. 1981)). However, the parties would contemplate substantial interstate activity where the performance of the contract necessitates involvement in interstate activity. *Id.* In *Shaver Partnership*, the contract required the builder to travel from Indiana to North Carolina, records of the project to be maintained in Kansas and for the builder to deal with suppliers from across the country. *Id.* This evidence was strong enough to support a conclusion that the contract evidenced a transaction involving commerce and was, therefore, governed by the FAA.

In *R. J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127 (Kan. Ct. App. 1982), the Kansas Court of Appeals applied the FAA to a small construction contract. In that case, the court held the parties knew the contract involved interstate activity because the project called for the use of California Redwood. *Dobson*, 628 So. 2d at 356 (citing *R. J. Palmer Constr. Co. v. Wichita Band Instrument Co.*, 642 P.2d 127, 130 (Kan. Ct. App. 1982)). A North Carolina appellate court held the parties contemplated substantial interstate activity in a personal service contract when the contract provided for air travel. *Bennish v. North Carolina Dance Theatre, Inc.*, 422 S.E.2d 335, 337 (N.C. Ct. App. 1992).

30. *Dobson*, 628 So. 2d at 356. In applying the earlier *Costa & Head* test ("slightest nexus"), the supreme court of Alabama held it insufficient for the purposes of invoking the FAA "merely to show that one or more of the parties to the contract is located in another state." *Id.* (citing *A. J. Taft Coal Co. v. Randolph*, 602 So. 2d 395, 397 (Ala. 1992)).

31. *Id.* at 357. The contract included the following statement: "Terminix performs its services in accordance with the requirements of federal, state, and local law. In the event of a change in existing law as it pertains to the services promised herein, Terminix reserves the right to revise the annual extension charge or terminate this agreement." *Id.*

32. *Id.*

substantial interstate activity.<sup>33</sup> Instead, the contract evidenced a transaction that was primarily local in nature.<sup>34</sup> From this adverse decision, Terminix appealed to the United States Supreme Court.

In the first majority opinion written by Justice Breyer, the United States Supreme Court rejected the "contemplation of the parties" test and overruled the Alabama Supreme Court.<sup>35</sup> The court faced the issue of whether Section 2 of the FAA<sup>36</sup> extends the Act's scope to the limit of congressional power under the Commerce Clause or whether it significantly restricts the FAA's application.<sup>37</sup> Finding that Section 2 reflected congressional intent to exercise full power under the commerce clause, the court held that the FAA should be applied expansively.<sup>38</sup> Instead of focusing on what parties contemplate when executing a contract, the court phrased the proper question as whether the contract, *in fact*, involved interstate commerce.<sup>39</sup> Following from this test, in any instance where a contract containing a valid arbitration agreement in fact involves interstate commerce, the FAA will preempt state anti-arbitration law and enforce the arbitration agreement.<sup>40</sup>

### III. LEGAL HISTORY

Although Congress enacted the FAA seventy years ago, the scope of its applicability is an issue which has yet to be determined.<sup>41</sup> Under the language of the FAA, an arbitration agreement in a contract "evidencing a transaction in commerce" is fully enforceable.<sup>42</sup> If this seemingly broad language invokes congressional power to the fullest extent of the commerce clause, Congress may have constitutional authority to enforce all commercial arbitration agreements in the United States.<sup>43</sup> However, whether or not Congress intended such extensive

33. *Terminix*, 115 S. Ct. at 837.

34. *Id.*

35. *Id.* at 842.

36. The specific portion of Section 2 at issue is the "contract evidencing a transaction involving commerce" language. 9 U.S.C. § 2 (1988).

37. *Terminix*, 115 S.Ct. at 836.

38. *Id.* at 839.

39. *Id.* at 842.

40. *Id.*

41. Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 386 (1992).

42. *Id.* See also 9 U.S.C. § 2 (1988). The relevant portions of § 2 provide: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Co.*, 460 U.S. 1 (1983), the United States Supreme Court stated that § 2 is the "primary substantive provision of the Act." *Id.* at 24.

43. Strickland, *supra* note 41 at 386. For a view that § 2 reaches well beyond commercial arbitration agreements, see 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 9.5.3 (Supp. 1994).

regulation when enacting the FAA is subject to fierce debate between courts and commentators alike.<sup>44</sup> As a result of this debate, the lines have been drawn, but no position has prevailed.

### *A. The Rise of Federal Common Law of Arbitration and its Applicability in State Courts*

In 1925, the FAA was born out of a judicial environment hostile to arbitration in order "to place an arbitration agreement 'on the same footing as other contracts, where it belongs.'"<sup>45</sup> The FAA authorizes federal courts to create a common law of arbitration, assuring the accomplishment of this goal.<sup>46</sup> For years following the enactment of the FAA, the idea that the FAA applied in state courts was not raised.<sup>47</sup> It was not until 1967 when the United States Supreme Court decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>48</sup> that state courts began to apply the FAA.<sup>49</sup> Although a federal case based on

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44. Strickland, *supra* note 41, at 386. See e.g., *Ex Parte Jones*, 628 So. 2d 316, 318 (Ala. 1993) (Maddox, J., dissenting).

45. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924), quoted in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985); see also Strickland, *supra* note 41, at 389; *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989); *Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512, 518 (2d Cir. 1991) ("The body of preemptive federal substantive law that supports the FAA has developed largely in response to state laws that restrict arbitration in derogation of agreements freely negotiated."). In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, the United States Supreme Court noted that the FAA was designed "to make arbitration agreements as enforceable as other contracts." In a later case, the Court determined that Congress passed the FAA "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Chief Justice Burger, writing for the Court in *Southland*, traced the need for the FAA to English courts which jealously guarded their jurisdiction. *Southland*, 465 U.S. at 13. "The problems Congress faced were . . . twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements." *Id.* at 14.

46. *Prima Paint*, 388 U.S. at 404 n.12 ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."). Beginning with *Prima Paint*, the United States Supreme Court enunciated the view that the "effect of [§ 2] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24; see also, *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Volt Info. Sciences*, 489 U.S. at 475; *Fahnestock*, 935 F.2d at 518. Although early cases interpreting the FAA did not share this view and severely restricted the FAA's reach into interstate commerce, these cases no longer have precedential value. MACNEIL, *supra* note 43, at 9:37.

47. Strickland, *supra* note 41, at 391; see also, Arthur S. Feldman, Note, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University: Confusing Federalism with Federal Policy Under the FAA*, 69 TEX. L. REV. 691, 704 (1991) (The FAA was originally contemplated to apply only in federal courts).

48. 388 U.S. 395 (1967).

49. Strickland, *supra* note 41, at 395. State courts began to apply the FAA for two main reasons. First, state courts operating under *Prima Paint* held that they were bound by the FAA. Second, several courts found the advantages of compelling arbitration under the FAA would lighten case loads and provide a uniform rule for both state and federal courts. Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1326 (1985).

diversity jurisdiction, the Court determined the constitutional application of the FAA in state courts under the *Erie*<sup>50</sup> doctrine.<sup>51</sup> This determination turned on whether Congress enacted the FAA pursuant to Article I, governing congressional power over interstate commerce,<sup>52</sup> or through its Article III power over federal courts.<sup>53</sup>

A close reading of the legislative history<sup>54</sup> surrounding the enactment of the FAA provided the Court with sufficient evidence to conclude that Congress had exercised its Article I commerce power when passing the FAA.<sup>55</sup> Although the

However, some state courts distinguished the ruling in *Prima Paint* because it was based on federal diversity jurisdiction and refused to apply the FAA. *Id.* at 1326-27.

50. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Since the FAA provisions are often important enough to make them "outcome determinative" under the *Erie* doctrine, the FAA is "substantive," rather than procedural in nature, and issues arise regarding its application in diversity cases. *Prima Paint*, 388 U.S. at 405; *see also*, *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). Congress relied on its broad commerce powers for authority to apply the FAA as substantive law because *Erie* denied Congress the ability to make substantive law based solely upon Article III powers. David P. Pierce, Comment, *The Federal Arbitration Act: Conflicting Interpretations of its Scope*, 61 U. CIN. L. REV. 623, 629-30 (1992).

51. *Prima Paint*, 388 U.S. at 404. The 1925 Congress, which passed the FAA thirteen years before the Court's *Erie* decision, "had reason to believe that it still had power to create federal rules to govern questions of 'general law' arising in simple diversity cases . . . absent any state statute to the contrary." *Id.* at 405 n.13.

52. Article I of the United States Constitution states: "The Congress shall have the power to . . . regulate commerce . . . among the several states . . ." U.S. CONST. art. I, § 8, cl. 3.

53. Strickland, *supra* note 41, at 395. Article III of the United States Constitution states: "The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. . . . [T]he supreme court shall have appellate jurisdiction . . . under such regulations as the Congress shall make." U.S. CONST. art. III, §§ 1, 3, cl. 1, 2.

54. Julius H. Cohen, a member of the Committee on Commerce, Trade & Commercial Law of the American Bar Association, submitted a brief stating:

It is not only the actual and physical interstate shipment of goods which is subject to the interstate commerce powers of the Federal Government, but these powers govern every agency or act which bears so close a relationship to interstate commerce that they can reasonably be said to affect it. Contracts relating to interstate commerce are within the regulatory powers of Congress. *Joint Hearings on S. 1005 & H.R. 646 Before the Subcomm. of the Commis. on the Judiciary*, 68th Cong., 1st Sess. 38 (1924); *see also*, Petitioner's Opening Brief at \*13, *Allied-Bruce Terminix v. Dobson*, 1994 WL 198822 (U.S. Oct. 4, 1994). A supporter of the FAA advocated applying the Act to contracts relating to interstate commerce.

*Prima Paint*, 388 U.S. at 405 n.13.

55. *Prima Paint*, 388 U.S. at 405. Justice Fortas, writing for the majority in *Prima Paint*, stated that "it is clear beyond dispute that the [FAA] is based upon and confined to the incontestable federal foundations of 'control over interstate commerce . . .'" *Id.* Subsequent United States Supreme Court precedent reaffirmed that the FAA arose out of congressional Article I powers. Justice Marshall, writing for the majority in *Perry*, also found the FAA was "enacted pursuant to the Commerce Clause." *Perry*, 482 U.S. at 489; *see also*, *Southland*, 465 U.S. at 11 ("The [FAA] rests on the authority of Congress to enact substantive rules under the Commerce Clause."). However, Justice O'Connor does not share this view. Her dissent in *Southland* found the legislative history to the Act "establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal



Court agreed the FAA promulgated substantive law, *Prima Paint* held the Act applicable to cases based on diversity of citizenship<sup>56</sup> simply because Congress intended this result.<sup>57</sup>

Finding that federal courts must apply the FAA when deciding diversity cases only begged the question of whether Congress intended the FAA to apply in state courts as well.<sup>58</sup> In 1986, that issue was squarely before the Court in *Southland Corp. v. Keating*, which held that state courts are indeed bound by the central provisions of the FAA.<sup>59</sup> To reach this result, the Court examined the legislative history of the FAA and the "involving commerce" requirement of Section 2.<sup>60</sup> The legislative history, according to the majority, "makes clear that the House Report contemplated a broad reach of the Act, unencumbered by state law constraints."<sup>61</sup> In addition, the "involving commerce" requirement demonstrates congressional intent to apply the FAA in state courts because Congress needs commerce powers to regulate state courts.<sup>62</sup> Although *Prima Paint* and *Moses*

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courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts." *Southland*, 465 U.S. at 25 (O'Connor, J., dissenting).

56. Federal jurisdiction is based on diversity of citizenship if "the matter in controversy exceeds the sum or value of \$50,000 . . . and is between citizens of different states . . ." 28 U.S.C. § 1332 (1988).

57. *Prima Paint*, 388 U.S. at 405. The Court framed the question as "whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be answered in the affirmative." *Id.*

58. Although legislative history provides support for applying the FAA in diversity cases, it leaves the extension of the FAA to state courts ambiguous. Strickland, *supra* note 41, at 396; see also *supra* note 54.

59. *Southland*, 465 U.S. at 16. Although the FAA is considered substantive law, the Court found the issue of arbitrability governed by federal law in either state or federal court. *Id.* at 12.

60. *Id.* at 14.

61. *Id.* at 13. Although the legislative history is not without some ambiguities, the Court found "strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts." *Id.* at 12.

62. *Id.* at 14. Although the FAA binds state courts, it applies only to the extent a transaction involves interstate commerce. *Id.* The Court also inferred a broad application of the FAA from "the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce." *Id.* at 13. Noting that only a small fraction of all civil litigation in the United States is in federal courts, the Court could not "believe Congress intended to limit the [FAA] to disputes subject only to federal court jurisdiction." *Id.* at 15 n.8 (emphasis in original).

Justice O'Connor dissented in all respects from the *Southland* majority. *Id.* at 24 (O'Connor, J., dissenting). She determined the overall structure of the FAA and the legislative history demonstrate that the FAA has "no application whatsoever in state courts." *Id.* at 31. Justice O'Connor did not see the "facial silence" of § 2 regarding which judicial forums the FAA binds as a license to govern state court proceedings where other sections of the FAA specifically refer only to federal courts. *Id.* at 22 ("The structure of the FAA itself runs directly contrary to the reading the Court today gives to § 2. §§ 3 and 4 are the implementing provisions of the Act, and they expressly apply only to federal courts."). *Id.* at 29. Furthermore, Justice O'Connor interpreted the "unambiguous" legislative history to show Congress believed the FAA was procedural in nature and therefore only applicable in federal courts. *Id.* at 26. In response to Justice O'Connor's argument, the majority stated that "if it is correct

*H. Cone Memorial Hosp. v. Mercury Construction Corp.*<sup>63</sup> made the FAA applicable in state courts, the *Southland* ruling is important because it marked the first time the Court held the FAA applicable in a state case, whereas *Moses H. Cone* and *Prima Paint* were based on federal diversity jurisdiction.<sup>64</sup> In *Perry v. Thomas*,<sup>65</sup> the United States Supreme Court reaffirmed the applicability of the FAA in state court proceedings.<sup>66</sup> *Perry*, like *Southland*, originated in state court and the Court held the California statute requiring a judicial forum conflicted with the FAA and was therefore preempted under the Supremacy Clause.<sup>67</sup>

Thus, from *Prima Paint* through *Perry*, arbitration law under the FAA was "federalized" and became the "applicable substantive law of the United States."<sup>68</sup> Along with the expansion of the federal common law of arbitration, federal policy in favor of arbitration also gained tremendous support. United States Supreme Court precedent has continually emphasized that "questions of arbitrability should be addressed with a healthy regard for the federal policy favoring arbitration [and that] any doubts concerning the scope of arbitrable issues [should] be resolved in favor of arbitration."<sup>69</sup> In addition to answering the general question of whether the FAA applies in state courts, the *Southland* holding also determined the fate of state anti-arbitration law. After *Southland*, states were no longer authorized to apply policies hostile to arbitration if the parties' agreement fell within FAA parameters.<sup>70</sup> "[T]he preemptive effect of the FAA after *Southland* . . . displaces

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that Congress sought only to create a procedural remedy in the federal courts, there can be no explanation for the express limitation in the [FAA] to contracts 'involving commerce'." *Id.* at 14.

63. 460 U.S. 1 (1983).

64. Strickland, *supra* note 41, at 396. Since jurisdiction in *Moses H. Cone* was based on diversity, its ruling on the applicability of the FAA in state courts was technically dicta, leading some state courts to ignore the holding. *Id.* at 396 n.65.

65. 482 U.S. 483 (1987).

66. *Id.* at 489 ("Enacted pursuant to the Commerce Clause, [the FAA] is enforceable in both state and federal courts."). Justice O'Connor dissented in *Perry* for the same reasons she dissented in *Southland*. *Id.* at 494 (O'Connor, J., dissenting).

67. *Id.* at 491 n.8. Under the Supremacy Clause, "[the] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. CONST. art. VI, cl. 2. Two years later, the Court in *Volt Information Sciences* reached the opposite conclusion regarding a different California statute. 489 U.S. at 477-78 (state law may be preempted to the extent it "stands as an obstacle to the accomplishment of and execution of the full purposes and objectives of Congress. . . . [T]he question before us . . . is whether application of [the California statute] . . . would undermine the goals and policies of the FAA. We conclude that it would not.").

68. Strickland, *supra* note 41, at 396.

69. *Moses H. Cone*, 460 U.S. at 24-25, (cited in *Volt Info. Sciences*, 489 U.S. at 475); see also, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) ("the [FAA] itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."). Section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24; see also, *Perry v. Thomas*, 482 U.S. 483, 489 (1987).

70. Strickland, *supra* note, 41 at 396-97.

all state law limiting arbitration regardless of the underlying policy."<sup>71</sup> Justice Marshall, writing for the Court in *Perry*, found the federal policy in favor of arbitration strengthened the FAA's preemptive effect by "[foreclosing] state legislative attempts to undercut the enforceability of arbitration agreements."<sup>72</sup> In *Volt Information Sciences*, the Court, headed by Chief Justice Rehnquist, defined the perimeters of federal policy as "simply to ensure the enforceability . . . of private agreements to arbitrate."<sup>73</sup>

Although recognizing strong federal policy in favor of arbitration, the Court found "[t]he FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."<sup>74</sup>

### B. When Does a Transaction "Involve" Interstate Commerce?

Although it is clear after *Perry* that the FAA applies in state courts, when a case actually falls within the reach of the FAA is still a hotly debated issue.<sup>75</sup> Even in federal courts, an independent basis for jurisdiction must be established because the FAA, by its terms, does not confer subject matter jurisdiction.<sup>76</sup> The formal requirements for invoking the FAA include a written agreement calling for arbitration which evidences a transaction involving interstate commerce.<sup>77</sup> Due

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71. Strickland, *supra* note, 41 at 399.

72. *Perry*, 482 U.S. at 489. Justice Marshall also quoted *Southland*:

In enacting § 2 of the federal Act, Congress declared a federal 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 . . . . Section 2, therefore, embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable "upon such grounds as exist at law or in equity for the revocation of any contract."

*Id.* (quoting *Southland*, 465 U.S. at 10, 11).

73. *Volt Info. Sciences*, 489 U.S. at 476. The Court restricted the FAA to the terms of an agreement to arbitrate, finding "no federal policy favoring arbitration under a certain set of procedural rules." *Id.* The FAA does not force parties to arbitrate where they have not agreed to do so; rather it requires courts to enforce private agreements to arbitrate according to the terms set by the parties. *Id.*

74. *Id.* at 477.

75. Compare Judge Lumbard's "contemplation of the parties" test with the "slightest nexus" test set forth in *Ex Parte Costa & Head (Atrium), Ltd.*; see *supra* notes 22-30 and accompanying text. In *Prima Paint*, Justice Black's dissenting view held the FAA applicable only to contracts between merchants for the interstate shipment of goods because Congress failed to use the language "affecting commerce" which normally manifests congressional intent to exercise its full power over commerce. *Prima Paint*, 388 U.S. at 409-10.

76. *Southland*, 465 U.S. at 16 n.9 ("While the [FAA] creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise."); see also MACNEIL, *supra* note 43, at 9:9 ("[T]he FAA creates no federal jurisdiction by itself.")

77. *Ex Parte Costa & Head (Atrium), Ltd.*, 486 So. 2d at 1275, *overruled on other grounds, Ex Parte Jones*, 628 So. 2d 316, 318 (Ala. 1993). See *supra* note 22. The FAA defines "commerce" as: "Commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or

to a great disparity between state and federal arbitration law, whether the FAA applies can be critical and outcome determinative.<sup>78</sup> As Professor Strickland has noted, "[i]f an arbitration agreement concerns a transaction involving interstate commerce, then the FAA and accompanying federal common law control; if the contract does not involve interstate commerce, then state law controls."<sup>79</sup> Case law has demonstrated that once an agreement "involves" interstate commerce within the meaning of the FAA, it will be governed by federal arbitration law.<sup>80</sup> However, what is not clear is exactly when a contract involves interstate commerce. According to Professor Strickland, the extent of constitutional power Congress intended to exercise when passing the FAA holds the answer to this question.<sup>81</sup>

Under its broad commerce powers, Congress may regulate and enforce any arbitration agreement affecting interstate commerce.<sup>82</sup> Some courts have given broad interpretation to "affecting interstate commerce," which may mean Congress is authorized to regulate and enforce "all commercial arbitration agreements and perhaps all arbitration agreements of any kind."<sup>83</sup> In the past, when Congress has enacted legislation intending to exercise its full constitutional power under the commerce clause, this intention was manifested by using the words "affecting interstate commerce."<sup>84</sup> The present task facing courts is to determine whether

Territory or foreign nation . . . ." 9 U.S.C. § 1 (1988).

78. Strickland, *supra* note 41, at 410. As was mentioned earlier, one reason the FAA is characterized as substantive law is largely because its application may be outcome determinative. See *supra* note 50 and accompanying text.

79. Strickland, *supra* note 41, at 410.

80. See *e.g.*, *Raytheon Co. v. Automated Business Sys., Inc.*, 882 F.2d 6, 9 (1989) ("[S]ince the arbitration clause under consideration was part of a contract which affected interstate commerce, [appellee] is correct in its contention that the broad policies of the [FAA] govern our analysis.").

81. Strickland, *supra* note 41, at 411. Section 2 will apply in state courts only where the arbitration agreement evidences a transaction involving commerce. Jiang, *supra* note 6, at 482. Therefore, "[t]he question of application of § 2 in most state arbitration cases turns on the issue of whether the underlying contract evidenced a transaction involving interstate commerce." *Id.* at 482-83. To determine the extent Congress has exercised its constitutional authority, "the key question is whether the courts will read ["transaction involving commerce"] in the broadest constitutional sense of interstate . . . commerce or in a more restrictive view." MACNEIL, *supra* note 43, at 9:38.

82. *Id.* See also, *Snyder v. Smith*, 736 F.2d 409, 418 (7th Cir.), *cert. denied*, 469 U.S. 1037 (1984). The prevailing view holds § 2 binding on state courts because Congress exercised its commerce powers to create a body of substantive federal law governing arbitration agreements in transactions involving commerce. Jiang, *supra* note 6, at 482.

83. Strickland, *supra* note 41, at 411 (emphasis in original). In *Southland*, Chief Justice Burger noted that since at least 1824, congressional authority under the Commerce Clause has been held "plenary." 465 U.S. at 11. "In the words of Chief Justice Marshall, the authority of Congress is 'the power to regulate; that is, to prescribe the rule by which commerce is to be governed'." *Id.* at 11-12 (citing *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824)).

84. Strickland, *supra* note 41, at 411. Professor Strickland noted two examples of Congress using "affecting interstate commerce" to manifest this intention. See, *e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a(b) (1988) ("Establishments affecting interstate commerce . . ." must provide equal access to all persons); National Labor Relations Act, 29 U.S.C. § 160(a) (1988) ("The [National Labor Relations] Board is empowered . . . to prevent any person from engaging in any unfair labor practice

Congress intended the FAA to reach all arbitration agreements within its commerce power or only a portion of those agreements.<sup>85</sup> Although the resolution of this issue may determine the outcome of any given case, commentators and courts alike have paid little attention to this issue.<sup>86</sup> The United States Supreme Court has failed to provide a workable standard in this area and has chosen instead to determine each case individually.<sup>87</sup>

The interstate commerce issue, never having been squarely before the United States Supreme Court, has been used in the past as a vehicle to reach other issues.<sup>88</sup> *Bernhardt v. Polygraphic Co. of America*,<sup>89</sup> a diversity case, was the first United States Supreme Court case to focus on the interstate commerce issue.<sup>90</sup>

The Court avoided the difficult *Erie* question, upon which the district court and appellate court disagreed, by determining that the FAA was inapplicable under the facts of the case.<sup>91</sup> The Court again focused on the substance of the FAA's interstate commerce requirement in *Prima Paint*.<sup>92</sup> The facts of the case involved a consulting agreement whereby Flood & Conklin would advise and assist Prima Paint with customer accounts and moving operations from one state to another.<sup>93</sup> Given that the consulting agreement was "inextricably tied to [an] interstate transfer and to the continuing operations of an interstate manufacturing

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. . . affecting commerce."). *Strickland, supra note 41*, at 411 n.140. Professor Jiang raises the "linguistic question" of whether "involving commerce" is the same as "affecting commerce." Jiang, *supra note 6*, at 484 n.53. Although most courts have ignored the difference, Professor Jiang notes that "only a few cases . . . suggested that 'involving commerce' was intended to have a narrower scope than 'affecting commerce'." *Id.* Justice Black's dissent in *Prima Paint* made a distinction between the two phrases and found that Congress' failure to use "affecting commerce" limited the FAA's application. *Id.*

85. *Strickland, supra note 41*, at 412.

86. *Id.* See also, Jiang, *supra note 6*, at 483 ("Case law determining which contractual relationships or matters constitute transactions within the meaning of section 2 is scarce.").

87. *Strickland, supra note 41*, at 412. Due to this lack of guidance from the United States Supreme Court, lower federal courts and state courts have determined this issue using different standards. *Id.*

88. *Id.* at 412 n.148. Professor Strickland points to the United States Supreme Court which "addressed the Act's commerce requirement in passing to reach or avoid other issues concerning the FAA." *Id.*

89. 350 U.S. 198 (1956).

90. *Strickland, supra note 41*, at 412.

91. *Id.* at 413. In *Bernhardt*, the parties entered into a contract in New York and while performing obligations under the contract, Bernhardt moved to Vermont. Although the case was based on diversity, the Court found "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions." *Bernhardt*, 350 U.S. at 200-01. Although the contract clearly contemplated changing Bernhardt's state citizenship and performing duties outside New York, the court apparently found this evidence insufficient to invoke the FAA. *Id.* Under either of the modern tests for determining the interstate commerce issue, this case would have been decided differently. See *infra*, notes 97-123 and accompanying text.

92. *Strickland, supra note 41*, at 413.

93. *Id.* at 413-14. See also, *Prima Paint*, 388 U.S. at 397, 401.

and wholesaling business, [t]here could be no clearer case of a contract evidencing a transaction in interstate commerce."<sup>94</sup>

Professor Jiang offers an argument for a "transactional" approach to determine if a contractual relationship falls within Section 2.<sup>95</sup> Under this approach, only areas which occupy significant federal interests fall within the FAA, leaving areas where federal interests are weak to state law regulation.<sup>96</sup> For example, consumer transactions became a significant federal interest by congressional legislation and are therefore subject to preemption by the FAA, assuming the contract involves commerce.<sup>97</sup> However, most courts use one of two related standards to determine if a contract satisfies the "involving commerce" requirement of Section 2.<sup>98</sup> The more restrictive "contemplation of the parties" standard, enunciated by Chief Judge Lumbard in *Metro Industrial Painting Corp. v. Terminal Construction Co.*,<sup>99</sup> examines whether the parties contemplated substantial interstate activity when executing the contract.<sup>100</sup> The more expansive "commerce in fact" test asks whether the transaction actually involved interstate commerce.<sup>101</sup> Although courts generally use one test to the exclusion of the other, Professor Jiang argues that "[s]imultaneous use of the two tests . . . would promote a finding that interstate commerce is involved."<sup>102</sup> Since the United States Supreme Court has yet to adopt a standard to determine when a contract falls within the Section 2 commerce requirement, lower federal courts and state courts have developed their own standards.

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94. *Prima Paint*, 388 U.S. at 401 (citation omitted). Justice Black dissented and would only find the FAA applicable in a narrow set of cases where agreements between merchants involve the interstate shipment of goods. *Id.* at 401 n.7 (Black, J., dissenting). Professor Strickland argues that the court may have recognized the applicability of the FAA in this case because the transaction at issue "involves interstate commerce under any but the most restrictive definition." Strickland, *supra* note 41, at 414.

95. Jiang, *supra* note 6, at 483-84.

96. *Id.*

97. *Id.* at 484. In contrast, areas such as child support and medical malpractice, which are normally subject to state regulation, are issues lacking sufficient federal interests, even though the contractual relationship may involve commerce. *Id.* In general, "[w]hether a particular contractual relationship . . . is a transaction under section 2 should be determined on the basis of federal interest and the development of federal law and policy." *Id.* This concept would likely find support from Justice Black's dissenting opinion in *Prima Paint* which called for a narrow application of § 2 only to transactions involving merchants.

98. *Id.* at 485.

99. *Id.* 287 F.2d 382 (2d. Cir.) (Lumbard, C.J., concurring), *cert. denied*, 386 U.S. 817 (1961).

100. *Id.* at 387.

101. Jiang, *supra* note 6, at 485-86.

102. *Id.* at 486. Federal arbitration policy, which is more favorable to enforcement of arbitration agreements, would be better served by a broad interpretation of involving commerce. *Id.* Therefore, Professor Jiang argues for a combination of the two tests, stating that "[c]ourts should find involvement of interstate commerce where it can be shown that either the parties have contemplated interstate activities or the underlying contract evidences a transaction that actually involved commerce, regardless of the parties' intent." *Id.* at 487.

Courts taking the expansive view of the FAA hold that the FAA's "involving commerce" language is "coextensive with congressional power to regulate under the commerce clause."<sup>103</sup> In *Snyder v. Smith*<sup>104</sup> for example, the Seventh Circuit Court of Appeals held that "[u]nder the commerce clause, Congress may reach activities 'affecting' interstate commerce."<sup>105</sup> Finding that the "involving commerce" language invoked Congress' commerce powers, the court determined that "Congress intended the FAA to apply to all contracts that it constitutionally could regulate."<sup>106</sup> In order to find evidence that a contract involves commerce, the *Snyder* court held it permissible to look *beyond* the transactions "expressly authorized on the face of the contract" to determine if the FAA applies.<sup>107</sup> The First Circuit, in a securities arbitration case, found that "[s]ince the arbitration clause under consideration was part of a contract which affected interstate commerce, [appellee] is correct in its contention that the broad policies of the [FAA] govern our analysis."<sup>108</sup>

Courts adopting the narrower view contend that Congress did not intend the FAA to regulate all agreements it could constitutionally reach under its commerce powers.<sup>109</sup> If this conclusion is reached, the next logical question to answer is: how far does the FAA reach into agreements which affect interstate commerce?<sup>110</sup> In *Metro Industrial Painting*, Chief Judge Lumbard's concurring opinion agreed that the FAA is applicable in state courts.<sup>111</sup> However, he

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103. *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986). The Fifth Circuit Court of Appeals has also held § 2 applicable to contracts which "relate to interstate commerce, a standard that implements the strong federal policy favoring arbitration." *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 148 (5th Cir. 1987). In an earlier case, the Fifth Circuit stated that "[c]ommerce under the Act includes all contracts relating to interstate commerce." *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986). The Ninth Circuit also ruled that the FAA governs all agreements "affecting" interstate commerce in *First Investors Corp. v. American Capital Fin. Servs., Inc.*, 823 F.2d 307, 309 (9th Cir. 1987). More than thirty years ago, the Second Circuit Court of Appeals noted that "Congress took pains to utilize as much of its power as it could and by doing so it sought to reduce to a minimum the danger of judicial rejection on constitutional grounds." *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 407 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed*, 364 U.S. 801 (1960).

104. 736 F.2d 409 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984).

105. *Id.* at 418. Professor Strickland notes that the *Snyder* case is "perhaps the most extensive and most often cited discussion justifying use of the 'affecting interstate commerce' standard in FAA cases." Strickland, *supra* note 41, at 417. Although diversity of citizenship has never been held to be enough to invoke the FAA, Macneil notes two cases which come very close to doing so. MACNEIL, *supra* note 43, at 9.44, 9.5. For example, in *Lacheney v. Profitkey Int'l, Inc.*, 818 F. Supp. 922, 924 (E.D. Va. 1993), the court held diversity alone will not meet the interstate commerce requirement, "but its basis for finding 'substantial interstate activity' suggests that it would be *almost impossible* for citizens of different states *not* to meet the FAA interstate commerce test." *Id.* (emphasis added).

106. *Snyder*, 736 F.2d at 418.

107. *Id.* at 416. In *Snyder*, the court construed the "involving commerce" language *very* broadly. *Id.* at 418.

108. *Raytheon Co. v. Automated Business Sys. Inc.*, 882 F.2d 6, 9 (1st Cir. 1989).

109. Strickland, *supra* note 41, at 418.

110. *Id.*

111. *Id.* at 386.

found "the significant question as to the scope of federal law and its effect on state courts . . . is not whether . . . the parties *did* cross state lines, but whether, at the time they entered into and accepted the arbitration clause, they *contemplated* substantial interstate activity."<sup>112</sup> In Judge Lumbard's view, a finding that state lines were actually crossed is irrelevant in regard to the application of the FAA.<sup>113</sup> Rather, it is what the parties knew or had reason to know about the interstate character of their agreement that is the proper subject of inquiry.<sup>114</sup> Several states, including Alabama and North Carolina, have explicitly adopted Judge Lumbard's "substantial contemplation" test.<sup>115</sup>

The Alabama Supreme Court first adopted Judge Lumbard's test in *Ex Parte Warren*.<sup>116</sup> At that time, Alabama courts were operating under the standard set forth in *Ex Parte Costa & Head (Atrium), Ltd.*,<sup>117</sup> which construed the "involving commerce" language broadly "so that the slightest nexus of the agreement with interstate commerce will bring the agreement within the ambit of the FAA."<sup>118</sup> In 1992, the Alabama Supreme Court made a choice between the two conflicting standards in *Ex Parte Brice Bldg. Co., Inc.*<sup>119</sup> Restricting Warren to its narrow factual context, the court applied the "slightest nexus" test and found the FAA applicable.<sup>120</sup> In 1993, the court finally resolved the issue by explicitly rejecting the *Costa & Head* "slightest nexus" standard in favor of the "contemplation of the parties" standard enunciated in *Warren*.<sup>121</sup> Stating that Warren "represents a more reasoned approach," the court overruled any case law applying a standard inconsistent with *Warren*.<sup>122</sup>

This view, however, did not command a unanimous court. Judge Maddox, dissenting in both *Warren* and *Ex Parte Jones*, found the wider application of the FAA under the "slightest nexus" test better effectuates the intent of Congress and is more in line with other jurisdictions.<sup>123</sup> Ian Macneil and his colleagues support Judge Maddox's view, finding courts which adopt a narrow view of "involving commerce" are "deliberately swimming against the tide."<sup>124</sup> Alabama, once considered a leader in recognizing the scope of Section 2, cited and

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112. *Id.* at 386-87.

113. *Id.* at 388.

114. *Id.*

115. *Id.* at 421.

116. 548 So. 2d 157 (Ala.), *cert. denied*, 493 U.S. 998 (1989).

117. 486 So. 2d 1272 (Ala. 1986), *overruled by Ex Parte Jones*, 628 So. 2d 316 (Ala. 1993).

118. *Id.* at 1275 (emphasis added).

119. 607 So. 2d 132 (Ala. 1992).

120. *Id.* at 134.

121. *Ex Parte Jones*, 628 So. 2d 316, 318 (Ala. 1993); *see also, Dobson*, 628 So. 2d at 355.

122. *Id.* For a discussion of how courts in Kansas and North Carolina have applied Judge Lumbard's "contemplation of the parties" standard, *see supra* text accompanying note 29.

123. *Id.* (Maddox, J., dissenting); *see also, Warren*, 548 So. 2d at 160 (Maddox, J., dissenting).

124. MACNEIL, *supra* note 43, at 9.52, 9.54.



disregarded the broader "slightest nexus" test.<sup>125</sup> For this reason, Macneil argues case like Warren should be put aside.<sup>126</sup>

#### IV. INSTANT DECISION

In the instant case, the United States Supreme Court revisited Section 2 of the FAA and determined that a broader reading of the Act, enlarging its scope to the extent of Congress' commerce powers, is consistent with the basic purpose of the FAA.<sup>127</sup> The result of this holding is to apply the FAA in all cases in which the parties' agreement *in fact* affects interstate commerce.<sup>128</sup> The Court reached this result by considering the language, background, basic purpose and structure of the FAA.<sup>129</sup> Justice O'Connor, concurring with the majority, agreed with the court's construction of Section 2, but would restrict the FAA to federal courts only.<sup>130</sup> Writing in dissent, Justice Thomas, whom Justice Scalia joined, also would not extend the scope of the FAA to apply in state courts.<sup>131</sup>

##### A. The Majority Opinion

The majority began its analysis of the interstate commerce issue with a brief legal background of the FAA.<sup>132</sup> Starting with the purpose of the Act, the Court noted that prior rules hostile to arbitration motivated Congress to enact the FAA in 1925.<sup>133</sup> In order to displace these rules, Congress intended courts to enforce arbitration agreements to the same extent as other contracts.<sup>134</sup> Given that the FAA was enacted pursuant to Congress' power under Article I, it could be applied in diversity cases to displace anti-arbitration state law.<sup>135</sup> In addition, the Court held the FAA applicable in state courts as well, providing an opportunity to maintain uniform results in similar cases filed in state and federal courts.<sup>136</sup> With this history in mind, the Court faced two interpretative questions: What does "involving commerce" mean, and when does a contract "evidence a transaction"

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125. *Id.*

126. *Id.* at 9:53.

127. *Terminix*, 115 S. Ct. at 836.

128. *Id.* at 843.

129. *See generally Id.*

130. *Id.* at 843 (O'Connor, J., concurring).

131. *Id.* at 845 (Thomas, J., dissenting).

132. *Id.* at 838.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 839. In *Southland*, the Court held that the FAA preempted state laws which invalidate arbitration agreements. In this case, twenty state attorneys general wrote amicus curie briefs asking the court to overrule this decision. The court explicitly refused to do so, noting that no significant changes in the law have occurred since *Southland* was decided and that private parties have likely relied on *Southland* when drafting arbitration agreements. *Id.*

involving commerce?<sup>137</sup> The answer to these questions considered together determines whether the FAA "carves out an important statutory niche" in which states remain free to apply anti-arbitration laws and policies.<sup>138</sup> The Court found no such "niche" exists.<sup>139</sup>

Focusing initially on the meaning of the phrase "involving commerce" as used in the FAA, the court determined that this statement is equivalent to "affecting commerce," which normally manifests congressional intent to exercise full commerce powers.<sup>140</sup> This position is supported by the legislative history surrounding the enactment of the FAA, which indicates that Congress intended an expansive interpretation of this phrase.<sup>141</sup> United States Supreme Court precedent lends additional support to the majority interpretation.<sup>142</sup> The majority noted that past cases held the FAA embodied Congress' intent to enforce arbitration agreements by exercising the maximum extent of its power.<sup>143</sup> Finally, the Court noted that a more restrictive interpretation, such as the one taken by the Alabama Supreme Court, would complicate the law and promote litigation from a statute whose purpose is to avoid litigation.<sup>144</sup>

Next, the Court focused on what constitutes a contract evidencing a transaction involving interstate commerce.<sup>145</sup> After considering Judge Lumbard's "contemplation of the parties" test, the Court found a "commerce in fact" standard more faithful to the FAA for several reasons.<sup>146</sup> First, the Court found the "contemplation of the parties" test invites litigation over what parties did or did not contemplate when drafting an agreement and also noted the unlikelihood that Congress intended a test encouraging litigation when enacting an arbitration statute.<sup>147</sup> Second, Judge Lumbard's federalism argument lost much of its force in light of subsequent United States Supreme Court precedent holding that state laws contrary to the FAA are preempted by the FAA.<sup>148</sup> In addition, the Court

137. *Id.* at 839, 841.

138. *Id.* at 839.

139. *Id.*

140. *Id.* at 841. Justice Breyer noted that other federal statutes fail to provide guidance because the FAA is the only statute to use the word "involving" to describe an interstate commerce relation. *Id.* at 839.

141. *Id.* at 841.

142. *Id.* at 840.

143. *Id.* The court cited *Southland*, *Prima Paint*, and *Perry*, to support this contention.

144. *Id.* The court recognized and responded to arguments calling for a restrictive interpretation of the FAA. Although Congress may not have appreciated the scope of the Commerce Clause when the FAA was enacted, the Court stated that it is not unusual to expand a statute along with the expansion of the Commerce Clause. *Id.*

145. *Id.* at 840.

146. *Id.* at 841.

147. *Id.* The majority stated that, while it may be natural for parties to contemplate goods sold and prices when drafting an agreement, it may not be natural for parties to think about the interstate commerce connection of their agreement. *Id.*

148. *Id.* Judge Lumbard warned against excessive federal encroachment on powers which may be reserved to the states. *Id.* at 842.

also rejected the variation on Judge Lumbard's test offered by amicus, calling for an "objective" ("reasonable person" oriented) version, which would serve to better protect consumers signing form contracts.<sup>149</sup> Section 2 of the FAA allows states to protect consumers from unlawful arbitration provisions through invalidation "upon such grounds as exist at law or in equity for the revocation of any contract."<sup>150</sup> Finally, the Court found the FAA language supports a "commerce in fact" test because the legislative history demonstrates that Congress intended to create a law covering all areas Congress has authority to regulate.<sup>151</sup>

In concluding their analysis, the majority held the FAA prohibits state policies allowing enforcement of some contract provisions, such as price and credit, but not others, namely an agreement to arbitrate.<sup>152</sup> According to the majority, such a policy would place arbitration on unequal footing with other contracts, which directly contradicts the Act's basic purpose.<sup>153</sup> For all of the reasons stated above, the Court adopted a "commerce in fact" interpretation of the FAA, requiring that a contract in fact involve interstate commerce before the FAA will apply.<sup>154</sup>

### B. Concurring and Dissenting Opinions

In a concurring opinion, Justice O'Connor agreed with the majority's interpretation of the FAA because it provides a uniform standard whereas a more restrictive view would likely foster litigation and frustrate the underlying purpose of the Act.<sup>155</sup> However, Justice O'Connor and the majority part ways regarding the effect of such a broad interpretation as it applies in state courts.<sup>156</sup> She fears the instant decision will displace many state statutes which were precisely crafted to afford greater protection of consumers through procedural requirements, such as a knowing and voluntary consent to arbitrate.<sup>157</sup> Her position has always been that the FAA should apply only in federal courts and not in state courts.<sup>158</sup> According to her *Southland* and *Perry* dissents, the fundamental source for federal statutory preemption of state law is congressional intent, and such intent must be

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149. *Id.* at 843. The alternate "reasonable person" test was offered by the American Arbitration Association. *Id.*

150. *Id.* See also 9 U.S.C. § 2 (1988).

151. *Id.* at 842.

152. *Id.* at 843.

153. *Id.*

154. *Id.*

155. *Id.* (O'Connor, J., concurring).

156. *Id.*

157. *Id.* Justice O'Connor also cites as examples a Montana statute which refuses to enforce arbitration agreements in consumer contracts where the amount in dispute is \$5,000 or less, MONT. CODE ANN. § 27-5-114(2)(b) (1993), and a South Carolina statute requiring that notice of an arbitration provision be placed prominently on the first page of a contract, S.C. CODE ANN. § 15-48-10(a) (Law. Co-op. Supp. 1993). *Id.*

158. *Id.*

"clear and manifest."<sup>159</sup> Instead of following the intent of Congress, the majority position of the Court has effectively rewritten the FAA over the past ten years, giving it a preemptive effect which Congress never intended.<sup>160</sup> Her view is that *Southland* was wrongly decided and at the end of her opinion, she left an open invitation for Congress to reverse *Southland's* holding through legislation.<sup>161</sup>

Justice Scalia dissented from the majority position, stating he too stands ready to overrule the *Southland* decision.<sup>162</sup> Although Justice Scalia has joined two majority opinions which rely on *Southland*, no parties in those cases sought to overrule *Southland*, so it was never before the court.<sup>163</sup> However, in this case, the amicus brief submitted by twenty state attorneys general seeks that very result.<sup>164</sup> Justice Scalia characterizes the holding in *Southland* as a "permanent, unauthorized eviction of state court power" to decide a large number of disputes.<sup>165</sup> In addition, he found the preemptive effect of *Southland* wholly unnecessary due to "mistake of law" as an available contract remedy.<sup>166</sup>

Writing in dissent, Justice Thomas, joined by Justice Scalia, concluded that both aspects of the *Southland* decision were incorrectly decided and also would not apply the FAA in state courts.<sup>167</sup> Justice Thomas found significant the fact that almost thirty-five years passed after the enactment of the FAA before it was suggested Section 2 applied in state courts.<sup>168</sup> He views the FAA as a procedural device and it would have been extraordinary for Congress to promulgate procedural rules applicable to state courts.<sup>169</sup> According to Justice Thomas, the FAA is procedural because an agreement to arbitrate can be characterized as a type of forum selection clause.<sup>170</sup> In addition, provisions of the FAA other than Section 2 plainly have no application in state courts.<sup>171</sup> Although the terms of Section 2 do not explicitly limit its application to federal courts, Justice Thomas examined Section 2 in context with the entire FAA, finding Section 2 was not intended to bind the states as a provision of substantive law.<sup>172</sup> Furthermore, Justice Thomas points out that if Section 2 was in fact substantive

159. *Id.* (citing *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)).

160. *Id.* Justice O'Connor finds support for this position from Justice Stevens' dissenting opinion in *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting).

161. *Id.* at 845.

162. *Id.* (Scalia, J., dissenting).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 846 (Thomas, J., dissenting).

168. *Id.*

169. *Id.*

170. *Id.* at 847.

171. *Id.* For example, Section 3 provides that "any suit or proceeding . . . brought in *any of the courts of the United States* . . . under an agreement in writing for such arbitration, the court in which such suit is pending . . . shall . . . stay the trial of the action until such arbitration has been had . . ." (emphasis added). 9 U.S.C. § 3 (1988). *Id.*

172. *Id.* at 548.

law, a violation of an arbitration agreement covered by Section 2 would create federal question jurisdiction.<sup>173</sup>

#### IV. COMMENT

Prior to the instant case, much of the common law of arbitration which survived the enactment of the FAA has been superseded by FAA provisions.<sup>174</sup> The current prevailing view is to push Section 2 towards the limits of congressional power under the Commerce Clause.<sup>175</sup> The impact of interpreting Section 2 in this manner is immense, making the FAA applicable to *all arbitration* in the United States, in both state and federal courts.<sup>176</sup> By holding the "involving commerce" requirement of Section 2 coextensive with "affecting commerce", the instant decision appears to have completed the journey initiated by *Prima Paint* to extend the reach of the FAA to all areas Congress can constitutionally regulate under its "plenary" commerce powers. Following from this decision, "[t]here may be no limits to the coverage of the FAA, other than affirmative constitutional restraints on Congress."<sup>177</sup>

Macneil and his colleagues agree that if such an extension were made, the only arbitration matters possibly escaping the FAA would be domestic relations and other traditional state matters.<sup>178</sup> However, the instant case refers to states in a generic sense and creates no explicit exception for traditional state interests.<sup>179</sup> No where in the opinion does the Court draw a distinction between certain arbitration matters, holding those regulated by the FAA, and others which a State "remains free to apply its anti-arbitration law."<sup>180</sup> The only potential argument for restricting the Court's decision lies in the examples used, "price, service, credit," which point to commercial transactions and are consumer oriented.<sup>181</sup> However, the Court's generic approach to state anti-arbitration law appears to foreclose this argument by holding the FAA does not "carve out an important statutory niche" where states may apply their own law.<sup>182</sup>

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173. *Id.* Federal question jurisdiction is determined under 28 U.S.C. § 1331 (1988).

174. MACNEIL, *supra* note 43, at 9.66.

175. *Id.* at 9.47. *See, e.g., Snyder*, 736 F.2d at 418 ("That the requirement that an arbitration agreement involve commerce is not a limitation but a qualification suggests that Congress intended the FAA to apply to all contracts that it constitutionally could regulate.").

176. MACNEIL, *supra* note 43, at 9.47. The Seventh Circuit, in *Snyder*, left this question unanswered. "We need not decide today whether Congress intended the FAA to apply to all contracts affecting interstate commerce." *Snyder*, 736 F.2d at 418.

177. *Id.* at 9.48

178. *Id.*

179. Macneil and his colleagues foresaw the potential for the instant decision by stating that "it is by no means clear that even [traditional state interests] are not subject to congressional constitutional power." MACNEIL, *supra* note 43, at 9.47.

180. *Terminix*, 115 S. Ct. at 839.

181. *Id.* at 843.

182. *Id.* at 839.

Extending the scope of Section 2 to all contracts affecting commerce necessarily begs the question: when does a contract "affect commerce"? The Court answered this question with a "commerce in fact" standard, rejecting the narrow "contemplation of the parties" test.<sup>183</sup> For the FAA to govern a contract, the provisions of the contract must *in fact* affect interstate commerce.<sup>184</sup> In addition to comporting with congressional intentions manifested in the legislative history, this standard benefits arbitration for several reasons. First, determining what parties contemplated when executing an agreement necessarily invites litigation and speculation through circumstantial evidence. In sharp contrast, an objective "commerce in fact" test allows parties to provide tangible proof of interstate activities through real evidence. Second, the "commerce in fact" standard provides much needed predictability to an area suffering from inconsistency in the past. Furthermore, predictable results may breed favorable attitudes towards arbitration, as an alternative to traditional litigation, from courts and parties alike. Although disagreeing with other portions of the majority opinion, Justice O'Connor fully supports a "commerce in fact" interpretation of congressional intent.<sup>185</sup>

Even before this decision, Macneil and his colleagues argued for courts "to take judicial notice that it is almost impossible to contract to engage in any significant economic activity without affecting commerce, thereby evidencing a 'transaction involving commerce' under FAA Section 2."<sup>186</sup> The effect of such an approach would create an assumption holding all arbitration agreements subject

183. *Id.* at 840. State court decisions, like the Alabama Supreme Court's decision in *Ex Parte Warren* (see text accompanying notes 123-26), highlight the ambiguous and erratic interpretation given the FAA's commerce requirement, emphasizing the need for one standard applicable in all FAA cases. Although federal courts tend to apply the FAA expansively relying on the broad federal policy in favor of arbitration (see, e.g., *Snyder*, 736 F.2d at 417), state courts continue to restrict the FAA to a fewer number of cases, perhaps in defense of their own judicial authority. Professor Strickland notes "[t]he existence of these conflicting approaches to the FAA, and the unpredictability of the interstate commerce inquiry, frustrate the central policy of the [FAA], i.e., to provide for an expeditious and efficient extra-judicial process for settling disputes with minimal judicial involvement." Strickland, *supra* note 41, at 455.

184. *Id.* at 841.

185. *Id.* at 843 (O'Connor, J., concurring). Cases determining whether to apply the FAA begin with an analysis of congressional intent manifested through the legislative history surrounding the Act's passage. It is illogical to assume that Congress, when enacting the FAA, intended to condition the extent of its authority on what parties did or did not contemplate when executing a contract. Whatever may be said of the Act's legislative history, it is clear Congress did *not* intend to relinquish its authority to regulate under the Commerce Clause to the "contemplations" of parties when executing a contract.

186. MACNEIL, *supra* note 43 at 9.46. Macneil provides an example of a court which has taken this step. The Vermont Supreme Court, in *Preziose v. Lumbermen's Mut. Casualty Co.*, 568 A.2d 397 (Vt. 1989), the court "simply assumed that any automobile insurance policy is a 'transaction involving commerce.'" *Id.* Not all commentators agree that the FAA should be extended as far. Strickland argues that Congress did not make clear their intention for the FAA to reach all commercial arbitration agreements in the United States. Strickland, *supra* note 41, at 386. See also, MACNEIL, *supra* note 43, at 9.5 (for a view that the FAA is somewhat less encompassing, see generally Strickland, *supra* note 41.).

to the FAA unless the party opposing arbitration can demonstrate otherwise.<sup>187</sup> Although not going this far, the instant case takes a significant step in this direction. Furthermore, if Congress did intend to limit the FAA to only federal courts, as argued by Justice O'Connor, the "involving commerce" requirement is rendered superfluous.<sup>188</sup> The legislative history surrounding the FAA demonstrates a broader intent was manifest.<sup>189</sup> Including the commerce test in Section 2 demonstrated congressional intent to create a pervasive doctrine, reaching all contracts involving commerce.<sup>190</sup> Therefore, if a contract affects commerce, the FAA requires enforcement of any agreement to arbitrate. The instant decision solidifies the federal policy in favor of arbitration and adds legitimacy to arbitration as a whole.

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187. MACNEIL, *supra* note 43, at 9.47. Although a strong supporter of extending the FAA to its fullest extent, Macneil finds it sound policy to allow "a few common law remains to peek out from around the edges of the FAA. Doing so adds flexibility to the FAA without damaging its works." *Id.* at 9.70.

188. In *Southland*, the majority answered Justice O'Connor's argument by stating that "[i]f it is correct that Congress sought only to create a procedural remedy in the federal courts, there can be no explanation for the express limitation in the [FAA] to contracts 'involving commerce'." *Southland*, 465 U.S. at 14.

189. A chief proponent of the FAA testified before Congress that the FAA relates to all contracts involving interstate commerce. *Prima Paint*, 388 U.S. at 405 n.13.

190. *Terminix*, 115 S. Ct. at 841. Interpreting "involving commerce" as the functional equivalent to "affecting commerce," which serves as Congress' vehicle to reach its constitutional limits, the Court's decision disposes of any arguments that limit the FAA to certain types of transactions, such as between merchants only. This holding answers the question posed by Professor Jiang regarding the linguistic difference between "affecting commerce" and "involving commerce." See *supra* note 84. A theory explaining why Congress explicitly limited sections, other than § 2, to federal courts may be found in *Volt Information Sciences*. There, the Court found the FAA requires enforcement of an arbitration agreement according to its terms and does not favor a particular set of procedural rules. *Volt Info. Sciences*, 489 U.S. at 475. This holding, together with the § 2 commerce requirement, may show congressional intent simply to enforce agreements to arbitrate, but allow parties to determine how the arbitration will proceed. Therefore, the federal policy favoring arbitration would be served, yet states would still be allowed to provide the procedure, an area traditionally left to state legislation.

## VI. CONCLUSION

The overall effect of the instant case is to enforce arbitration agreements contained in contracts which *in fact* affect interstate commerce. Any state law or policy contrary to federal law and policy will be superseded. The only hope for a party wishing to avoid an arbitration clause is to show the contract has no effect on commerce. Given the broad definition of commerce, however, proving a contract does not affect interstate commerce in any way is no easy feat. Although enough to win a majority of the United States Supreme Court, the instant case may rest on shaky grounds. If the Court overrules the *Southland* decision, which several members of the Court stand ready to do, the foundations of the instant case will crumble and the scope of the FAA will once again be in dispute.

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