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## Exploring the Federal Arbitration Act through the Lens of History Symposium

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# Exploring the Federal Arbitration Act Through The Lens of History

*Imre Stephen Szalai\**

The United States Arbitration Act (known today as the Federal Arbitration Act, or FAA) is a relatively short and deceptively cryptic statute.<sup>1</sup> The heart of the statute, section 2, is one sentence, and this key provision simply declares that arbitration agreements are generally “valid, irrevocable, and enforceable.”<sup>2</sup> There is not much traditional legislative history surrounding this statute because much of the development of the bill that became the FAA occurred through organizations outside of Congress, like the American Bar Association and the New York Chamber of Commerce.<sup>3</sup> As a result, to understand the FAA at a deeper level, it is helpful to examine the broader history and context surrounding the FAA’s enactment.

While in private practice and before I studied the history of the FAA in detail, the prevalence of arbitration clauses in many types of contracts and transactions and the FAA’s impact on litigation caught my attention. The FAA can be a game-changer, especially in connection with class action lawsuits. Through the FAA, courts routinely compel a named plaintiff in a class action to arbitrate his or her claims on an individual basis, thereby ending class actions filed in court.<sup>4</sup> The ability to prohibit or limit class proceedings appears to be a key reason why some businesses choose to include arbitration clauses in their contracts.<sup>5</sup>

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1. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2012). The federal statute was originally called the “United States Arbitration Act.” 43 Stat. 883, ch. 213, § 14.

2. 9 U.S.C. § 2 (2012).

3. See generally IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992); IMRE S. SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013) (discussing the different people, organizations, beliefs, and events that inspired the enactment of the FAA and similar state statutes during the 1920s).

4. See, e.g., Dang v. Samsung Electronics Co., No. 14-CV-00530-LHK, 2015 WL 4735520 (N.D. Cal. Aug. 10, 2015) (enforcing arbitration agreement by compelling named plaintiff to submit individual claims to arbitration); Iappini v. Silverleaf Resorts, Inc., No. 4:15 CV 695 RWS, 2015 WL 4430186, at \*1 (E.D. Mo. July 20, 2015) (same).

5. Consumer Financial Protection Bureau, *Arbitration Study, Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a)*, at § 3.4.5 (March 2015) (“Almost all of the arbitration clauses studied contained terms limiting the availability of class proceedings in arbitration.”) [hereinafter CFPB’s *Arbitration Study*]; Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871-884 (2008) (finding in a study that “every consumer contract with an arbitration clause also included a waiver of classwide arbitration” and “the frequent use of arbitration clauses in the same firms’ consumer contracts may be an effort to preclude aggregate consumer action”). A financial services industry lawyer testified at a hearing held by the Consumer Financial Protection Bureau that if the Bureau banned the use of class action waivers in arbitration clauses, many companies would simply stop using arbitration clauses. Barbara S. Mishkin, *Video of October 7 CFPB arbitration field hearing now available*, CFPB MONITOR (Oct. 26, 2015) <https://www.cfpbmonitor.com/2015/10/26/video-of-october-7-cfpb-arbitration-field-hearing-now-available/> (indicating that Alan Kaplinsky’s “remarks can be found at the following segments of the video: 39 to 43 minutes, 56 to 62 minutes and 70 minutes to 74 minutes”). “Although the CFPB’s proposal reflects an inclination not to outright prohibit the use of arbitration, let’s make it perfectly clear, or

In addition to having a dramatic impact on class disputes, arbitration also can have an impact on the resolution of individual disputes, and the use of arbitration in consumer and employee contracts can be problematic. Arbitration is supposed to be based on the consent of the parties involved,<sup>6</sup> but there is evidence that individuals often do not comprehend the significance of arbitration clauses and how these clauses block access to courts.<sup>7</sup> Furthermore, arbitration can frustrate access to justice because individuals may find it difficult to obtain legal counsel when their dispute is covered by an arbitration clause. There is evidence that attorneys sometimes reject clients who are bound by an arbitration clause.<sup>8</sup> Additionally, state and federal courts around the country routinely rely on the FAA to send away consumers or employees who are seeking justice from the courthouse against a more powerful corporate defendant.<sup>9</sup> However, there is evidence that some plaintiffs do not continue pursuing relief through arbitration after a court compels arbitration.<sup>10</sup> Because many plaintiffs do not refile their claims in arbitration after a court dismisses a lawsuit by compelling arbitration, it appears such plaintiffs prefer the ability to pursue a claim in court, before a jury and with the full panoply of procedural rights available in court, such as broad discovery, broad appellate rights, and the right to proceed as a class. In theory, a court's order compelling arbitration should lead to the resolution of claims through arbitration. However, in reality, an order compelling arbitration can have the effect of ending the entire process of dispute resolution in favor of the defending parties. Instead of arbitration being used in good faith to resolve claims, arbitration clauses can be misused as a way to suppress claims.

My initial interest in the history of the FAA arose out of my experiences representing clients and seeing how the FAA could be a game-changer for dispute resolution. In light of the broad and powerful use of the statute today and how it impacts access to justice in connection with so many different areas of law, I went in search of a deeper history regarding the FAA because I wanted to understand why the statute was enacted and whether current uses of the statute were consistent with the original intent behind its enactment.

Through years of research, I saw an amazing story develop regarding why and how the FAA was enacted. There is a rich history behind its enactment during the

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as my kids used to say, 'let's be real, Dad.' By requiring companies to insert in their arbitration provisions language excepting class actions from arbitration, the Bureau is in reality proposing an outright ban. It is a de facto ban. Let's call it what it is. If this proposal becomes a final regulation, most companies will simply abandon arbitration altogether. That's because the cost-benefit analysis of using arbitration will shift dramatically." *Id.*

6. The first, most fundamental principle of arbitration law is that arbitration is a matter of contract between the parties. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement . . .") (citations omitted); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties.") (citations omitted).

7. CFPB's *Arbitration Study*, *supra* note 5, at § 1.4.2. ("Consumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally either do not know whether they can sue in court or wrongly believe that they can do so.")

8. CFPB's *Arbitration Study*, *supra* note 5, at § 6.1 n.8 (noting "instances of counsel rejecting representations because of arbitration clauses").

9. *See, e.g.*, *supra* note 4 and accompanying text.

10. CFPB's *Arbitration Study*, *supra* note 5, at § 6.7.1 (out of 52 cases dismissed from court pursuant to a motion to compel arbitration, only 12 cases, or a little less than a quarter, about 23%, were refiled in arbitration).

Roaring Twenties.<sup>11</sup> The individuals who were involved had passionate, sincere beliefs about the use of arbitration to resolve commercial disputes.<sup>12</sup> The campaign for the FAA involved celebratory parties fitting for the Great Gatsby, invitations to an exclusive Hollywood hangout, and stump speeches at movie theaters, synagogues, and churches.<sup>13</sup> Many different people, factors, institutions, and beliefs helped shape and contribute to the development and passage of the FAA, including progressivism, the First World War, a changing national and international interconnected economy, Prohibition, and a larger movement for procedural reform in the legal system, to name a few.<sup>14</sup> Diving into the history stunned me and fascinated me more than I ever expected.

After publishing my historical research about the FAA's enactment, I received many questions about the history from attorneys, other law professors, and my students, such as why is this history important, or isn't the history just an interesting footnote to the statute? I am writing this essay to help explain why I believe the FAA's history is valuable. Tens of millions of Americans are bound by arbitration clauses in many different contexts, and the impact of these clauses can be dramatic and shut people out of the courthouse. In light of the prevalence of such clauses and their impact, and in light of the very limited traditional legislative history and sparse language of the statute itself, it is important to study the background of the law governing such clauses in order to bring about a deeper understanding of the law and its original purpose.

More specifically, this invited symposium contribution explores the following lessons I learned from studying the history of the FAA's enactment. First, in light of this history, the Supreme Court has grossly erred in interpreting the FAA. Second, the history can help one better understand current controversies regarding arbitration law. Finally, this history provides different perspectives on the role of arbitration in our legal system, such as the dynamic relationship between litigation and arbitration, the relationship between the government and its people, and hidden values of arbitration.

#### I. THE FAA, AS ERRONEOUSLY INTERPRETED BY THE SUPREME COURT TODAY, IS "AN EDIFICE OF THE [SUPREME COURT'S] OWN CREATION"

One fundamental lesson I learned from studying the history of the FAA's enactment is that the Supreme Court has grossly erred in interpreting the statute. The history of the FAA's enactment helps demonstrate that the FAA was originally intended to provide a framework for federal courts to support a limited, modest system of private dispute resolution for commercial disputes, not the expansive system that exists today involving both state and federal courts and covering virtually all types of non-criminal disputes. When one examines the FAA through the lens of history, the Supreme Court's modern, expansive view of the FAA collapses. As former Justice Sandra Day O'Connor lamented, "the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA],

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11. See generally SZALAI, *supra* note 3 (discussing the different people, institutions, beliefs, and events that inspired the enactment of the FAA and similar state statutes during the 1920s).

12. *Id.*

13. *Id.*

14. *Id.*

building instead, case by case, an edifice of its own creation.”<sup>15</sup> The Supreme Court, through erroneous interpretations of the FAA, has created an expansive, relatively unsupervised system of dispute resolution touching almost every aspect of American life. Current and former Justices have admitted that the Court’s flawed interpretations of the FAA are overly expansive and are causing ongoing constitutional problems.<sup>16</sup> Yet, the Supreme Court has continued to expand its erroneous interpretations of the FAA.

Through my historical research, I learned the statute was enacted to cover privately-negotiated arbitration agreements between merchants in order to facilitate the resolution of contractual disputes, through minimal procedures applicable solely in federal court. However, through decades of flawed interpretations, the Supreme Court has expanded the statute to force both state courts and federal courts to acknowledge and compel arbitration of a wide variety of disputes, including complex statutory disputes of a public nature, consumer disputes, and employment disputes. Based on the history of the FAA’s enactment, it is clear that the statute was never intended to apply in state courts or cover employment disputes.

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Supreme Court stated in dicta in a footnote that “enforcement of the [FAA] is left in large part to the state courts.”<sup>17</sup> A year later, in *Southland Corp. v. Keating*, the Supreme Court unequivocally held that the FAA is a “substantive rule applicable in state as well as federal courts.”<sup>18</sup> The *Southland* Court found, in connection with a state court proceeding, that the FAA preempted a state law banning the arbitration of franchise disputes.<sup>19</sup> The *Southland* Court relied on a manufactured “federal policy favoring arbitration” to hold that the FAA “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>20</sup>

However, the FAA was never intended to apply in state courts. The late Professor Ian Macneil wrote a detailed book setting forth numerous arguments why *Southland*’s holding is deeply flawed:<sup>21</sup> the FAA’s structure as a unitary, comprehensive statute;<sup>22</sup> its explicit language referring to the Federal courts;<sup>23</sup> the legislative history;<sup>24</sup> the universal understanding at the time of the FAA’s enactment that

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15. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

16. *Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting) (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (the Supreme Court’s flawed FAA ruling in *Southland* results in a “permanent, unauthorized eviction of state court power to adjudicate a potentially large class of disputes”); *Southland Corp.*, 465 U.S. at 23 (O’Connor & Rehnquist, JJ., dissenting) (“Congress intended to require federal, not state, courts to respect arbitration agreements.”); *Allied-Bruce*, 513 U.S. at 285-297 (Thomas & Scalia, JJ., dissenting).

17. *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 n.32 (1983).

18. *Southland Corp.*, 465 U.S. at 16.

19. *Id.*

20. *Id.* at 10.

21. See generally MACNEIL, *supra* note 3 (discussing the structure and organization of the statute, the language of the statute, the legislative history, and the political environment to emphasize that the FAA was intended to apply solely in federal courts).

22. MACNEIL, *supra* note 3, at 105-07.

23. MACNEIL, *supra* note 3, at 106-07; 9 U.S.C. § 3 (2012) (a party may petition “any court of the United States”); 9 U.S.C. § 10 (2012) (a party may petition “the United States court in and for the district wherein the award was made” to vacate the award); see also 9 U.S.C. § 4 (2012) (a party may petition “any United States district court” for an order compelling arbitration).

24. See generally MACNEIL, *supra* note 3, at 111-19.

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arbitration laws were procedural;<sup>25</sup> and other factors demonstrate that the FAA was never intended to apply in state courts.

Professor Macneil stressed in his landmark book that his study of the FAA was limited and narrow. He explained that his account regarding the FAA “necessarily omit[ted] a great deal, particularly relating to context and causation,”<sup>26</sup> and he encouraged others to engage in a deeper study of American arbitration law and explore issues such as the broader forces behind the arbitration reform movement of the early twentieth century and the relationship between arbitration reform and a general movement for procedural reform.<sup>27</sup> Inspired by Professor Macneil’s pioneering book, I tried to engage in a deeper study of the broader context of the enactment of the FAA.

My research confirmed that the FAA was part of a broader movement for procedural reform. The FAA and the Rules Enabling Act of 1934,<sup>28</sup> which reformed federal court procedure and led to the adoption of the Federal Rules of Civil Procedure, were part of the same movement to simplify court procedures, relieve overcrowded judicial dockets, and provide for improved, efficient methods of resolving disputes.<sup>29</sup> Both laws responded to widespread dissatisfaction with the complex procedural landscape of the judicial system of the time.<sup>30</sup> This relationship between the FAA and a broader movement for procedural reform helps reinforce the principle that the FAA is a procedural law, and as explained by one of the key drafters of the FAA, procedural law is the law of the forum:

[W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought. That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts.<sup>31</sup>

Examining the broader history of the FAA confirmed that the FAA was part of a larger movement for procedural reform, as a procedural statute, it is clear that the FAA was intended for application only in federal courts.<sup>32</sup>

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25. *Id.* at 109-11.

26. *Id.* at 174.

27. *Id.* at 174.

28. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

29. See generally SZALAI, *supra* note 3, at 166-73.

30. *Id.*

31. *Bills To Make Valid And Enforceable Written Provisions Or Agreements For Arbitration Of Disputes Arising Out Of Contracts, Maritime Transactions, Or Commerce Among The States Or Territories Or With Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 37 (1924) [hereinafter 1924 Hearings].

32. As explained by Justice Thomas in *Allied-Bruce Terminix Companies, Inc. v. Dobson*:

At the time of the FAA’s passage in 1925, laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance, because they were directed solely to the mechanisms for resolving the underlying disputes. As then-Judge Cardozo explained: “Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow.” It would have been extraordinary for Congress to attempt to prescribe procedural rules for *state* courts. And because the FAA was enacted against this general background, no one read it as such an attempt.

*Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286-88 (1995) (Thomas, J., dissenting) (citations omitted).

The drafting history of the statute also helps show that the statute was designed solely for federal courts. Professor Macneil found a letter published in an ABA report from W.H.H. Piatt, a member of the ABA's committee involved in drafting the FAA, to Senator Thomas J. Walsh of the Senate Judiciary Committee, a subcommittee of which held hearings regarding the proposed bills that would become the FAA.<sup>33</sup> This letter helps confirm the original understanding of the FAA as a statute applicable solely in federal court. At the time of the FAA's enactment, federal courts had an amount in controversy requirement of \$3,000 for subject matter jurisdiction (which would be about \$40,000 in today's dollars, adjusted for inflation).<sup>34</sup> An early draft of the FAA relaxed this amount in controversy requirement so that parties could bring FAA proceedings in federal court even if the underlying dispute was relatively small and involved only a few dollars.<sup>35</sup> However, there was some concern among members of Congress that FAA petitions would flood the federal courts if the FAA eliminated the \$3,000 threshold applicable to other federal suits.<sup>36</sup> As a result, the original draft of the FAA was changed before Congress enacted the statute so that the then-prevailing \$3,000 jurisdictional threshold would apply to FAA proceedings.<sup>37</sup>

Piatt's letter to Senator Walsh, which Professor Macneil discussed in his landmark book, lamented that requiring a \$3,000 amount in controversy for FAA petitions would "deprive the smaller claimants in arbitration cases of the opportunity to resort to the courts."<sup>38</sup> But if the FAA were applicable in state courts, which generally do not have minimum dollar requirements for subject matter jurisdiction, smaller claimants would not be deprived of the opportunity to rely on the FAA.<sup>39</sup> If the FAA applied in state courts, then smaller claimants could invoke the FAA in state courts in connection with small \$5 disputes. Piatt's letter expressing concern regarding the amount in controversy only makes sense if the FAA applied solely in federal court.<sup>40</sup>

In my own research, I found similar correspondence among other drafters of the FAA expressing their concerns about having a \$3,000 amount in controversy requirement for FAA proceedings. Julius H. Cohen expressed to Charles L. Bernheimer that he "feared" some members of Congress would insist on applying the \$3,000 amount in controversy requirement to the FAA because of concerns regarding increased court congestion from FAA petitions.<sup>41</sup> In connection with preparing for an upcoming congressional hearing on the proposed bills that would become the FAA, Cohen and Bernheimer developed a strategy to deal with the members of the

33. See generally MACNEIL, *supra* note 3, at 99-100, 105.

34. *All Writs Act, Pub. L. No. 61-475, 36 Stat. 1087, 1091-94*, § 24 (1911) ("The district courts shall have original jurisdiction ... [o]f all suits of a civil nature, at common law or in equity, ... where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States ....")

35. See generally MACNEIL, *supra* note 3, at 105.

36. *Id.* at 90, 105.

37. *Id.* at 105.

38. *Id.* at 99-100, 105.

39. *Id.* at 105.

40. *Id.*

41. See SZALAI, *supra* note 3, at 134 (citing Letter from Julius H. Cohen to Charles L. Bernheimer (Jan. 29, 1923) (maintained by New York Chamber of Commerce and Industry Records Archival Collection, Series V, Rare Book & Manuscript Library, Columbia University in the City of New York, Box 114, Folder 19)).

Senate Judiciary Committee in charge of the bill in case a senator did not like the bill's proposed elimination of the \$3,000 amount in controversy requirement generally applicable to federal proceedings.<sup>42</sup> If a senator did not like the elimination of \$3,000 requirement and asked the drafters to include a minimum threshold amount for subject matter jurisdiction for FAA proceedings, Bernheimer and Cohen agreed they would insist at the hearing that it is too difficult to determine an appropriate dollar amount.<sup>43</sup> If senators continued to demand that a minimum threshold exist for subject matter jurisdiction for FAA proceedings, Cohen and Bernheimer agreed they would suggest \$3,000 as the minimum jurisdictional threshold.<sup>44</sup> However, Cohen insisted that they should not easily surrender this issue of a dollar amount; the drafters did not want to apply a \$3,000 jurisdictional requirement to FAA proceedings.<sup>45</sup>

If section 2 of the FAA was intended to apply in state courts, as the Supreme Court held in *Southland* in 1984, then the drafters would not have been concerned about applying a \$3,000 jurisdictional requirement for FAA proceedings. If the FAA applied in state courts, the drafters would not have expressed concerns about depriving smaller claimants of the ability to rely on the statute. These concerns raised by the drafters suggest the FAA was intended to apply solely in federal courts.

As a result of the flawed *Southland* decision and the FAA's applicability in state courts, there is an ongoing, "permanent, unauthorized eviction of state court power to adjudicate a potentially large class of disputes," and "*Southland* will not become more correct over time."<sup>46</sup> Several Supreme Court cases carry forward *Southland*'s flaw and apply the FAA in connection with state court proceedings and engage in an unconstitutional erosion of state sovereignty. For example, in *Preston v. Ferrer*, the Court applied the FAA in connection with a state court proceeding and held that the FAA overrides a state law granting primary jurisdiction to a carefully-designed administrative agency to resolve disputes regarding the representation of artists in the entertainment industry.<sup>47</sup> Similarly, in *Marmet Health Care Center, Inc. v. Brown*, the Supreme Court applied the FAA in another state proceeding and held that the FAA preempts state law guaranteeing a state judicial forum for personal injury claims against nursing homes,<sup>48</sup> and in *Perry v. Thomas*, the Court held that the FAA preempts state law requiring a judicial forum for wage collection actions.<sup>49</sup> All of these cases involve an unconstitutional displacement of state law resulting from the flawed *Southland* holding.

In addition to the constitutional problems created by the flawed *Southland* decision, *Southland* has also contributed to another troubling aspect regarding the use of the FAA. Before the Supreme Court issued *Southland* and when the FAA was generally considered applicable solely in federal court, parties seeking to rely on the FAA would have to demonstrate the existence of subject matter jurisdiction in

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284-85 (1995) (Scalia, J., dissenting).

47. *Preston v. Ferrer*, 552 U.S. 346, 349-50 (2008).

48. *Marmet Health Care Ctr, Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012).

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

the federal courts. For commercial disputes involving a breach of contract, an underlying dispute would have to exceed \$75,000 for a federal court to have jurisdiction over a related FAA proceeding.<sup>50</sup> However, for the last thirty years under *Southland*, the FAA has been binding on state courts, which generally do not have minimum dollar requirements for subject matter jurisdiction. Thus, after *Southland*, FAA proceedings could be brought in state court involving a small \$50 contract dispute, which would not be possible in federal court. The FAA's expansion into state courts resulting from the flawed *Southland* decision may have contributed to the spread or acceptability of arbitration for small consumer disputes, where meaningful consent to arbitration likely does not exist.

The history of the FAA's enactment helps show that the Supreme Court has grossly erred in interpreting the FAA in other ways, beyond the application of the FAA to state courts. According to the Supreme Court, the FAA applies to employment disputes,<sup>51</sup> but the history demonstrates that the FAA was never intended to apply in the employment context.<sup>52</sup> Also, the Supreme Court has held the FAA applies to statutory claims,<sup>53</sup> but the statute was designed to facilitate the resolution of a narrow category of disputes: commercial disputes of a contractual nature.<sup>54</sup>

What is immediately apparent from studying the history of the FAA is that the statute was intended to support a modest system of arbitration of contractual disputes between merchants through limited procedures available in federal court. However, through flawed judicial interpretations, the Supreme Court has dramatically expanded the FAA to support an extensive system of dispute resolution covering virtually every type of non-criminal claim, and the FAA today is displacing broad swaths of state power. As lamented by some Justices, the Supreme Court has "play[ed] ostrich" and ignored the history of the FAA,<sup>55</sup> and "the [Supreme] Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."<sup>56</sup>

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50. The amount in controversy for federal court subject matter jurisdiction in connection with state law claims must currently exceed \$75,000. However, at the time of *Southland* in 1984, the amount in controversy for such claims would have to exceed \$10,000, which was increased to \$50,000 in 1988, and eventually increased to \$75,000 in 1996. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415 (\$10,000); Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, § 201, 102 Stat. 4642 (\$50,000); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847 (\$75,000).

51. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001).

52. See generally SZALAI, *supra* note 3, at 191-92 (examining historical evidence why the FAA was never intended to apply to employment disputes).

53. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 614-15 (1985).

54. Stephen E. Friedman, *The Lost Controversy: Limitation of the Federal Arbitration Act*, 46 U. RICH. L. REV. 1005, 1010 (2012) (the text of the FAA demonstrates that the statute only covered contract claims, not statutory claims). The reformers who developed and lobbied for the FAA envisioned the statute as covering commercial arbitration of contract disputes between merchants. The examples of disputes cited by the reformers in the legislative history involve disputes of a contractual nature, like a dispute about the quality of goods delivered.

55. *Circuit City*, 532 U.S. at 128 (Stevens, Ginsburg, Breyer, & Souter, JJ., dissenting).

56. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

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## II. THE HISTORY OF THE FAA'S ENACTMENT SHEDS LIGHT ON CURRENT CONTROVERSIES REGARDING ARBITRATION LAW

Another value of studying the history of the FAA's enactment is that the history sheds light on and informs current debates about arbitration law doctrines, such as the effective vindication doctrine and the availability of pre-hearing discovery in arbitration. Studying the background of the FAA's enactment provides a deeper context to understand the development of arbitration law and current controversies in arbitration law.

### A. *The Effective Vindication Doctrine and Judicial Supervision of Arbitration Agreements*

A year after its infamous *Southland* decision expanding the FAA's coverage to state courts, the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, further expanded the FAA to cover statutory claims:

[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce ... valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The "liberal federal policy favoring arbitration agreements" manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." As this Court recently observed, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which "requires that we rigorously enforce agreements to arbitrate."<sup>57</sup>

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57. *Mitsubishi*, 473 U.S. at 625-26 (citations omitted). See also *Allied-Bruce*, 513 U.S. at 627 ("[T]he Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). In *Scherk v. Alberto-Culver Co.*, the Supreme Court held that the FAA covered claims under the Securities Exchange Act of 1934 in connection with an international business transaction. The international aspect of the business deal in *Scherk* was an important factor in the Court's *Scherk* decision and enabled the Court to distinguish prior cases that held statutory claims were not arbitrable under the FAA in the domestic context. The Court in *Scherk* reasoned that considerable uncertainty regarding dispute resolution and the applicable law could exist in connection with international business deals, and arbitration could avoid this uncertainty and thereby help promote international commerce. If the Court refused to enforce the international arbitration agreement in *Scherk*, the Court understood such a refusal could frustrate international trade. In sum, a key factor influencing the *Scherk* holding was the international nature of the business transaction at issue. Although *Mitsubishi* also involved an international transaction, the Court's reasoning in *Mitsubishi* was not limited to the international context. The *Mitsubishi* Court, relying (very selectively, in my opinion) on the text of the FAA, found that the FAA's language does not bar arbitration of statutory claims. Furthermore, the Court expressed skepticism about the continued refusal of courts to compel arbitration of statutory claims in the domestic context. Although *Mitsubishi* involved an international business transaction, the Court's reasoning in *Mitsubishi* paved the way for the broad arbitrability of statutory claims in the domestic context.

However, the FAA was designed for contractual disputes, not statutory claims. It should be emphasized that the majority in *Mitsubishi* quoted the FAA in a self-serving, selective manner and ignored critical language in the statute limiting its coverage to contractual disputes.<sup>58</sup> When quoting the FAA, the majority conveniently omitted the language that the FAA makes enforceable provisions “to settle by arbitration a controversy thereafter arising out of such contract.”<sup>59</sup> Section 2 of the FAA, by its very terms, contains an important limitation; section 2 only makes enforceable arbitration clauses in a contract to resolve disputes “thereafter arising out of such contract.”<sup>60</sup> There is a big difference between broadly saying a “written agreement to arbitrate” as the majority in *Mitsubishi* stated, and to quote the actual, more precise, and more limited language of the statute, restricting coverage of the FAA to disputes arising out of a contract.<sup>61</sup> The majority’s phrase, a “written agreement to arbitrate,” is so broad that this unlimited phrase would easily encompass the arbitration of statutory claims, but the actual phrase from the statute is more restricted and would cover only claims arising out of a contract.<sup>62</sup>

The *Mitsubishi* decision changed and expanded arbitration law to permit the broad arbitrability of statutory claims and led to cases like *Shearson/American Express, Inc. v. McMahon*,<sup>63</sup> *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>64</sup> and *Gilmer v. Interstate/Johnson Lane Corp.*<sup>65</sup> As a result of these cases, the FAA by default covers virtually all types of non-criminal statutory claims.

To help justify the judicial expansion of the FAA to cover statutory claims and alleviate concerns regarding such expansion, the Supreme Court in *Mitsubishi* announced the effective vindication doctrine:

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58. Friedman, *The Lost Controversy Limitation of the Federal Arbitration Act*, *supra* note 53, at 1025.

59. 9 U.S.C. § 2 (2012).

60. *Id.*

61. Compare 9 U.S.C. § 2 (declaring that written provisions in a contract “to settle by arbitration a controversy thereafter arising out of such contract” are fully enforceable) (emphasis added), with *Mitsubishi*, 473 U.S. at 625 (“The Act’s centerpiece provision makes a written agreement to arbitrate ‘in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’”) (ellipsis in original).

62. 9 U.S.C. § 2. The flawed reasoning of the majority in *Mitsubishi* seems to turn federal question jurisdiction on its head. Section 2 of the FAA makes enforceable a provision in a contract “to settle by arbitration a controversy thereafter arising out of such contract.” *Id.* Because the *Mitsubishi* Court found that section 2 of the FAA covers federal antitrust claims, the Court’s ruling in *Mitsubishi* seems to treat federal antitrust claims as a controversy arising out of a contract. If the Court is correct that antitrust claims indeed are controversies arising out of a contract, it seems that federal question jurisdiction should not exist for such claims. In other words, under the flawed reasoning of *Mitsubishi*, claims arising under federal law, such as statutory antitrust claims or civil rights claims, are really controversies arising under a contract, and such a topsy-turvy result would undermine federal question jurisdiction.

63. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (indicating that the FAA covers RICO claims).

64. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (indicating the FAA covers federal securities law claims).

65. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (indicating the FAA covers civil rights claims pursuant to the Age Discrimination Employment Act).

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And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.<sup>66</sup>

If particular arbitration procedures would not permit a party to vindicate their rights effectively, a court can refuse to enforce the agreement or invalidate the problematic terms under the effective vindication doctrine.<sup>67</sup> In other words, the effective vindication doctrine was linked to the Supreme Court's expansion of the FAA to cover statutory claims.

Since 1985, when the Supreme Court announced the effective vindication doctrine in *Mitsubishi*, lower courts have relied on this important doctrine to help police arbitration agreements for fundamental fairness. However, in 2013, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court undermined the effective vindication doctrine by declaring it to be mere "dictum" from *Mitsubishi*.<sup>68</sup> The majority in *Italian Colors* construed this dictum narrowly as preventing "prospective waiver of the right to pursue statutory remedies."<sup>69</sup> In other words, the majority characterized this dictum as applying, in a limited fashion, to roadblocks that would appear at the front-end of an arbitration proceeding and prospectively frustrate one's ability to pursue statutory remedies.<sup>70</sup> The majority opined that "perhaps" this dictum would apply to and invalidate excessive arbitral filing fees or an express waiver prohibiting the filing of statutory claims.<sup>71</sup>

Lower courts, following the majority from *Italian Colors*, have begun to limit the effective vindication doctrine. For example, prior to *Italian Colors*, some courts would police the fairness of employment arbitration agreements by ensuring that an employee would not have to pay an arbitration filing fee or costs beyond what the employee would pay for a court's filing fee.<sup>72</sup> For example, if a court filing fee was \$350, an arbitration clause requiring an employee to bear more than \$350 for engaging in an arbitration would frustrate the ability of the employee to vindicate their

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66. *Mitsubishi*, 473 U.S. at 637; see also *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (construing *Mitsubishi*, *Rodriguez*, and *McMahon* as "demonstrat[ing] that even claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions") (quotations omitted).

67. See, e.g., *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (holding that "[w]hen an arbitration clause has provisions that defeat the remedial purpose of the statute ... the arbitration clause is not enforceable," and provisions insulating an employer from damages and equitable relief invalidate the arbitration clause); *Winn v. Tenet Healthcare Corp.*, No. 2:10-CV-02140, 2011 WL 294407, at \*8 (W.D. Tenn. Jan. 27, 2011) (recognizing that a plaintiff "cannot effectively vindicate his or her rights when the arbitration agreement at issue: (1) does not require that the arbitrator be qualified or unbiased; (2) unduly limits discovery; (3) limits remedies available to the employee; or (4) includes cost-sharing provisions that make arbitration prohibitively expensive") (citations omitted).

68. *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2307 (2013).

69. *Id.* at 2310 (citation omitted).

70. *Id.* at 2310-11.

71. *Id.*

72. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 110-11 (Cal. 2000) (relying on the effective vindication doctrine from *Mitsubishi* and concluding that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court"); *Lelouis v. W. Directory Co.*, 230 F. Supp. 2d 1214 (D. Ore. 2001) (citing *Armendariz* with approval and invalidating arbitration agreement because the arbitration agreement, inter alia, made the employee bear half the costs of arbitration).

rights in the arbitral forum.<sup>73</sup> However, some lower courts following *Italian Colors* are now construing the effective vindication doctrine very narrowly and finding that it is now acceptable for employees to pay arbitral fees above the amount of a court filing fee because the effective vindication dictum, at most, “perhaps” applies to arbitral fees that are prohibitively high.<sup>74</sup>

Understanding the original purpose behind the FAA helps one understand the development of the effective vindication doctrine and why *Italian Colors* is a harmful case. The FAA provides for a limited role for the judiciary in supervising arbitration. However, if one understands that the FAA was designed for a limited category of commercial disputes between consenting co-equals, the limited role of the judiciary in supervising arbitration makes sense. There was no pressing need to police the fairness of arbitration clauses when arbitration was limited to commercial parties who gave meaningful consent to arbitrate contractual disputes. Understanding the FAA’s background, that the statute was never intended to block employment disputes from the courthouse, and that the statute was never intended to provide for the arbitration of statutory claims, can help one appreciate the significance of the effective vindication doctrine. When the Supreme Court began grafting amendments to the FAA, to cover statutory claims, and to cover employment disputes, then a need developed to protect against abusive uses of arbitration in these contexts. The effective vindication doctrine can be understood as a modest judicial solution to regulate the judicial expansion of arbitration into the statutory and employment context. However, now that the Supreme Court has weakened the effective doctrine in *Italian Colors*, courts are less able to protect employees from harsh arbitration clauses.

One can understand *Mitsubishi* as involving two judicial expansions of the FAA. First, the Court expanded the FAA and opened the door for the FAA to cover statutory claims. Second, the Court expanded arbitration law by developing the effective vindication doctrine. However, in *Italian Colors*, the Supreme Court took a scalpel and focused solely on cutting out the effective vindication doctrine from arbitration law by dismissing it as limited, narrow dictum.<sup>75</sup> At the same time the *Italian Colors* Court struck down one half of *Mitsubishi* involving the effective vindication doctrine, the Court left untouched the other main part of *Mitsubishi* expanding the FAA to cover statutory claims. The Court in *Italian Colors* left in place the unjustified expansion of the FAA into statutory claims, while undermining the corresponding doctrine that helped justify the expansion. If the Court were to shine a light and take a close look at the arbitrability of statutory claims in light of the text and history of the FAA, the Court would find there is no support for the arbitrability

73. See, e.g., *Abraham v. ESIS, Inc.*, No. C-07-04014-JCS, 2008 WL 220104, at \*5-6 (N.D. Cal. Jan. 25, 2008) (relying on *Armendariz* to invalidate an arbitration agreement’s requirement that the employee pay a fee to an employer in order to initiate arbitration).

74. *Byrd v. SunTrust Bank*, No. 2:12-CV-02314-JPM, 2013 WL 3816714, at \*18 (W.D. Tenn. July 22, 2013) (“*Italian Colors Restaurant* makes it more difficult to demonstrate that particular provisions in an arbitration clause are unenforceable because those provisions make it more expensive to arbitrate a federal statutory claim;” because of *Italian Colors*, it is “more difficult for Plaintiffs to show that the Arbitration Clause is unenforceable due to high fees associated with arbitration”); *Mercado v. Doctors Med. Ctr. of Modesto, Inc.*, No. F064478, 2013 WL 3892990, at \*6-7 (Cal. Ct. App. July 26, 2013) (recognizing that the Supreme Court in *Italian Colors* rejected a broad application of the effective vindication doctrine and the *Italian Colors* decision “cast[s] doubt on the continued validity” of *Armendariz*, which allowed courts to invalidate any arbitral fee in excess of court filing fees).

75. *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2310 (2013) (“The ‘effective vindication’ exception to which respondents allude originated as dictum in *Mitsubishi Motors* . . .”).

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of statutory claims, just like there is no real statutory support for the effective vindication doctrine. The modern FAA is truly an “edifice of [the Supreme Court’s] own creation” in multiple ways,<sup>76</sup> and this broad expansion and interpretation of the FAA collapse under close scrutiny.

When viewing the effective vindication doctrine in isolation, and stripped from the broader history of the statute, it is easy to dismiss the doctrine as dictum with very little support in the text of the statute. The effective vindication doctrine, however, makes more sense when one considers the history and development and expansion of the FAA. The judicial creation of the effective vindication doctrine in *Mitsubishi* served as a counterbalance to the judicial expansion of the FAA to cover statutory claims. As recognized by the dissent in *Italian Colors*, the effective vindication doctrine was fundamental to the modern, expansive arbitration framework supported by the FAA because the doctrine allowed the FAA to coexist in a healthy relationship with the arbitrability of statutory claims.<sup>77</sup> The *Italian Colors* dissent also viewed the effective doctrine as not mere dictum because the doctrine was central condition to the holding of *Mitsubishi*.<sup>78</sup>

By undermining the effective doctrine, the majority in *Italian Colors* left a significant gap or hole in judicial supervision of arbitration. This lack of judicial supervision is getting worse because of other recent FAA decisions from the Supreme Court, *AT&T Mobility LLC v. Concepcion*,<sup>79</sup> and *Rent-A-Center, West, Inc. v. Jackson*.<sup>80</sup> In *Concepcion*, the Supreme Court construed the FAA as having broad, vague preemptive powers that can override state laws having a “disproportionate impact on arbitration.”<sup>81</sup> Some lower courts are using *Concepcion* to narrow the scope of judicial review of arbitration clauses for fairness because some state law defenses, when applied to arbitration, are having a “disproportionate impact on arbitration.”<sup>82</sup> Likewise, *Rent-A-Center* is dramatically narrowing the scope of judicial review of arbitration agreements. In *Rent-A-Center*, the Supreme Court found that delegation clauses, whereby the parties delegate to the arbitrator decisions regarding the enforceability and formation of the arbitration agreement, are fully enforceable, unless a party can demonstrate fraud in the making of a delegation clause, which involves a challenging showing.<sup>83</sup> In effect, if a party challenges an arbitration clause as one-sided or involving unfair procedures, courts no longer can review

76. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

77. *Italian Colors*, 133 S. Ct. at 2313 (2013) (Kagan, Ginsburg, & Breyer, JJ., dissenting) (the effective vindication doctrine “reconciles the Federal Arbitration Act (FAA) with all the rest of federal law”).

78. *Id.* at 2317 (2013). The *Italian Colors* dissent interpreted the effective vindication doctrine more broadly than the majority’s interpretation of the doctrine as applying solely to a “prospective waiver” at the front-end of an arbitration proceeding. The dissent believed that the doctrine should help regulate and police arbitration clauses with respect to the front-end of an arbitration proceeding (such as a severe statute of limitations), the middle of an arbitration proceeding (such as a provision limiting the type of evidence that can be considered), and the back-end of an arbitration proceeding (such as a provision banning the arbitrator from granting certain relief). *Id.* at 2314. The dissent recognized that multiple different types of arbitral provisions could prevent a party from effectively vindicating their rights.

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

80. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63 (2010).

81. *Concepcion*, 563 U.S. at 1747.

82. See, e.g., *Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 1007 (N.D. Cal. 2012) (recognizing that pre-*Concepcion*, courts would invalidate discovery limits in arbitration, but post-*Concepcion*, “limitations on arbitral discovery no longer support a finding of substantive unconscionability”).

83. *Rent-A-Ctr., W., Inc.*, 561 U.S. at 72 (“Accordingly, unless [the plaintiff] challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.”).

such challenges when a delegation clause exists.<sup>84</sup> The Court has expanded the FAA so that the FAA covers virtually every type of non-criminal claim, but at the same time, the Court has moved in the opposite direction and dramatically shrunk the level of judicial supervision or review of arbitration agreements. By understanding the history, I saw the need for the effective vindication doctrine, and I have a better understanding of how the doctrine developed. Also, examining the original enactment and development of the FAA helps one see that there is a significant and growing gap regarding judicial supervision of arbitration.

### B. Pre-Hearing Discovery in Arbitration

As another example of how the FAA's history can help one better understand the development of the FAA and current debates, consider a developing circuit split regarding the FAA and discovery. Section 7 of the FAA provides the following:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.<sup>85</sup>

Courts are currently split when interpreting this provision of the FAA. Some courts interpret section 7 narrowly as granting power to arbitrators to compel non-parties to provide testimony as witnesses at arbitration hearings, and under this narrow view, arbitrators generally do not have power to issue subpoenas regarding *pre-hearing* discovery.<sup>86</sup> However, other courts have interpreted section 7 of the FAA more broadly to encompass the power of arbitrators to compel pre-hearing document discovery from non-parties.<sup>87</sup> Under this broader view, the power to compel attendance at a hearing implicitly assumes the power to compel pre-hearing discovery.

When one examines this circuit split in the context of the FAA's history, one can better understand this discovery issue. The FAA was enacted before modern, broad discovery existed. At the time of the FAA's enactment, the federal court system did not have procedures for broad, pre-trial discovery such as those that exist today.<sup>88</sup> Moreover, considering the limited coverage of the FAA as a statute to facilitate the resolution of commercial, contractual disputes, it seems that evidence

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84. See, e.g., *Kohsuwan v. Dynamex, Inc.*, No. G049522, 2015 WL 3457280 (Cal. Ct. App. June 10, 2015) (enforcing delegation clause and compelling arbitration of whether the arbitration clause's fee provisions and location provisions were unconscionable).

85. 9 U.S.C. § 7 (2012).

86. *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004); *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 212 (2d Cir. 2008); see also *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (as a general rule, arbitrators can only compel non-parties to provide testimony as witnesses at a hearing, unless there is a showing of "special need or hardship," such as demonstrating that the information sought is otherwise not available).

87. *In re Arbitration Between Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870–71 (8th Cir. 2000) (reasoning that implicit in the authority to compel witnesses to testify at an arbitration hearing is the power to compel pre-hearing discovery).

88. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698 (1998).

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would be in the possession of the parties in most cases for contractual disputes. Furthermore, an arbitrator selected by two merchants to resolve a contractual dispute would probably be knowledgeable of the industry. Considering the FAA in its historical context, it seems that the narrow view is the better interpretation of the statute as originally intended, and thus, the FAA grants arbitrators the power to compel the attendance of non-party witnesses at the arbitration hearing, but not for purposes of pre-hearing discovery.<sup>89</sup>

Understanding how courts expanded the coverage of the FAA over time to include statutory claims and employment disputes, and further understanding how court procedures grew to embrace broad discovery, which is now the norm in American litigation, it is easier to understand why some courts take the broader view regarding section 7. Just like the effective vindication doctrine can be understood as way to cope and alleviate concerns with the expansion of the FAA to statutory claims, the broader view regarding pre-hearing discovery in arbitration can similarly be understood as justifying the expansion of the FAA and as helping to make arbitration proceedings fairer. For example, in an employment discrimination case – which was never intended to be subject to the FAA, the key evidence of discrimination may be in the hands of defendants or non-parties who work for corporate defendants, and the broader view of the FAA permitting pre-hearing discovery can be understood as necessary for a fundamentally fair proceeding and justifying the expansion of the FAA to employment disputes. More generally speaking, as the courts pushed the coverage of the FAA far beyond its original intent, which is not justified under the terms of the statute, some courts were also willing to develop doctrines or interpretations of the FAA providing some protections or procedural fairness guarantees to help cope with problems associated with the statute's expanded coverage.<sup>90</sup>

The FAA was intended to have limited coverage in 1925, and our judicial system has changed since the FAA's enactment as a result of the adoption of the Federal Rules of Civil Procedure. Courts today are trying to make the statute fit more modern times and broader contexts, such as employment disputes, consumer disputes, and statutory claims. Also, to some degree, courts seem to be adopting modern notions of procedural fairness, such as modern expectations regarding discovery, and imposing them on arbitration proceedings. However, the language and original intent of the statute cannot support such broad judicial activism. Understanding the history and original purpose of the FAA can provide a deeper and better understanding of modern debates about the FAA, such as the development and existence of the effective vindication doctrine and the availability of pre-hearing discovery from non-parties.

### III. EXAMINING THE FAA'S HISTORY REVEALS HOW ARBITRATION FITS INTO THE BROADER LEGAL SYSTEM

Exploring the broader historical context of the FAA's enactment brought about a tectonic shift in how I viewed the FAA. When I was in private practice using the

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89. See *Hay Grp.*, 360 F.3d at 407 (adopting the narrow view of the FAA and recognizing that the Federal Rules of Civil Procedure, from the time of their adoption in 1937 until 1991, "did not allow federal courts to issue pre-hearing document subpoenas on non-parties").

90. See *supra* pp. \_\_\_\_ (discussing *Mitsubishi's* creation of the effective vindication doctrine).

FAA and before I explored its history in detail, I viewed the FAA at a very micro-level and solely in terms of how the FAA could shape the resolution of a particular dispute between my client and another party. I viewed the FAA in isolation and only in terms of how it governed a relationship between two parties. However, after I studied the history of the FAA's enactment, my view of the FAA radically changed and expanded to a broader, macro-level perspective, and I saw how the FAA fits into our larger legal system and society. Also, exploring the broader history helped me see arbitration in a positive light, especially compared to the more modern uses of arbitration in connection with consumer and employment disputes.

*A. Studying the FAA's History Reveals An Expansive View of Dispute Resolution and the Interconnectivity Between Arbitration and Litigation*

Studying the history of the FAA's enactment made me consider dispute resolution more broadly, and the history revealed an interesting inter-relationship between arbitration and the court system. A critical piece of the FAA's history is that the FAA was part of a larger movement of procedural reform from the early twentieth century, and the FAA grew out of broad frustration with the existing, complex, overburdened court system of the time.<sup>91</sup>

Before the adoption of the landmark Federal Rules of Civil Procedure in 1938, there was much uncertainty and confusion regarding federal court procedures. As a general rule, pre-1938 federal courts would borrow, to a certain degree, the state court procedures of the state where the federal court sat pursuant to the Conformity Act of 1872, which provided that:

practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, *as near as may be*, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held . . . .<sup>92</sup>

Federal court practice therefore varied from state to state. Moreover, because of the discretion granted to a federal court by the Conformity Act's soft suggestion that federal procedure should conform "as near as may be" to state procedures, there was "hideous confusion" and "shifting uncertainty" regarding federal court practice:

[E]ven where there was conformity, it was to be "as near as may be," and this was understood by the Court to make the Conformity Act "to some extent only directory and advisory" and to permit the federal judge to disregard a state practice that would, in the judge's view, "unwisely encumber the administration of the law, or tend to defeat the ends of justice." With

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91. See SZALAI, *supra* note 3 (discussing in more detail how the FAA's enactment is related to a broader movement for procedural reform is adapted from my book).

92. 4 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1002 n.19 (3rd ed. 1998) (quoting Conformity Act of June 1, 1872, ch. 255, § 5, 17 Stat. 1970 (1872)) (emphasis added).

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all these exceptions to conformity, and with the judge left somewhat at large to decide when to conform, it is hardly surprising that the result was, in the view of a distinguished commentator, “a mixture of conflicting decisions, which have served to cloud the whole subject in hideous confusion and shifting uncertainty.”<sup>93</sup>

Lawyers of the time expressed frustration with the confusing, uncertain, shifting nature of court procedures. A committee of the American Bar Association reported that “a lawyer practicing in the Federal courts, even in his own state, feels no more certainty as to the proper procedure than if he were before a tribunal of a foreign country,”<sup>94</sup> and because of this tremendous uncertainty and confusion, pre-1938 federal procedure has been compared to “Sanskrit” to an average attorney.<sup>95</sup> To add insult to injury and create a perfect storm of injustice, in addition to this significant confusion and uncertainty regarding court procedure, the federal court system was also struggling with overwhelming dockets because of a variety of other factors, such as Prohibition-related cases.<sup>96</sup>

Because of these problems in the federal court system, a decades-long struggle and movement to reform, streamline, and simplify federal court procedure began at the turn of the century. American Bar Association committees developed a plan of procedural reform to alleviate the problems of the confusing and uncertain procedures of the federal court system.<sup>97</sup> The committees developed a plan whereby a statutory act would set forth general principles for courts, and the judiciary would then develop procedural rules.<sup>98</sup> Ultimately, this procedural reform movement led to the Rules Enabling Act in 1934, which delegated to the judiciary the process of developing a uniform body of federal court procedures, and eventually, the adoption of the landmark Federal Rules of Civil Procedure in 1938.<sup>99</sup>

The push for the FAA’s enactment was part of this broader movement of procedural reform. Both the FAA and the Rules Enabling Act were landmark reforms that arose out of the broad frustration with the pre-1938 court system. If one examines the Congressional hearings regarding the proposed bills that became the FAA, the testimony contains numerous references to this broader push for procedural reform.<sup>100</sup>

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93. *Id.* at § 64 (citations omitted).

94. American Bar Association, *Report of Committee on Uniformity of Procedure and Comparative Law*, 19 ANN. REP. A.B.A. 411, 420 (1896).

95. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1042 (1982) (“[A] common view of federal practice under the Conformity Act was, ‘To the average lawyer it is Sanskrit; to the experienced federal practitioner it is monopoly; to the author of text books on federal practice it is a golden harvest.’”) (citation omitted).

96. *Olmstead v. United States: The Constitutional Challenges of Prohibition Enforcement*, FED. JUST. CTR., [http://www.fjc.gov/history/home.nsf/page/tu\\_olmstead\\_narative.html](http://www.fjc.gov/history/home.nsf/page/tu_olmstead_narative.html) (last visited Jan. 28, 2016) (noting that during the 1920s, Prohibition-related cases comprised on average about 2/3 of the district court cases); Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 JUST. SYS. J. 1, 1 (2003) (noting overcrowded federal dockets due to increased government regulations, war-related contract disputes, and Prohibition-related cases).

97. See generally Burbank, *supra* note 95, at 1043-1095 (discussing the movement for reforming federal court procedure).

98. *Id.*

99. *Id.*

100. See generally 1924 Hearings, *supra* note 31 (mentioning frustrations with the court system and referring to a larger movement to reform court procedure).

Because of the broken court system, merchants desired to take commercial disputes to a system of arbitration. As observed by one judge in New York, the commercial center of the United States, business interests “were willing to do almost anything”<sup>101</sup> to avoid submitting a controversy to the broken court system:

In the past fifty years we have revolutionized our methods of the conduct of private business, and largely also the conduct of public business; our methods are more direct, exact, and to the point; they minimize the possibility of error, eliminate “lost motion” and cut “red tape.” Yet to all this improvement in methods our judicial procedure has paid substantially no heed. The mechanics of a courtroom trial are still substantially the same as they were in the days when our ancestors rode in stage-coaches, used tallow dips or pine knots for lighting. . . . [T]he court has failed to keep pace with the life of the community which surges outside its walls. . . . [T]he average court is the most indirect, inexact, inefficient, uneconomical and unintegrated instrumentality in the modern state. . . . Business men go to arbitration to avoid legal procedure. . . .<sup>102</sup>

In sum, when examining the history of the FAA’s enactment, one sees a dynamic between the judicial system and arbitration. When the judicial system was broken and overwhelmed with overcrowded dockets, arbitration acted like a safety valve, and commercial disputes flowed from the court system into arbitration.

Exploring the history of the FAA emphasized there is a degree of interrelatedness regarding different methods of dispute resolution. If one method became undesirable, parties could bring their disputes to other forums. Instead of viewing arbitration in a narrow plane of my client’s dispute with another party, studying the history of the FAA’s enactment encouraged me to view dispute resolution more expansively and dynamically in relation with other forms of dispute resolution.

One sees a similar dynamic with dispute resolution at work today, and the two systems of arbitration and litigation influence each another.<sup>103</sup> For example, if commercial interests find the court system unattractive, commercial interests -- both in the 1920s and today -- may attempt to channel more disputes into a system of arbitration.<sup>104</sup> In recent years, in both New York and Delaware, leading centers for the

101. William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L. Q. 186, 199 (1917).

102. *Id.* at 199-201 (1917); see also William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L. Q. 261, 265 (1917) (explaining that business people had a strong dislike for court procedure, which was “too complicated, technical, indirect, dilatory, wasteful of his time and everyone else’s, to warrant him in taking any avoidable chances with the judicial mill”).

103. I do not intend to suggest that such influence and interrelatedness do not exist in connection with other forms of dispute resolution. However, arbitration and litigation in court have strong parallels in that both forms of dispute resolution result in a binding judgment by a non-party or non-parties to the dispute. They can be viewed as substitutes to a certain degree, and the two systems influence each other.

104. Similarly, if commercial interests find arbitration unattractive, the commercial interests may choose to go to court instead. In the financial services industry, it is expected that the Consumer Financial Protection Bureau may ban the use of class action waivers in connection with arbitration agreements. *CFPB Considers Proposal to Ban Arbitration Clauses that Allow Companies to Avoid Accountability to Their Customers*, CONSUMER FIN. PROTECTION BUREAU (Oct. 7, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers>. Representatives of trade groups have publicly stated that if such a regulation is adopted, businesses would likely stop including arbitration clauses and would prefer to have disputes heard in court. See Mishkin, *supra* note 5. Several companies admitted that they disliked

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corporate world, the judiciaries updated and modified procedures for commercial disputes in order to make the court system more competitive and attractive in comparison to arbitration. In 2014, New York established new, optional court procedures for commercial cases exceeding \$500,000.<sup>105</sup> Under the new rules, cases are supposed to be ready for trial in nine months,<sup>106</sup> and in order to meet this tight deadline, a key feature of the new procedural rules are discovery limits, including seven interrogatories, five requests to admit, seven depositions at seven hours each, and document requests limited to “those relevant to a claim or defense in the action” and “restricted in terms of time frame, subject matter and persons or entities to which the requests pertain.”<sup>107</sup> Like arbitration procedures, the parties must agree to follow these accelerated procedures, and also like arbitration, they may enter into pre-dispute agreements to abide by these special procedures.<sup>108</sup> The Honorable James M. Catterson, former Justice of New York’s Appellate Division, First Department, explained that the new accelerated court rules were designed “to provide the parties with an alternative to arbitration while still guarantying important procedural protection, such as the right to appeal the final judgment.”<sup>109</sup> The development of these new procedural rules for court helps demonstrate that the judiciary and commercial arbitration systems can be interrelated and influence each other.

Similarly, in 2009, in an attempt to “preserve Delaware’s pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters,” Delaware amended its code in order to create and embed an arbitration-like system within its judiciary.<sup>110</sup> A synopsis of the amendment explained that courts are normally required to defer to the parties’ wishes to arbitrate commercial disputes and stay lawsuits so that arbitration could proceed, and these disputes were often of great interest to Delaware entities.<sup>111</sup> Pursuant to the amendment, parties could now agree to have a judge of the Delaware Chancery Court serve as an arbitrator with a streamlined set of procedures, and thus this new system would help keep the Delaware judiciary “at the cutting edge of dispute resolution” by not losing disputes to a system of private arbitration.<sup>112</sup> Although the United States Court of Appeals for the Third Circuit struck down this Delaware system of government-sponsored arbitration as uncon-

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arbitration procedures in California, and as a result, companies no longer seek to enforce arbitration agreements in California so that they could litigate their disputes. Brief for DirecTV, Inc., Comcast Corp., & Dell Inc. as Amici Curiae Supporting Petitioner, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (No. 09-893), 2010 WL 3183855.

105. See *Administrative Order of the Chief Administrative Judge of New York’s Courts*, N.Y. COURTS (June 2, 2014), <http://www.nycourts.gov/rules/comments/orders/AO-77-14.pdf>.

106. *Id.*

107. *Id.*

108. *Id.*

109. *New Rule on Accelerated Adjudication Procedures in New York State Courts*, INT’L INST. FOR CONFLICT PREVENTION & RESOL., INC. (May 23, 2014), <http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/861/New-Rule-on-Accelerated-Adjudication-Procedures-in-New-York-State-Courts.aspx>.

110. *Delaware Coal. for Open Gov’t, Inc. v. Strine*, 733 F.3d 510, 512 (3d Cir. 2013) (citing H.R. 49, 145th Gen. Assemb., 1st Reg. Sess. (Del. 2009)).

111. Synopsis, H.R. 49, 145th Gen. Assemb., 1st Reg. Sess. (Del. 2009).

112. *Id.*

stitutional in 2013 because of First Amendment concerns regarding the private nature of these court proceedings,<sup>113</sup> the attempt to reform the judiciary arose from the growth of commercial arbitration.<sup>114</sup>

Litigation and commercial arbitration are intertwined. Cross-pollination can easily occur, and procedural developments in one system can influence the other and lead to innovations and improvements in dispute resolution. As mentioned above, the New York and Delaware judiciaries borrowed streamlined procedures from arbitration to help serve commercial interests.<sup>115</sup> Judges at the time of the adoption of modern arbitration statutes recognized that the judiciary was lagging behind advances in business,<sup>116</sup> and the same dynamic exists today. For example, in England and Wales, a Civil Justice Council, an advisory group established by statute for overseeing the modernization of the civil justice system, recently recommended that the judiciary start administering an online system of dispute resolution.<sup>117</sup> These ideas for reforms in the judiciary were inspired by private systems of online dispute resolution, like Modria, eBay, and Cybersettle.<sup>118</sup>

Examining the history of the FAA broadened my views of dispute resolution. Studying the history revealed that arbitration and litigation are interconnected systems, with the ability to influence one another, and this interrelatedness and influence was visible at the time of the FAA's enactment and still continues today.

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113. *Delaware Coal. for Open Gov't, Inc.*, 733 F.3d at 516-21.

114. After the Third Circuit's ruling, the chief justice of the Delaware Supreme Court announced that the state would not "wallow[] in defeat" and instead develop a different arbitration system. Leo E. Strine, Jr., Chief Justice of the Delaware Supreme Court, State of the Judiciary Address (June 4, 2014) *available at* [http://www.rcfp.org/sites/default/files/docs/20140620\\_151641\\_strine\\_speech.pdf](http://www.rcfp.org/sites/default/files/docs/20140620_151641_strine_speech.pdf). In 2015, Delaware enacted the Rapid Arbitration Act, which provides for streamlined arbitration procedures for commercial disputes. Delaware Rapid Arbitration Act, 10 Del. C §§ 5801-5812 (2015). Among other things, the law provides for reduced discovery, and also disputes must be resolved within 120 days. *Id.* The Delaware Chancery Court could appoint arbitrators, and any appeal of an arbitral decision would be straight to the Delaware Supreme Court. *Id.* Under many other arbitral statutes, a trial court would typically hear an attempt to vacate an arbitral award, and then possibly an appellate court may hear an appeal of the trial court's decision, a process which could take years. *See, e.g.*, 9 U.S.C. §§ 10-12, & 16 (2012). The innovations from the Delaware system were intended to keep Delaware at the cutting edge of dispute resolution for commercial disputes.

115. Also, arbitration can sometimes adopt court procedures. For example, some arbitration agreements adopt judicial rules of civil procedure. *Ophthalmic Consultants of Texas v. Morales*, No. 13-15-00278-CV, 2015 WL 6119490, at \*4-5 (Tex. App. Oct. 15, 2015). Also, there are arbitration agreements that have borrowed the plausibility pleading standard from federal court practice. *Arbitration Order Granting Motion to Dismiss*, 2013 AAA Employment LEXIS 168 (June 7, 2013) (Fink, Arb.); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (construing Fed. R. Civ. P. 7 as embodying a plausibility standard for complaints). The two systems of arbitration and litigation can influence procedural developments in each other.

116. *See Ransom, The Organization of the Courts for the Better Administration of Justice*, *supra* note 101, 199-201.

117. Online Dispute Resolution Advisory Group, *Online Dispute Resolution for Low Value Civil Claims*, CIVIL JUSTICE COUNCIL (February 2015) <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

118. *Id.* The Civil Justice Council's report describes how different providers of online dispute resolution operate. *Id.* at § 4.

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*B. The History of the FAA's Enactment Showcases Arbitration In A Positive Light*

I must admit that I can be cynical about the broad use of arbitration in the consumer and employee context. I often see stronger parties use their bargaining power to impose systems of arbitration where the playing field is tilted in their favor with one-sided procedures or hurdles that disadvantage a consumer or employee. For example, arbitration clauses in the consumer or employee context can sometimes attempt to shorten statute of limitations, ban or severely restrict discovery, or contain other harsh terms,<sup>119</sup> and because of the Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*,<sup>120</sup> courts no longer review unfair or harsh terms if the stronger party insulates the arbitration clause with a delegation clause. On a day to day basis as I read cases compelling consumers and employees to arbitrate, I can cynically view arbitration as a means not to resolve disputes in good faith, but as an attempt to suppress claims and insulate wrongdoers from liability.

However, examining the history of the FAA's enactment showed me a completely different perspective and positive view of arbitration. The reformers who developed the FAA had a genuine, sincere, good faith belief about the process of arbitration as a streamlined, efficient method to resolve commercial disputes in a non-acrimonious setting.<sup>121</sup> They envisioned a system where commercial parties, with meaningful consent, would establish a tribunal where both mediation and arbitration would occur for contractual disputes and where the neutral party would be an expert from the same industry who could facilitate or produce a quicker, better-informed result when compared to litigation before a judge or jury with little or no background in the industry. The reformers were actively involved in administering a well-respected system of arbitration, and they acted with a deep sense of civic duty in establishing this system, with no intent to cause harm or disadvantage a weaker party. Studying the history of the FAA's enactment reminded me that arbitration, when two parties provide meaningful consent, can be a beneficial system.

*C. The FAA's History Also Emphasizes That Through the FAA, Parties Have the Power to Create Procedure*

As mentioned above, the Rules Enabling Act, which simplified and reformed federal court procedure, and the FAA are related and were the products of a larger movement for procedural reform.<sup>122</sup> Both laws responded to frustration with the broken judicial system of the time. Also, progressive beliefs influenced both laws.<sup>123</sup> Progressives believed that delegation of authority to experts could help cope with changes and problems in a complex, changing society.<sup>124</sup> Both the FAA and the Rules Enabling Act embody a progressive philosophy in that both involve minimal legislative pronouncements or standards, and both laws delegate to others the creation of procedure.<sup>125</sup> Studying the history of the FAA reminded me that

119. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

120. *Rent-A-Ctr, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

121. See SZALAI, *supra* note 3, at 91-95.

122. See *supra* notes 82-92 and accompanying text.

123. See SZALAI, *supra* note 3, at 173-79.

124. *Id.*

125. *Id.*

through the FAA, the government respects the power of parties to develop their own procedures.

Before studying the history of the FAA, I was accustomed to seeing arbitration rules as set in stone by a stronger party, and such procedures could often be one-sided. I viewed the FAA in a negative light. However, studying the history of the FAA's enactment, considering the FAA in light of the progressive movement and the FAA's relationship to the Rules Enabling Act, highlighted a different perspective of the FAA. The FAA grants the power to create procedures for one's own disputes. This view of the FAA highlights a spirit of innovation and creativity, and with this power, there is an opportunity to improve dispute resolution. This power to create has of course a bad side, when a stronger party develops one-sided procedures to its sole advantage. But studying the FAA's enactment gave me a different perspective: through arbitration, there can be procedural experimentation that could lead to improvements in dispute resolution.

Also, this power to create procedures can help democratize law and make law more accessible. Through the power to establish tribunals, people can have a hand in developing how laws or customs would be implemented and applied. Through arbitration, where meaningful consent exists, there is an opportunity for one to experience law in a more unfiltered manner, instead of law being seen or filtered through complex court procedures understood only by attorneys.

#### *D. The FAA's History Reveals An Important Relationship Between the Government and Its People*

Examining the FAA in its broader context reminded me that the FAA is not solely about the resolution of disputes between two parties. The FAA helps define a relationship between the government and its people. When the FAA was understood as originally intended, this relationship between the government and its people was healthy at first. Under the original view of the FAA, as limited in scope to commercial, contractual disputes between commercial interests giving meaningful consent, the government in effect defined a relatively narrow category of disputes that would be removed from more government-controlled dispute resolution in a traditional court. The FAA, when applied as originally intended between consenting parties, expresses a value that people can be trusted to control the resolution of their own disputes. The FAA, when applied properly, embodies government respect for party autonomy.<sup>126</sup>

Also, the enactment of the FAA was understood as a service to the government. Arbitration under the FAA would alleviate the burdens of an overcrowded judiciary with respect to certain claims.<sup>127</sup> Arbitration, with meaningful consent, could be viewed as embodying a civic service by conserving government resources. As a result, the history helps reveal that the FAA is not solely about resolving a dispute between two parties. The FAA can also be understood as defining a relationship between the government and its people, and this relationship involves mutual respect, where the government respects the choice of people to control dispute resolution, and the people respect and serve the government by alleviating overcrowded judicial dockets.

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126. EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 3-5 (2006).

127. *See supra* notes 82-92 and accompanying text.

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Unfortunately, the FAA now embodies a very different relationship between the government and its people. Several things have changed. First, consent is no longer meaningful in many situations, and as a result, one party is in effect defining the procedures. Second, categories of disputes covered by the FAA are broader than ever and touch virtually every non-criminal area of law. Third, the Supreme Court over the years, while expanding the coverage of the FAA, has minimized the ability of courts to police arbitration agreements for fundamental fairness.<sup>128</sup> The FAA, as applied by courts today, now reveals a different relationship between the government and its people. When a court compels arbitration of an employee or consumer dispute, despite allegations that the arbitration procedures are unfair and one-sided and that no meaningful consent exists, there is a now a different message or impression given to the public. In the past, the FAA would embody a respect for personal autonomy. However, the FAA as applied by courts today often conveys a different impression. Instead of respect for personal autonomy, compelling arbitration today can convey a harsher message that the government does not care about pleas of injustice from weaker parties such as consumer or employees. Especially when a court enforces a delegation clause in the face of valid arguments that certain arbitral procedures in an agreement are one-sided, there is an appearance or an impression that the formal judicial system is now actively supporting a sham system.

*E. The History of the FAA Provides a Window Revealing Society's Values*

Gary Born, in his leading treatise on international arbitration, has observed that totalitarian governments have a tendency not to respect arbitration while more democratic societies do respect and promote arbitration.<sup>129</sup> Examining how a society chooses to resolve disputes provides a window into people's beliefs or values. In isolation and stripped from its history, commercial arbitration today is simply understood as a way to avoid litigation.<sup>130</sup> However, when examining the enactment of the FAA in its broader context, one sees that the FAA embodies many different values and beliefs. The enactment of modern commercial arbitration statutes in America occurred at a very particular time in American history, and in examining the history of the FAA, one can see the imprint of societal, philosophical, or political beliefs of the time. For example, modern arbitration laws in America took root in the aftermath of the First World War, which involved an unprecedented amount of destruction at the time.<sup>131</sup> The development and enactment of modern arbitration laws in America reflected a societal desire to avoid future mass destruction and the belief that peaceful resolution of economic rivalries could assist to avoid future wars. Also, the FAA's enactment occurred during the progressive era.<sup>132</sup> From the end of the civil war through the 1920s, America had gone through more changes

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128. See *supra* notes 71-76 and accompanying text.

129. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1 (2014) ("As a rule, where totalitarian regimes or tyrants have held sway, arbitration – like other expressions of private autonomy and association – has been repressed or prohibited; where societies are free, both politically and economically, arbitration has flourished.")

129. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960) ("In the commercial case, arbitration is the substitute for litigation.")

130. SZALAI, *supra* note 3, at 161-65.

131. *Id.*

132. *Id.* at 173-79.

than in any prior period in its history, with a growing, interconnected national economy and rapid industrialization, urbanization, and immigration.<sup>133</sup> There was a progressive belief that delegating decision-making authority to experts would help manage or deal with the tremendous changes in society, and this progressive belief influenced the arbitration reform movement.<sup>134</sup> In effect, by passing the FAA, the government was giving its blessing to the people, through the delegation of decision-making authority to chosen experts, to help cope with changes in an interconnected, growing economy. In studying the FAA's history, I saw how the FAA was an intermediate, evolutionary step in the rise of the administrative state where experts are delegated the authority to handle complex problems.<sup>135</sup> In sum, studying the broader history of the FAA's enactment provided a window into society's beliefs.

#### F. *The History of the FAA Reveals the Power of One*

On a very personal level, studying the history of the FAA's enactment reminded me of the power of one person with a passionate dream. One person, more than any other, stands out as a driving force behind the enactment of the FAA: Charles Bernheimer.<sup>136</sup> Inspired by a strong desire to respond honorably to a sharp betrayal by another merchant, he found a solution in German law, which provided for the enforceability of pre-dispute arbitration agreements.<sup>137</sup> He devoted almost decades of his life and his personal finances to lobbying for arbitration laws, as well as advocating for the use of arbitration and training institutions and individuals how to develop arbitration systems.<sup>138</sup> He was not the only person involved in reforming arbitration laws in America, but he was the driving force and appropriately recognized as the "Father of Commercial Arbitration" in America.<sup>139</sup>

When I was researching the history of the FAA and beginning to write my book, my children would often ask what I was working on. Instead of getting into the details of what is arbitration, I often replied I was studying how one person with a dream was able to change the legal system. Bernheimer's deep and sincere passion for arbitration jumped out from the dry, crumbling records.

After I published my book about the FAA's history, one of Bernheimer's relatives contacted me and forwarded me a copy of a letter he had found taped into a book in his library. The letter was written to Bernheimer from Benjamin Cardozo, who was at the time the Chief Judge of New York's highest court and who would later join the United States Supreme Court. Cardozo's letter was a response to materials and pictures Bernheimer had sent regarding his explorations in the West. Bernheimer was an Indiana Jones-like explorer who often went on expeditions on behalf of the American Museum of Natural History. Cardozo expressed shock that for several years he had not known even a "hint" about Bernheimer's other life as an explorer. At the end of the letter, Cardozo adds "I don't think I can let you talk

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133. *Id.*

134. *Id.*

135. *Id.* at 188.

136. See SZALAI, *supra* note 3, at 25-26.

137. *Id.* at 31-33.

138. *Id.*

139. *C.L. Bernheimer, Merchant, Dies*, 79, N.Y. TIMES, July 2, 1944, at 19 (stating that Bernheimer was "widely known as the father of commercial arbitration").

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to me about arbitration in the future.”<sup>140</sup> Cardozo believed that Bernheimer had more interesting things to talk about, namely, his explorations. I laughed out loud when I saw Cardozo’s statement about Bernheimer not being permitted to discuss arbitration again in the future. Bernheimer was notorious for talking to anyone and everyone about the benefits of arbitration,<sup>141</sup> and I am sure Bernheimer pestered Cardozo regarding the importance of arbitration over the years. The letter reminded me of Bernheimer’s burning passion to preach and spread the gospel of arbitration.

I can be cynical and jaded at times and believe that change is not possible. However, the history of the FAA’s enactment powerfully reminds me that one passionate person with a dream can start a fire, almost a hundred years ago, and change an entire legal system that impacts virtually everyone today.

The history of the FAA is far from just an interesting footnote to the statute. The history of the FAA is invaluable on multiple levels and completely transformed my understanding of the statute, dispute resolution, the relationship between the government and its people, and the role of arbitration in our broader legal system.

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140. Letter from Benjamin Cardozo to Charles Bernheimer, dated September 1, 1927 (on file with author).

141. Bernheimer, known as the “Father of Commercial Arbitration” in the United States, used every opportunity to share the benefits of arbitration with people. *See, e.g.*, SZALAI, *supra* note 3, at 87, 90, 102-03, 184.