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The Future of Arbitration Law?

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THE FUTURE OF ARBITRATION LAW?

By Kristen M. Blankley[*]

ABSTRACT

This Article provides an in-depth statistical analysis of statutory interpretation of the Supreme Court's arbitration docket. This paper follows my work in *Standing on Its Own Shoulders: The Supreme Court's Statutory Interpretation of the Federal Arbitration Act*. By looking at how the Court interprets the Federal Arbitration Act (FAA), this paper makes predictions about how arbitration cases might be resolved in the future. This paper considers the reliance on and use of fourteen tools of statutory interpretation over the Court's 52 cases and 114 separate opinions interpreting the FAA through the end of 2021. By considering four crucial sub-categories of cases, this paper draws trends and comparisons across different arbitration legal theories. Specifically, this paper analyzes class arbitration cases, preemption cases, arbitrability cases, and cases involving a potential conflict between the FAA and other federal law. This paper draws four primary conclusions. First, the class action cases will likely continue to build off of themselves, by relying on past precedent and the arbitration canon. Second, the Court will likely continue to give the FAA broad preemptive power given not only its broad support across the Court but also because of an interesting "Thomas Effect" in which Justice Thomas votes against his own prior opinions to maintain a conservative majority. Third, the arbitrability cases stand as a microcosm of the entire arbitration docket, even though they do not contain any strong trends unique to such cases. Finally, this paper draws the conclusion that the Court treats the FAA as a super-statute, giving it gravitational pull over other statutes that might conflict with it.

INTRODUCTION

As the saying goes, the best predictor of the future is the past. In the legal realm, this maxim is bolstered by the principle of stare decisis, and trends within areas of law can be seen and often predicted. Legal scholars, pundits, and journalists predict the holdings of key Supreme Court cases based on political leanings, prior precedent, and intuition. Arbitration scholars, too, engage in similar predictions based on these factors. And while few Supreme Court cases actually surprise those who watch the dockets carefully, some legal scholars are beginning to use data analysis to describe trends supported by data – including trends in statutory interpretation and voting patterns by justices.[1]

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[1] *See, e.g.*, FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION (2009) (conducting analysis, including individual justice-level trends); Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117

Following the trends of empirical research in statutory interpretation by the Supreme Court by other scholars,[2] I coded and analyzed every opinion by the Court interpreting the Federal Arbitration Act (FAA). In my first paper based on this analysis, *Standing on Its Own Shoulders: The Supreme Court's Statutory Interpretation of the Federal Arbitration Act*,[3] I compared general trends in statutory interpretation as reported by other scholars with the trends that emerged in my arbitration-specific dataset.[4] In the arbitration context, the Court overrelies on judge-made law, including prior arbitration precedent and the arbitration canon, when compared to other scholar's similar analyses in other areas.[5]

While the first paper in this series considered general trends comparing FAA precedent with other Supreme Court precedent, this article looks at trends within arbitration law and considers the future of arbitration. This paper moves beyond the global comparatives and digs into important questions within arbitration law. Specifically, this paper considers trends within the arbitration case docket itself relating to class action, preemption, and arbitrability cases.

In the present in-depth analysis, I discovered a number of interesting trends. First, the class action docket and the preemption docket used similar tools of statutory interpretation, despite the fact that those two sets of cases have little overlap. Both of those sets of cases involved high reliance on the text of the FAA, prior FAA cases, and reliance on the arbitration canon. The preemption cases also uncover an interesting trend in Justice Thomas' voting pattern, which I call the "Thomas Effect." Second, the arbitrability cases are an interesting microcosm because the use of tools of statutory interpretation mirrored almost identically the whole of the arbitration docket. And third, the patterns uncovered in the line of cases in which the FAA arguably conflicts with other federal law demonstrated that the FAA is being interpreted as a super-statute.

This article proceeds in five parts. First, this article provides critical background into my first study with the purpose of providing useful background information. The second part analyzes the impact of the Supreme Court's choice of tools of interpretation within the arbitration class action docket, and the implications for future class action arbitration cases. The third part looks specifically at the Court's FAA preemption cases, as they relate to non-preemption and other types of FAA cases. In the fourth part, this article analyses the arbitrability docket – the cases in which the Court decided whether a court or arbitrator makes

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MICH. L. REV. 71 (2018) (analyzing canon use in the Roberts' Court); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221 (2010) (analyzing first five years of the Roberts' Court); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2010) (conducting analysis focusing on legislative history use).

[2] *See, e.g.*, Anita Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1292 (2020) (analyzing the Roberts Court's use of purposivist tools); Anita Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909 (2016) (reviewing canon use and overall trends of the Roberts Court); James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231 (2009) (conducting statutory analysis and comparing approaches in workplace and tax law); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) (analyzing Supreme Court use of canons in the area of labor and employment).

[3] Kristen M. Blankley, *Standing On Its Own Shoulders: The Supreme Court's Statutory Interpretation of the Federal Arbitration Act*, 55 AKRON L. REV. 101 (2022).

[4] *See generally id.*

[5] *Id.* at 103.

certain decisions regarding the viability of the underlying case.[6]. The fifth part considers the tools used to determine whether a claim arising under federal law is subject to an arbitration agreement – a category of cases I refer to as "conflicts" of federal law.[7] At the end of each part, I predict the future of each category of cases, assuming that Congress adopts no radical changes to the FAA.[8]

I. PREVIOUS RESEARCH

When I originally undertook this project, I followed in the footsteps of scholars before me, particularly Professors James Brudney and Professor Anita Krisnakumar.[9] My dataset includes 52 cases decided by the Supreme Court interpreting the FAA through the end of 2021. These cases span from 1938 to 2019. The 52 cases involve 114 separate opinions: fifty majority or per curium opinions; forty-three dissenting opinions; one plurality opinion; and twenty concurring opinions.[10] For each opinion, I recorded basic information, such as the case name, year, opinion type (majority, dissent, etc.), author, and number of signatories to the opinion.[11] I also noted whether the case involved a question relating to class actions.[12]

As I created the database, I captured some arbitration-related data particularly relevant to the analysis in this paper. I divided the cases into six different arbitration-specific categories: 1) preemption, 2) arbitrability, 3) jurisdiction, 4) award review, 5) conflicting federal statutes, and 6) other.[13] As discussed in more detail below, I separately coded cases dealing with arbitrability due to a contract defense, arising out of the *Prima Paint*[14] line of cases, and those cases considering whether a federal statute precludes arbitration of the underlying claim, arising out of the *Wilko v. Swan*[15] line of cases. In this second category of cases, I only coded the tools of interpretation used to interpret the FAA, and not the tools used to interpret the other federal statute at issue (i.e., the Age Discrimination in Employment Act in *Gilmer*[16] or the Federal Labor Relations Act in *Epic Systems*[17]). I also captured the exact section of the FAA the Court interpreted, but analyzing the cases across these six categories

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[6] *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (defining a "question of arbitrability" as the "question whether the parties have submitted a particular dispute to arbitration").

[7] Kristen M. Blankley, *Creating a Framework for Examining Federal Agency Rules Impacting Arbitration*, 63 WASH. U. J.L. & POL'Y 9, 16–26 (2020) (outlining the historical and current treatment of conflicts of federal law with the FAA and the resolution of such conflicts).

[8] In March 2022, Congress enacted the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, prohibiting the enforcement of pre-dispute arbitration agreements and class action waivers for claims involving sexual harassment and sexual assault. 9 U.S.C. §§ 401–02. Given the limited scope of the new law, I do not anticipate it changing my predictions in each of the parts.

[9] Professors James and Krishnakumar are mentioned in *supra* note 2.

[10] Blankley, *supra* note 3, at 116. Later in this paper, the category of "concurring" opinions includes all opinions other than majority opinions, dissenting opinions, and per curium opinions.

[11] *Id.* at 117.

[12] *Id*.

[13] *Id.* (Codebook list of arbitration categories).

[14] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[15] Wilko v. Swan, 346 U.S. 427 (1953).

[16] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[17] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1616 (2017).

proved more useful than across specific sections (i.e., cases interpreting §2's general mandate or the §4 authority to compel arbitration).

I coded for thirteen primary interpretive tools, including the text, the whole act rule, prior precedent (both arbitration precedent and non-arbitration precedent), three categories of canons, legislative history (and a breakdown thereof), legislative inaction, intent, and purpose.[18] I chose these particular categories to pattern my work on previous work by Professors Brudney and Krishakumar to facilitate drawing comparisons with other statutory interpretation literature.[19] Rather than consider only the presence or absence of the use of a tool, I used a slightly more granular scale to capture one of the following: 1) reliance on a tool, 2) citation *or* rejection of a tool without reliance, and 3) absence of any discussion of the tool.[20]

My first study drew conclusions by comparing my arbitration data with the data previously collected by other scholars. Specifically, I concluded in the first study that – compared to work done by other scholars – the Supreme Court relied more on itself when interpreting the FAA than it does when interpreting other statutes.[21] I drew this conclusion by comparing rates of reliance on prior Supreme Court precedent within the FAA dataset compared to other scholars' reported data. My research broke down reliance on prior FAA cases compared to other Supreme Court cases from other areas of the law (such as civil procedure or labor arbitration), and my research showed that within the FAA docket, the Supreme Court relies more on FAA prior precedent compared to other studies that did not distinguish between cases that might or might not have stare decisis effect.[22] This conclusion was bolstered when looking specifically at substantive canon use. I separated out reliance on the arbitration canon from reliance on other canons (such as those relating to the doctrine against implied repeal or reading statutes together harmonious), and my findings showed that the Supreme Court had a higher rate of reliance on the *arbitration canon alone* compared to other scholars' work documenting reliance on all substantive canons combined.[23] Given these factors, unsurprisingly, my data showed an overreliance on the text compared to studies of statutory interpretation.[24] Taken together, these findings show that the Supreme Court has looked to itself to interpret the FAA in a way that appears to be unique.

This paper, then, explores trends *within* the arbitration dataset. The remaining sections consider issues related to important areas of arbitration law, including issues involving class action, preemption, arbitrability, and conflicts between federal statutes. Each of those areas is addressed in turn.

II. CLASS ACTION FINDINGS

Arbitration cases involving class action issues are the most divisive portion of the Court's docket. These cases often result in fractured opinions with slim majorities, similar to

[18] Blankley, *supra* note 3, at 122.

[19] *See supra* note 7.

[20] Blankley, *supra* note 3, at 151 (detailing the methods used to ensure accuracy and consistency of coding across cases).

[21] *Id.* at 103.

[22] *Id.* at 125.

[23] *Id.* at 102.

[24] *Id.* at 103.

cases involving litigation class actions.[25] In addition, these cases show high reliance on both textual tools (text, prior precedent, canons) and purposivist tools (intent, purpose). Of all of the Court's arbitration cases, the cases involving class action appear to be the most outcome oriented, focusing on business interests to the exclusion of the interests of consumers, employees, and other potential claimants.

The class action docket poses interpretive challenges for the Court because the FAA does not address the issue. Congress enacted the FAA in 1925, prior to the promulgation of the modern Federal Rule of Civil Procedure.[26] Congress, however, has not re-visited the FAA to address class action issues, and without a statutory basis, the Court has forged its way utilizing different lines of lines of reasoning to support different cases. In 2022, Congress amended the FAA to prohibit the enforcement of pre-dispute class action waivers in the limited context of cases involving sexual assault and sexual harassment.[27] Congress did not add any additional language to address the availability of class actions in any other arbitration context.

Without an independent textual basis for class action rulings, the Court applies legal reasoning from the six categories of arbitration cases. For instance, *Green Tree v. Bazzle,*[28] the first case that delved into class action issues,[29] fell within the arbitrability line of reasoning.[30] *Stolt-Nielsen v. AnimalFeeds*[31] turned on legal issues regarding the scope of review of arbitration awards,[32] and *Epic Systems v. Lewis*[33] grappled with the issue of whether claims falling under the Fair Labor Standards Act required a judicial forum.[34] Yet, despite the varying legal theories underlying the cases, this section details some commonalities in statutory interpretation when cases involve a class action.

This section considers the fourteen unique cases in which Court interpreted the FAA when the underlying case involves a class action. These fourteen cases involve forty-four separate opinions, or an average of more than three opinions in each case. For perspective, non-class action arbitration cases generate slightly less than two opinions per case.[35] The cases fell within the following subject-matter categories: 1) seven arbitrability cases, 2) three

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[25] *See*, *e.g.*, TransUnion LLC v. Ramirez, 141 S.Ct. 2190, 2190 (2021) (delivering a 5-4 decision with three separate opinions on the issue of standing to assert the class action); Comcast Corp. v. Behrend, 569 U.S. 27, 27 (2013) (5-4 decision on the issue of class certification); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 338 (2011) (involving a majority opinion that was partially unanimous with part of the decision resulting in a 5-4 split opinion).

[26] The first modern version of Rule 23 became effective in 1966. *See* FED. R. CIV. P. 23 advisory committee's note to 1937 amendment. Prior to this rule, class procedures were governed under rules of equity, including Equity Rule 38, under the original 1937 Rules. *See id.*

[27] 9 U.S.C. § 402 (prohibiting the enforcement of pre-dispute arbitration agreements and pre-dispute joint action waivers in cases of sexual assault and sexual harassment).

[28] Green Tree v. Bazzle, 539 U.S. 444, 444 (2003).

[29] Coincidentally, the Supreme Court's decisions in Southland Corp. v. Keating, 465 U.S. 1 (1984), and Green Tree Fin. Corp. – Ala. v. Randolph, 531 U.S. 79 (2000), both involved classes of plaintiffs, although these cases did not turn on class action issues.

[30] *Bazzle*, 539 U.S. at 452–53 (plurality opinion) (performing arbitrability assessment).

[31] Stolt-Neilsen SA v. AnimalFeeds Int'l, 559 U.S. 662, 662 (2010).

[32] *Id.* at 677 (finding that arbitrator exceeded powers under FAA §10(a)(4)).

[33] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1612 (2017).

[34] *Id.* at 1627 (conducting conflict of federal laws analysis).

[35] The average number of opinions per case situated as a class action is roughly 3.1 opinions. In comparison, the remaining 38 cases in the data set generated an average of 1.8 opinions.

preemption cases, 3) two cases considering conflicts between the FAA and other federal law, 4) one case involved a jurisdictional question, and 5) one case involved review of an arbitration award.

The data discussed in this section falls into one of two categories: 1) opinions in cases that involved a class action; 2) opinions in non-class action cases. The first category includes both cases explicitly addressing class action issues, as well as cases situated as a class, but presenting different arbitration issues for the Court. By dividing the cases in this manner, these cases asked whether the Supreme Court interprets FAA cases differently when a class action is involved.

The data uncover interesting trends. Chart 1 depicts the percentage reliance on selected tools of statutory interpretation between class and non-class cases within majority opinions and dissenting opinions. For some tools of interpretation, the rate of reliance on the tool is nearly the same whether or not the case involves a class. In other instances, sizable differences exist.

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Chart 1

	Class Actions Majorities	Non-Class Action Majorities	Class Actions Dissents	Non- Class Action Dissents
Text	100%	81%	40%	50%
Whole Act	46%	35%	13%	14%
Other Fed Stat	23%	11%	20%	7%
FAA Precedent	100%	81%	53%	39%
Other Precedent	69%	41%	27%	36%
Arb Canon	62%	41%	7%	7%
Legislative History – All	7%	14%	27%	18%
Practical Consequences	54%	57%	60%*	29%*
Intent or Purpose	46%	43%	53%	50%

* One asterisk (*) indicates a p-value between 0.05 and 0.01 in a chi square pairwise comparison between class action and non-class action majorities and dissents.

Some of the data are interesting because they are *different* between class and non-class opinions. Tools of interpretation with notable differences include: 1) reliance on the text of the FAA, 2) reliance on other statutes, 3) reliance on FAA precedent, 4) reliance on non-FAA precedent, 5) reliance on the arbitration canon, and 6) reliance on legislative history. For two tools, practical consequences and intent or purpose, the most interesting finding is that the use of those tools was *not different* from the non-class action opinions.

To determine if the differences between class opinion types (majority or dissent) and non-class opinion types (majority or dissent), I conducted a chi square pairwise analysis. Due to the small sample size, this analysis only resulted in one statistically significant pair – the reliance on practical consequences in dissenting opinions. Although not a true significance,

the pairwise comparisons for majority opinions relying on the FAA text, FAA precedent, and non-FAA Supreme Court precedent could be described as trending towards significance – meaning that if the trends continue over a larger sample, it could become a significant difference.

A. Reliance on the Text in Class Action Opinions

The data showed a sizeable difference in rate of reliance on the text of the FAA in both majority and dissenting opinions between class and non-class cases. Majority opinions relied more frequently on the text in class cases compared to non-class cases, while dissenting opinions had a lower rate of reliance on the text compared to non-class dissents. Every single majority opinion involving a class relied on the text of the FAA, a curious finding given that the FAA does not say anything about class actions.

From a purely theoretical standpoint, I would have expected class-action arbitration cases to rely primarily on non-text sources because the FAA does mention class actions. However, the *Bazzle* decision is the only case in this set in which *none* of its four opinions relied on the text.[36] *Bazzle* involved a putative class action against a bank for alleged violations of the Truth in Lending Act.[37] In the early 2000s, the concept of a class action arbitration was new – but one that potentially could have been foreseen due to the Court paving the way for arbitration of statutory claims.[38] *Bazzle* was essentially an arbitrability case – because the question for the Court was "who decides" whether a class action can proceed in the face of a contract without guidance on the issue.[39] *Bazzle* fell on the heels of *Howsam v. Dean Witter Reynolds*, which made sweeping pronouncements regarding the arbitrator's ability to rule on "gateway" issues.[40] Perhaps because of the timing, the plurality in *Bazzle* relied almost exclusively on prior precedent, such as *Howsam* and the earlier *First Options* case to put the class action decision in the hands of arbitrators, not courts.[41] The other opinions in *Bazzle* similarly relied – or rejected – prior precedent, without considering other tools of interpretation, including the text.

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[36] Because the *Bazzle* decision is a plurality decision, I did not include the plurality opinion in the category of "majority" cases. The remaining cases in the class action docket all included a majority opinion, and all of those majority opinions relied on the text of the FAA, thus resulting in the 100% reliance calculation. For the purposes of my taxonomy, I considered this plurality opinion in the group of "other" opinions that are neither majority opinions or true dissenting opinions.

[37] Green Tree v. Bazzle, 539 U.S. 444, 448–49 (2003) (discussing facts and procedural history).

[38] Although Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991) was not the first case allowing for arbitration of claims falling under federal statutes, the majority's sweeping endorsement of arbitrators and arbitration opened the door for more and more businesses to include arbitration agreements within employment and consumer contracts.

[39] *Bazzle*, 539 U.S. at 449–50 (discussing the various approaches to the arbitrability questions taken in the two consolidated cases before the Court).

[40] *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) (holding that arbitrators have broad power to decide issues involving contract defenses, even if those defenses would undermine the contract as a whole, and arguably the arbitration agreement).

[41] *Bazzle*, 539 U.S. at 452 (distinguishing from First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)).

In the ensuing years, the *Bazzle* decision became a lightening-rod and was essentially limited to its facts by *Stolt-Nielsen v. AnimalFeeds*.[42] The Court expressed concern that no single issue in *Bazzle* garnered five votes[43] and noted that the decision appeared to have "baffled" the parties, who "misunderstood" its holding.[44] While *Bazzle* did not rely on the text at all, the *Stolt-Nielsen* Court went to great lengths to quote extensively from Sections 2 and 4 of the FAA to cut against the prevailing trend that *Bazzle* allowed arbitrators to determine whether a case could proceed as a class.[45] The Court's decision in *ATT v. Concepcion* followed suit, with extensive citation to Section 2 as it expanded the preemptive power of the FAA over state law.[46] The other cases in this set followed suit.

One reason why this set of cases has particularly high textual reliance may be precisely *because* the FAA does not address issues relating to class action arbitrations. Without explicit guidance, majority decisions may seek to buttress its decisions on the statutory provisions closest to answering the question. Another reason for high textual reliance may be due to the authorship of the majority opinions. Justice Scalia authors four of the thirteen majority class action opinions, including *Concepcion*, described in more detail below. Other known textualists, including Justices Gorsuch and Alito authored two and one majority opinion in this set, respectively.

B. Reliance on FAA Precedent and the Arbitration Canon

Although reliance on the text in class action cases may be surprising, reliance on former FAA precedent and the arbitration canon is expected. Similar to reliance on the text, 100% of majority opinions relied on prior FAA precedent in those opinions, compared to 81% of majority opinions in non-class action cases. Because the FAA does not address class action issues directly, I expected the Court to create its own jurisprudence in this area and then continue to rely on it going forward.

More surprising, however, is the rate of reliance on FAA precedent among dissenting opinions. Dissenting opinions relied on FAA precedent in 53% of class action dissenting opinions, compared to just 39% of non-class action dissenting opinions. One explanation for the higher reliance on FAA precedent among dissenting opinions is that as the law emerges in this area, the Justices have different opinions of the earlier precedent, and both sets of opinions are relying on the same cases, but reaching different conclusions.

American Express Colors v. Italian Colors fits this description. The question in *Italian Colors* was the proper application of an earlier decision – that of *Green Tree v. Randolph*. The *Randolph* case held that a party who could prove financial stress would make

[42] *See* Stolt-Nielson SA v. AnimalFeeds Int'l, 559 U.S. 662 (2010). In the interim, the Court heard two other arbitration cases that involved underlying class actions: *See* Buckeye Check Cashing v. Cardegna, 540 U.S. 440 (2006), and Vaden v. Discover Bank, 556 U.S. 49 (2009). Yet, the class action issues were not particularly salient in these cases.

[43] *Stolt-Nielsen SA*, 559 U.S. at 679 ("Thus, *Bazzle* did not yield a majority decision on any of the three questions.").

[44] *Id.* at 680.

[45] *Id.* at 681–82.

[46] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

the arbitral forum inaccessible could not vindicate rights under a statute.[47] In *Italian Colors*, the Court considered the application of *Randolph* to cases involving class action waivers and claims of financial inability to pay for expert witnesses.[48] The majority relied on *Randolph* and held that the "vindication of statutory rights" doctrine was limited to costs associated with access to the arbitral forum, i.e., arbitrator fees and administrative costs.[49] Justice Kagan, in dissent, similarly relied on *Randolph*, but found that *Randolph* should be read broadly, to ensure that the structure of the arbitration – here individual arbitration – did not financially impact the parties to the point requiring them to drop their claims.[50] Similarly, in *CompuCredit v. Greenwood*,[51] the majority and dissenting opinions agreed on the legal principle to be applied – in this case, whether the Credit Repair Organization Act contained a "contrary congressional command" such that claims under it could not be arbitrated – and the majority found no such command,[52] while the dissent disagreed with the conclusion.[53]

The arbitration canon is essentially a presumption in favor of arbitration that was created through FAA precedent. If reliance on FAA precedent is high in this subset of cases, presumably reliance on the arbitration canon would be similarly high. The data show that 62% of majority opinions relied on the arbitration canon, compared to 41% of non-class action cases, while the dissenting opinions relied on the arbitration canon at roughly the same rate – 7% across all dissents. A higher percentage of dissenting opinions (20% of class action dissents), compared to majority opinions (15% of majority opinions), explicitly rejected or cited the canon without reliance within the opinion.

My data show that the arbitration canon may be used to buttress arguments in the most controversial class action arbitration cases. Majority opinions that relied on the arbitration canon include: *Epic Systems v. Lewis*,[54] *DirecTV v. Imburia*,[55] *American Express v. Italian Colors,*[56] *CompuCredit v .Greenwood*,[57] and *ATT Mobility v. Concepcion*.[58] All of these decisions were controversial, as evidenced by multiple opinions for each of these cases and narrow vote margins. Surprisingly, the cases which relied on the arbitration canon cut across arbitration areas of law. Given that the arbitration canon is essentially a rule regarding arbitrability, I would have expected a disproportionate number of cases relying on the

[47] Green Tree Fin. Corp. – Ala. v. Randolph, 531 U.S. 79, 80–81 (2000) (holding that the doctrine of vindication of statutory rights extends to financial inability to access the arbitral forum).

[48] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231-32 (2013).

[49] *Id.* at 236 ("That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.").

[50] *Id.* at 242–43 (Kagan, J., dissenting) ("Randolph, we found, had failed to meet that burden: The evidence she offered was 'too speculative.' But even as we dismissed Randolph's suit, we reminded courts to protect against arbitration agreements that make federal claims too costly to bring.").

[51] CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012).

[52] *Id.* at 100–01 (setting forth the requirements of the "contrary congressional command" test as developed through Supreme Court arbitration precedent).

[53] *Id.* at 115–16 (Ginsburg, J., dissenting) (noting that the legal principles were "uncontroversial," but the application of those principles was disputed).

[54] *See* 138 S.Ct. 1612 (2017).

[55] *See* 577 U.S. 47 (2015).

[56] *See* 570 U.S. 228 (2013).

[57] *See* 565 U.S. 95 (2012).

[58] *See* 563 U.S. 333 (2011).

arbitration canon to be arbitrability cases. Instead, the use of the arbitrability canon also can be found in preemption cases, such as *Concepcion*, conflicts of federal law cases, such as *Epic Systems* and *CompuCredit*, in addition to arbitrability cases, such as *Imburgia*.

C. Reliance on Other Statutory and Case Law

Because the FAA does not address issues specific to class actions, I hypothesized that the class action cases would have a significantly higher reliance on outside law, both statutory law and case law. As a general matter, that hypothesis is supported by the data; however, that hypothesis is supported much more strongly among majority opinions than dissenting opinions.

Majority opinions relied on non-FAA statutory and case authorities at a rate trending towards a significantly higher rate than non-class action majorities. Among majority decisions, 23% relied on federal statutes or rules outside of the FAA, compared to only 11% in the non-class action cases. Majority opinions relied on non-FAA precedent in 69% class action majorities, compared to only 41% in non-class majorities. Both of these differences could become statistically significant if these trends continue at the same rates.. In two cases, the majority opinion relied on both outside statutory law and outside case law. In *Southland v. Keating*, Justice Burger relied on a wide variety of tools, including relying on non-FAA arbitration law,[59] non-arbitration law,[60] and non-arbitration rules and statutes.[61] The other casethat relied on both outside statutory and case law is *New Prime v. Oliveira*.[62] While Justice Burger in the *Southland* case utilized more than a dozen different tools of interpretation in that opinion, Justice Gorsuch's *Oliveria* case heavily relied on textualist tools, in addition to these non-FAA sources. In *Oliveria*, Justice Gorsuch relied on non-arbitration law to support his use of a language canon as well as statutes governing railroading to ultimately conclude that the FAA does not govern independent contractors in the transportation industry.[63]

Many cases relying on non-FAA law draw from other areas of arbitration law – notably labor arbitration.[64] The other area of influence outside of arbitration law appears to be laws governing civil procedure, both case law and statutory law.[65] Although none of these areas of outside law are surprising, they demonstrate an interesting trend that they may be more persuasive in cases implicating class actions than in non-class action cases. Perhaps

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[59] Southland Corp. v. Keating, 465 U.S. 1, 7 (1984) (relying on non-FAA arbitration law).

[60] *Id*. at 11–12 (relying on constitutional law); *id*. at 18 (Stevens, J., concurring in part and dissenting in part) (relying on non-arbitration federal preemption law).

[61] *Id*. at 15 (relying on statutes regarding civil procedure); *id*. at 20 (Stevens, J., concurring in part and dissenting in part) (relying on analogies with the Securities Act).

[62] New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019).

[63] *Id*. at 543–44 (holding that independent contractors in the transportation industry are not governed under the FAA); *see also* Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612, 1624 (citing non-FAA precedent in support of the application of a canon).

[64] *See*, *e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019) (relying on labor arbitration precedent); Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 567-68 (2013) (same); Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682–83 (2010); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003).

[65] *See, e.g.*, Vaden v. Discover Bank, 556 U.S. 49, 60 (2009) (relying on civil procedure law); Green Tree Fin. Corp. – Ala. v. Randolph, 531 U.S. 79, 86 (2000) (relying on civil procedure law governing interlocutory appeals); *Stolt-Nielsen SA*, 559 U.S. at 690 (Ginsburg, J., dissenting) (citing civil procedure law).

these sources allow the Court to interpret class action cases consistently across the various arbitration lines of cases.

D. Reliance on Practical Consequences, Intent, and Purpose

The most surprising finding is that the Supreme Court does considers practical consequences, intent, and purpose at the same frequency, with one exception, across class and non-class cases. Among majority opinions, the class action docket relies on practical consequences in 54% of opinions, compared to 57% of non-class action opinions, and the class action docket relies on the intent or purpose of the FAA in 46% of opinions, compared to 43% of non-majority opinions. For dissenting opinions, however, practical consequences are cited twice as often, 60%, as in non-class action dissenting opinions, 29%. Intent or purpose are cited at roughly the same rates in class action, 53%, and non-class action dissents, 50%.

Regarding majority decisions, the fact that practical concerns and intent show no difference between class action and non-class action cases was unexpected. Three of the most visible, and controversial, class action arbitration cases – i.e., *Stolt-Nielsen*, *Concepcion*, and *Italian Colors* – involved significant reliance on policy and intent, leading me to assume that this trend would be true across the whole class action docket. These three cases rely on pro-business policy considerations to buttress its textual arguments. The Alito majority decision in *Stolt-Nielsen* claimed that class arbitration "changes the nature of arbitration," potentially jeopardizing the benefits of arbitration, such as "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[66] Justice Scalia's *Concepcion* decision took the practical and policy to a higher level, with statements such as arbitration being "poorly suited to the higher stakes of class litigation" and the idea that "class arbitration greatly increases risks to defendants."[67] The *Italian Color* majority relied on these previous policy and purpose statements, concluding that *Concepcion* "resolves this case," again expressing concern about whether the "speedy resolution" of bilateral arbitration could be preserved in a class process.[68] While these statements were highly visible, statistically, they did not create a sea change in the reliance patterns among majority decisions.

Among dissenting opinions, the rate of reliance on policy considerations is significantly higher within the class action docket. The policy concern most often cited is one of fairness – notably whether the process is fair if the claimants must proceed not only in arbitration but also in bilateral, i.e., one-on-one, arbitration against a company. In the *Italian Colors* decision, Justice Kagan quipped that the Court's opinion sends the following message to claimants who cannot afford to maintain the costs of their case: "Too darn bad."[69] In *Imburgia*, Justice Ginsburg expressed concern that DIRECTV, a party having "hugely unequal bargaining power" over customers further reaped the "benefit of an ambiguity" in drafting its own contract.[70] She also worried that the Court's decision in *Epic Systems*

[66] *Stolt-Nielsen SA*, 559 U.S. at 685–86.

[67] *Concepcion*, 563 U.S. at 350.

[68] *Italian Colors Rest.*, 570 U.S. at 238–39.

[69] *Id*. at 240 (Kagan, J., dissenting).

[70] DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 65 (2015) (Ginsburg, J., dissenting).

allowing class waivers in employment contracts would lead to the "underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[71]

Although majority opinions cite purpose and policy reasons with similar reliance as non-class action opinions, these tools of interpretation are highly cited overall, and continue to be a trusted source of FAA interpretation. Dissenting justices appear to appeal to those practical consequences, particularly in these cases with broad impact on individuals.

E. Other Considerations

Two final observations can be made from this set of cases. First, agency deference was not a tool on which the Court relied in this dataset. The only case explicitly dealing with an agency determination is *Epic Systems v. Lewis*,[72] in which the Court determined whether the NLRA permitted a waiver of class action rights.[73] Despite the NLRB rulings on the issue,[74] the Court held that the NLRB did not have authority to interpret the FAA.[75] Therefore, no opinion relies on agency deference as a tool interpreting the FAA. Second, although legislative history is not used particularly frequently across the entire dataset, majority opinions relied on legislative history only half as frequently as they do in non-class action cases – while dissenting opinions relied on it more frequently. The legislative history, of course, do not speak to class action issues, so these opinions are using legislative history to interpret the questions outside of their implications on class actions.

F. Future of Class Action Docket?

The Court's class action cases will undoubtedly remain the most controversial cases among the cases under the FAA. Although the question presented rarely directly involves class processes, the broader implications are far greater. For example, the *Concepcion* case was, at its core, a case about preemption – but its impact on class action arbitration is potentially farther reaching than its ruling on preemption.[76]

The Court still appears to be grappling with the class action arbitration docket. The cases have become more fragmented over time – not less. Every class action arbitration case involves at least two opinions, and the 2019 decision of *Lamps Plus v. Varela* generated six opinions.[77] Perhaps because of the divisions on the Court relating to class actions, the

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[71] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting).

[72] *Id.* at 1612.

[73] *Id.* at 1619 ("Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.").

[74] *See* D.R. Horton, Inc. v. Nat'l Lab. Rel. Bd., 737 F.3d 344 (5th Cir. 2013) (discussing the NLRB rule regarding class waivers).

[75] *Epic Sys. Corp.*, 138 S. Ct. at 1629–30 (holding that agency deference is inappropriate); *see also* Allen S. Al-Haj, *Which Statute Will Trump: The Validity of Class-Action Waivers in Employment Arbitration Agreements*, 5 TEX. A&M L. REV. 105, 116–19 (2017) (discussing lower court opinions reaching the same conclusion that the NLRB does not have authority to interpret the FAA).

[76] I previously argued the broad scope of *Concepcion*'s reach in the area of class actions. *See* Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711 (2015).

[77] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

opinions use many tools of interpretation, and some with more frequency than the non-class action docket. In particular, finding a textual basis to support a class action majority and building off of prior FAA precedent appear to be requirements for a majority opinion.

Although the Court has entertained class action arbitration cases since the mid-1980s, the law has not settled or coalesced around predictable factors. Instead, this set of complex opinions suggest the law will continue to evolve and expand. As these class action opinions move in a direction that is increasingly business friendly, the Court can generally be predicted to vote along political lines.

III. PREEMPTION FINDINGS

While the class action cases cut across the various arbitration legal lines of precedent, these next three sections consider cases within a distinct legal theory – preemption, arbitrability, and conflicts of federal law. These three areas are discussed because they have the most cases and most opinions. Other areas of arbitration law, while important, do not currently involve enough opinions to make meaningful comparisons. Even these three sets of data are small and the numbers limit the statistical analyses that can be performed. In each of these sections, I consider the difference between cases within a specific legal theory and those outside of that legal theory. For example, I consider preemption opinions in contract with non-preemption opinions, rather than comparing preemption opinions to arbitrability decisions. These sections look for statistical significance by drawing out one variable, i.e., the type of arbitration legal theory, to see if the use of tools of interpretation changes when the legal theory changes.

This section considers the cases establishing the preemptive effect of the FAA over contrary state law. In 1984, the Supreme Court in *Southland v. Keating*[78] held, for the first time, that the FAA has such preemptive power.[79] To reach this conclusion, the Court resolved an ambiguity it created in the 1956 *Bernhardt v. Polygraphic Company of America*[80] case regarding the classification of the FAA under the *Erie* doctrine over whether the FAA is better characterized as a substantive or procedural law.[81] The *Southland* Court held that the FAA is substantive law and, as such, could displace contrary state law under the Supreme Clause of the U.S. Constitution.[82] This section considers the line of cases beginning with *Southland* and continuing to the present.

This dataset involves ten distinct cases and twenty-five different opinions. The Supreme Court decided three of these cases in the 1980s, two in the 1990s, one in the 2000s, and four in the 2010s. Of the ten cases, one resulted in a single opinion, four involved two opinions, four involved three opinions, and one case had four separate opinions. Despite the fact that this group averages 2.5 opinions per case, only one of the decisions, *ATT v.*

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[78] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[79] *Id*. at 16 ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that § 31512 of the California Franchise Investment Law violates the Supremacy Clause.").

[80] Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1954).

[81] *Id.* at 202 (reading the FAA narrowly to avoid problems involving conflicts with local law); *see also* Kristen M. Blankley, *supra* note 76, at 733 (discussing the history of FAA preemption and the problems with the *Bernhardt* opinion).

[82] *See* Allen S. Al-Haj, *supra* note 75.

Concepcion, involves a 5-4 split. This set of cases involves one per curium case, two eight-Justice majorities, three seven-Justice majorities, three six-Justice majorities, and one 5-4 decision. Only three of these cases involves a class action.

When considering the case ideology, nine of the ten cases resulted in conservative outcomes, and one had a liberal outcome.[83] The *Southland* case was decided as the public began to embrace ADR, which helps explain how Justice Burger could have ushered in a line of overwhelmingly conservative jurisprudence.[84] Six of the twenty-five opinions were authored by Justice Thomas, all but one were dissenting opinions. Justice Thomas' interesting role in the preemption literature is discussed in more detail below.

Chart 2 shows the percentage of reliance on individual tools of statutory interpretation, comparing the majority opinions of preemption cases to all other majority opinions, and the dissenting opinions of preemption opinions compared to all other dissenting opinions. I ran a pairwise chi square analysis between these two categories of majority opinions and these two categories of dissenting opinions.

As with the other analyses in this paper, the small sample size makes finding significant differences difficult. Two categories have a statistically significant difference: majority opinions' reliance on the whole act rule, and majority opinions' reliance on the intent or purpose of the FAA. Other categories have observable differences, even if they are not statistically significant.

[83] The Spaeth Supreme Court database, hosted by Washington University Law School, separates "conservative" from "lilberal" opinions based on factors related to consumers, employees, business, etc. *See* Harold J. Spaeth, Lee Epstein, et al., 2021 Supreme Court Database, Version 2021 Release 1. URL: http://Supremecourtdatabase.org.

[84] *See* Blankley, *supra* note 3, at 126.

Chart 2:

	Preemption Majorities	Non-Preemption Majorities	Preemption Dissents	Non-Preemption
Text	100%	83%	33%	52%
Whole Act	10%*	45%*	17%	13%
Other Fed Stat	10%	15%	8%	13%
FAA Precedent	100%	83%	42%	45%
Other Precedent	30%	53%	25%	35%
Arb Canon	70%	40%	8%	6%
Legislative History – All	20%	10%	25%	19%
Practical Consequences	50%	58%	39%	33%
Intent or Purpose	80%*	35%*	52%	67%

* One asterisk (*) indicates a p-value between 0.05 and 0.01 in a chi square pairwise comparison between preemption and non-preemption majorities and dissents.

Although only two pairs are statistically significant, the data still show interesting trends – both where the preemption cases are different and where they are the same as the non-preemption case. The following sections delve into the data and the underlying cases in more detail.

A. The Text and the Whole Act Rule

Surprisingly, the preemption cases have the same total reliance on the text as the class action cases, despite the fact that only three of the preemption cases involve underlying

class actions. The *Southland v Keating* case, discussed above,[85] utilized nearly every tool of interpretation in this first case recognizing the preemptive effect of the FAA, and the remainder of the cases also relied on the text of these opinions.

Normally, the textual reliance would be unsurprising, particularly given the ideological orientation of this set of cases. However, most of the majority opinions – many of which are conservative holdings – were authored by liberal-leaning justices.[86] In addition to Justice Burger's *Southland* opinion, Justice Thurgood Marshall authored *Perry v. Thomas*,[87] Justice Breyer wrote the majority opinions in both the *Allied-Bruce Terminix*[88] case and *DirecTV v. Imburgia*,[89] Justice Ginsburg wrote the majority opinions in both the *Cassoroto*[90] case and *Preston v. Ferrer*[91], and Justice Kagan authored *Kindred Nursing v. Clark*[92] decision. Only two majority opinions had conservative-leaning authors, notably Chief Justice Rehnquist in *Volt v. Leland Stanford*[93] and Justice Scalia in *ATT v. Concepcion*.[94] The per curium decision in *Marmet Health Care*[95] has no author. Other than the *Concepcion* case, the Court seems relatively aligned in its views on the preemptive effect of the FAA, particularly as it relates to the text of the statute.

The pattern of use of the whole act rule in the preemption cases is notable. All of the preemption cases lie on an interpretation of FAA Section 2, which makes arbitration agreements "enforceable."[96] The FAA, however, does not speak to the issue of preemption, and the *Southland* dissent, in particular, relied on this tool to argue that the remainder of the FAA argues against the fundamental question of whether the FAA is "substantive" or "procedural." Justice O'Connor cited the jurisdictional language in FAA Sections 3 and 4, and argued that if those sections facially apply only in federal courts, then FAA Section 2 should be read together as a procedural statute with no application in state courts.[97] Answering Justice O'Conner, the majority relied on the plain text of Section 2's "involving commerce" language in holding that Congress intended the Act to fall under its commerce power.[98]

Indeed, at least seven provisions of the FAA specifically contemplate federal court jurisdiction.[99] The lack of jurisdictional language in Section 2 led to various theories regarding Congress' intent from the scholarly community,[100] but the Supreme Court has

[85] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[86] Blankley, *supra* note 3, at 127, 130, 146.

[87] Perry v. Thomas, 482 U.S. 483 (1987).

[88] Allied Bruce Terminix v. Dobson, 513 U.S. 265 (1995).

[89] DirecTV, Inc. v. Imburgia, 557 U.S. 47 (2015).

[90] Dr.'s Assocs., Inc. v. Cassorotto, 517 U.S. 681 (1996).

[91] Preston v. Ferrer, 552 U.S. 346 (2008).

[92] Kindred Nursing Ctrs. Ltd. v. Clark, 137 S.Ct. 1421 (2017).

[93] Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Junior Univ., 489 U.S. 468 (1989).

[94] AT&T Mobility, Inc. v. Concepcion, 563 U.S. 333 (2011).

[95] Marmet Health Care Ctr. v. Brown, 565 U.S. 530 (2012).

[96] 9 U.S.C. § 2.

[97] Southland Corp. v. Keating, 465 U.S. at 22–23 (1984) (O'Connor, J., dissenting) (citing 9 U.S.C. §§ 3, 4).

[98] *Id.* at 14 (rejecting Justice O'Connor's whole act argument in favor of the language of Section 2).

[99] 9 U.S.C. §§ 3, 4, 7, 8, 9, 10, 11, and 16 (provisions containing express jurisdictional language).

[100] Blankley, *supra* note 76, at 721–22 (citing David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 Geo. L.J. 1217 (2013), Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002)).

largely agreed on the interpretation of Section 2 as substantive law with preemptive power. Because of the disconnect between the language in Section 2 invoking the limits of the Commerce Clause and the language of other sections invoking jurisdictional requirements, the scant use of the whole act rule in this set of cases is unsurprising.

B. FAA Precedent and the Arbitration Canon

Similar to the text, the preemption cases have similar levels of reliance on FAA precedent and the arbitration canon compared to the class action cases. For this set of cases, the biggest differences are found between preemption majorities and non-preemption majorities. The dissenting opinions show very little differences comparing preemption dissent to non-preemption dissents.

Regarding preemption majority opinions, this set of cases also showed 100% reliance on prior precedent, compared to 83% of non-preemption majorities that relied on prior FAA precedent. These numbers are quite similar to those in the class action set of cases, despite their relatively small number of overlap of cases. As noted above, this particular difference is not statistically significant, but it demonstrates an interesting trend that could potentially lead to significance over a larger set of data. The 100% reliance on FAA precedent in preemption majorities should not be surprising. The text of the FAA does not contain an express preemption clause, and these cases continue to build upon themselves in an increasingly broad manner.[101]

This set of majority opinions also relied on the arbitration canon heavily, in 70% of the opinions. Although not statistically significant, the number is much higher than the 40% of majority opinions that relied on the arbitration canon in non-preemption cases. The differences between these two groups could become statistically significant if these trends continue in the same proportions.

Perhaps the most unusual observation from the preemption cases is the use of the arbitration canon, which is partly a rule of arbitrability. The arbitration canon declares a "national policy favoring arbitration,"[102] as well as a rule of construction that "ambiguities as to the scope of the arbitration clause itself be resolved in favor of arbitration."[103] In other cases, the canon describes the requirement that arbitration agreements be "placed on same footing as other contracts."[104] The preemption cases cite all of these propositions, even though they do not all apply to preemption. While the "national policy" language can support a preemption analysis, the "scope" language,[105] often cited with the "national policy" language, does not apply to preemption at all. Preemption analyses consider a state law's applicability given the FAA's mandate to enforce arbitration agreements. The scope of the arbitration agreement and the clarity with which it is written is irrelevant. The "footing" language could apply to either a preemption analysis or an arbitrability analysis.

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[101] Blankley, *supra* note 3, at 137.

[102] Preston v. Ferrer, 552 U.S. 346, 353 (2008).

[103] *See* Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Junior Univ., 489 U.S. 468, 476 (1989).

[104] Dr.'s Assocs., Inc. v. Cassorotto, 517 U.S. 681, 687 (1996).

[105] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

In all, these cases show a clear preference for majority opinions to cite prior FAA precedent, as well as the arbitration canon when compared to non-preemption cases. The other types of opinions did not show clear difference in these areas.

C. Intent or Purpose

When considering the purposivist tools, practical consequences are relied on at roughly similar rates in majority opinions (50%) and dissenting opinions (39%) compared to their non-preemption counterparts (58% and 33%). However, the difference in reliance on intent is statistically significant between majority preemption (80%) decisions with majority non-preemption decisions (35%). Dissenting preemption opinions relied on intent or purpose (52%) less than non-preemption counterparts (67%), but the difference is not statistically significant in this small dataset.

With the exception of the *Concepcion* case, in majority decisions, the practical consequences on which the Court relies are relatively garden-variety concerns about administration of cases or the effect of decisions on state legislatures. For instance, in the *Terminix* case, the majority noted that the seminal *Southland* decision led to no "unforeseen practical problems" after the ruling ten years prior.[106] The *Kindred Nursing* majority invoked the absurdity doctrine in holding that Kentucky could not undermine the FAA through the operation of attorney-in-fact arrangements.[107]

The *Concepcion* decision merits additional commentary due to its extensive reliance on practical consequences. Justice Scalia provided at least six different arguments based on policy in the majority decision. First, the majority outlined concerns that a class action procedure cannot be streamlined due to its complex nature[108] and longer timelines.[109] Second, it expressed doubt that the confidentiality usually afforded to arbitration could be maintained.[110] Third, the Court doubted whether the parties could find an arbitrator competent to handled class action matters.[111] Fourth, the class action protocol developed by the American Arbitration Association are also complex.[112] Fifth, "class actions greatly increases risks to defendants."[113] Finally, the Court notes: "Arbitration is poorly suited to the higher stakes of class litigation."[114] The extent of the considerations is an outlier among the preemption docket – but it is certainly in line with the other cases in the class action docket.

The most notable trend in the preemption cases is the reliance on the intent or purpose of the FAA. Majority opinions relied on intent 80% of the time, compared with only

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[106] Allied-Bruce Terminix v. Dobson, 513 U.S. 265, 272 (1995).

[107] Kindred Nursing Ctrs., Inc. v. Clark, 137 S.Ct. 1421, 1428–20 (2017) ("The FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration.").

[108] *AT&T Mobility, Inc.*, 563 U.S. at 344 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.").

[109] *Id.* at 348–49 (discussing the timeline of bilateral arbitration compared to class arbitration).

[110] *Id.* at 348 ("Confidentiality becomes more difficult.").

[111] *Id.* ("And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.").

[112] *Id.* at 349 (discussing the intricacies of the AAA class action rules).

[113] *AT&T Mobility Inc.*, 563 U.S. at 350.

[114] *Id.*

35% of non-preemption majorities. Dissenting opinions cited intent 52% of the time, compared to 67% of the time in non-preemption majorities. These findings, while significant, are not particularly surprising because the legal question is whether Congress *intended* to supplant state law to the contrary.[115] The only cases in which the majority decisions failed to invoke Congress' intent were 1) the short, per curium decision in *Marmet Health Care*[116] which relied on only a few tools of interpretation, and 2) *DIRECTV v. Imburgia*,[117] which relied more on contract law than the FAA.

Dissenting opinions invoking practical consequences focus primarily on the issue of fairness; however, less than 40% of dissenting opinions discuss this tool of interpretation at all. For instance, in the *Imburgia* case, Justice Ginsberg's dissent expressed concern with the "hugely unequal bargaining power" between the parties in a case involving a consumer product.[118] And in Breyer's dissent in *Concepcion*, he correctly predicted the surge of mass arbitration proceedings when he noted: "a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims."[119] Reliance on Congressional intent similarly appears in less than 40% of preemption dissents. Justice Stevens concluded in *Southland* that Congress could not have intended the FAA to have preemptive power after discussing a number of other statutory tools,[120] and reiterates this point in *Perry v. Thomas*.[121] Justice Thomas also relies on intent in his dissents in the preemption cases, starting with the *Allied-Bruce Terminix* case.[122] A more complete discussion of Thomas' preemption philosophies are discussed below.[123]

D. Other Considerations

A handful of additional tools of interpretation in the preemption cases merit additional note. First, legislative history is relied on more in the preemption cases than non-preemption cases across all opinion types, most notably in concurring and other opinions. Although the number of these cases is low (2 majority opinions; 3 dissenting opinions, and 1 other opinion), the rate of reliance might suggest that the Court is more interested in contemporaneous evidence, such as legislative history, in the preemption cases than other

[115] Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

[116] Marmet Health Care Ctr. v. Brown, 565 U.S. 530, 532 (2012).

[117] DIRECTV v. Imburgia, 577 U.S. 47, 49 (2015).

[118] *Id.* at 65 (Ginsburg, J., dissenting).

[119] *AT&T Mobility Inc.*, 563 U.S. at 363. One of the practical results of *Concepction* is the advent of the mass arbitration, or the process of "simultaneously fil[ing] thousands of arbitration claims" as a response to a class action waiver in a commercial contract. Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REP. (Aug. 13, 2021), available at https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827/ (last visited May. 30, 2022).

[120] *Southland Corp.*, 465 U.S. at 21 (Stevens, J., concurring) (finding no intent by Congress to give the FAA preemptive power).

[121] Perry v. Thomas, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) (noting that the Court gave the FAA "a pre-emptive scope that Congress certainly did not intend").

[122] Allied-Bruce Terminix v. Dobson, 513 U.S. 272, 292 (1995) (Thomas, J., dissenting).

[123] *See infra* Part III.E (describing the "Thomas Effect").

arbitration cases. Reliance on legislative history is higher in the preemption cases compared to the arbitrability and conflicts of federal law cases.

Another interesting observation is the lack of reliance on non-FAA precedent in preemption cases compared to other types of cases. Because the preemption holding is *not* based on the text of the FAA, one might expect reliance on outside law to be higher in this area. To the contrary, the Court appears to be relying on its own precedent (i.e., prior FAA cases) and building upon itself in the preemption cases. This finding is in contrast with the arbitrability and conflicts of federal law cases, with both of those sets of cases – and the arbitrability cases in particular – relying on outside case law more frequently.

E. The "Thomas Effect"

Although not a tool of interpretation, Justice Thomas's vote in the preemption cases suggests that a "Thomas effect" might be present in the FAA docket. Although the name mimics that of the "Scalia effect" hypothesis (i.e., that Scalia "singlehandedly" discouraged the Court from using legislative history as an interpretive tool),[124] the "Thomas effect" refers to his unique role in preserving the preemptive effect of the FAA.

Early in his tenure, Justice Thomas was among the most vocal opponents of the FAA's preemptive power. Justice Thomas joined Justice Scalia's dissent in the *Terminix* case, on the basis that *Southland* was wrongly decided.[125] In his *Terminix* dissent, Justice Thomas relied on at least four separate tools of interpretation to demonstrate that the FAA should have no effect in state courts, including plain language,[126] the whole act rule,[127] non-FAA precedent,[128] and Congressional intent.[129] Further, he rejected the practical argument that parties have been relying on the *Southland* decision in their contract drafting.[130]

Following *Terminix*, Justice Thomas dissented in *Cassorotto* and *Ferrer* in short opinions invoking his dissent in *Terminix*.[131] Justice Thomas' view that the FAA did not apply in state courts applied equally in the preemption decisions, as well as other arbitration

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[124] David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653 (2010).

[125] *Allied-Bruce Terminix*, 513 U.S. at 285–87 (Thomas, J., dissenting) (expressing that the major holding of *Southland* "are wrong").

[126] *Id.* at 293 (Thomas, J., dissenting) ("There still would be no textual basis for Southland 's suggestion that § 2 requires the States to enforce those agreements through the remedy of specific performance—that is, by forcing the parties to submit to arbitration.").

[127] *Id.* at 293–94 (Thomas, J., dissenting) (reading FAA Section 2 together with Sections 3 and 4 that contain jurisdictional language).

[128] *Id.* at 292–93 (Thomas, J., dissenting) (relying on other Commerce Clause cases).

[129] *Id.* at 292 (Thomas, J., dissenting) (providing an argument disproving that "that Congress both viewed § 2 as a statement of substantive law and believed that it created no federal-question jurisdiction").

[130] *Allied-Bruce Terminix*, 513 U.S. at 295 (Thomas, J., dissenting) ("I do not doubt that innumerable contracts containing arbitration clauses have been written since 1984 . . . [s]till, I see no reason to think that the costs of overruling *Southland* are unacceptably high.").

[131] *See* Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting) ("As I have stated on many previous occasions, I believe that the Federal Arbitration Act does not apply to proceedings in state courts."); Dr.'s Assocs., Inc. v. Cassorotto, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting) ("For the reasons given in my dissent last Term in *Allied-Bruce Terminix Cos. v. Dobson*, I remain of the view that § 2 of the Federal Arbitration Act does not apply to proceedings in state courts. Accordingly, I respectfully dissent.").

decisions originating in federal courts.[132] By the 2010s, Justice Thomas' vote in preemption cases was predictable given his consistent vote and reasoning.

The "Thomas Effect" however, refers to the phenomenon that Justice Thomas will vote against this otherwise well-stated position if a conservative outcome cannot be maintained by the remaining Justices. In the 2011 landmark *Concepcion* case, Justice Thomas *concurred* and provided the critical fifth vote in this five-to-four decision. In *Concepcion*, Justice Thomas makes a hyper-technical argument that FAA Section 2 might apply to situations dealing with the "making of an agreement to arbitrate" even if in state court.[133] This argument, however, does not appear to be a change of heart. In two cases following *Concpecion*, Justice Thomas continued to dissent on the basis that the FAA "does not apply to proceedings in state court."[134] Both of those cases involved solid, conservative majorities that did not require his vote.

This phenomenon does not appear to be limited to the Court's preemption cases. In *Lamps Plus v. Varela*,[135] Justice Thomas joins the five-Justice conservative majority, despite concerns about the FAA's application in state courts. Although the *Varela* case deals primarily with arbitrability issues, Justice Thomas concurred and wrote separately because he remains "skeptical of this Court's implied pre-emption precedents."[136] Coincidentally, both *Concepcion* and *Varela* involve class action questions, and that fact may be the motivating factor in joining the more conservative justices when necessary to reach a desired outcome – i.e., limitations of class actions.

Whether the "Thomas Effect" will be necessary going into the future remains to be seen. The Court now has a six-to-three conservative majority since the elevation of Justice Amy Coney Barrett to the Supreme Court in 2020. Justice Thomas' vote may not be necessary if the remaining Justices vote in line with ideological principles, particularly in class action cases.

F. Future of the Preemption Docket?

The trajectory of the preemption docket is to preserve the preemptive power of the FAA, despite its controversial beginning in the *Southland* decision. Outside of the class action docket, the preemption principles appear to be broadly supported, as many of the decisions enjoy strong majorities. Since *Southland*, the most controversial preemption case was the *Concepcion* decision, which maintained and expanded on the FAA's preemptive power due, in part, to Justice Thomas' uncharacteristic concurrence among a long line of nearly identical dissenting opinions.

As for the expected tools of interpretation in future preemption cases, the current trends of relying on the text and the prior FAA cases will likely continue. Because the FAA's preemptive power is a matter of common law (as opposed to express preemption in the text of the statute), these two should continue to be the most commonly used tools. The heavy

[132] *See Preston*, 552 U.S. at 363 (Thomas, J., dissenting) (citing decisions in *Green Tree Fin. Corp. v. Bazzle* and *Buckeye Check Cashing v. Cardegna*, both of which are decisions concerning arbitrability).

[133] AT&T Mobility, Inc. v. Concepcion, 563 U.S. 333, 353 (2011) (Thomas, J., concurring).

[134] Kindred Nursing Ctrs., Inc. v. Clark, 137 S.Ct. 1421, 1429 (2017) (Thomas, J., dissenting); DIRECTV v. Imburgia, 577 U.S. 47, 59 (2015) (Thomas, J., dissenting).

[135] Lamps Plus v. Varela, 139 S. Ct. 1407, 1419–20 (2019) (Thomas, J., concurring).

[136] *Id.* at 1420 (Thomas, J., dissenting).

reliance on Congress' intent should also continue because the conflict preemption inquiry essentially asks about intent to displace contrary state law.

Any changes in the trajectory of the Court's preemption docket would likely require the Court to embrace tools of interpretation that have been rejected so far. Notably, renewed interest in the whole act rule would be a persuasive ground to overrule *Southland* and provide a textual basis to limiting or curtailing the preemptive power of the FAA. Given the conservative leaning of the current Court, this tool may be more palatable than resorting to an analysis of tools such as legislative history. In all, however, the Court will likely continue on the path of robust preemptive power for the FAA, particularly if the preemption cases arise in class action cases.

IV. ARBITRABILITY FINDINGS

The set of "arbitrability" cases in this dataset are those cases in which the question presented asks "who decides" a claim or defense – i.e., is it a question for the arbitrator or a question for the courts. The Court has addressed arbitrability questions since the 1930s and 40s, when it decided two admiralty cases turning, in part, on the identification of the proper decision-maker.[137] More recently, this section deals with *Prima Paint v. Flood & Conklin*[138] and *First Options of Chicago v. Kaplan*[139] and the jurisprudence following therefrom.

This subset involves nineteen distinct cases and thirty-nine different opinions. These cases span the entirety of the Supreme Court's arbitration docket, with four cases decided before 1980, one case in the 1980s, one in the 1990s, six cases in the first decade of the 2000s, and seven cases in the 2010s. Of the nineteen cases, six cases had only one opinion, ten involved two opinions, one involved three opinions, one case had four separate opinions, and one case had six opinions. The average number of opinions per case is just over two. This set of cases involves three per curium cases, five additional nine-Justice majorities, two eight-justice majorities, two seven-justice majorities, two six-justice majorities, four five-Justice majorities, and one plurality opinion. Seven of these cases in which the primary legal issue is arbitrability are also cases involving class actions.[140]

Chart 3 shows the percentage of reliance on individual tools of statutory interpretation, comparing the majority opinions of arbitrability cases to all other majority opinions, and the dissenting opinions of arbitrability opinions compared to all other dissenting

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[137] Anaconda v. Am. Sugar Refin. Co., 322 U.S. 42, 45 (1944) (discussing a party's ability to proceed in admiralty court with an arbitration agreement in a contract); Marine Trans. Corp. v. Dreyfus, 284 U.S. 263, 275–76 (1932) (holding that the court makes the initial determination to send a case to arbitration and thereafter has jurisdiction to confirm a resulting award).

[138] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

[139] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995).

[140] One of these class action cases is *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, which was a difficult case to fit into one category. At its most limited, the holding of *Stolt-Nielsen SA* is a holding dealing with the review of an arbitrator's clause construction award, the authority used to issue such an award, and whether the arbitration award is subject to vacatur. 559 U.S. at 676–77. If this were the only holding of *Stolt-Nielsen SA*, then the case would easily fit within the category of cases dealing with vacatur and judicial review. However, *Stolt-Neisen SA* has broader implications for arbitrability in that it essentially removed the authority for an arbitrator to decide that certain contracts can support a class arbitration hearing. *Id.* at 686–87 (holding that class procedures are too dissimilar from bilateral procedures to allow an arbitrator to hold that a contract would allow them without specific authorization).

opinions. I ran a pairwise chi square analysis between these two categories of majority and dissenting opinions.

Surprisingly, not one pairwise comparison shows a significant difference. In many instances, the precent reliance on a specific statutory tool is very close to the percent reliance in the non-arbitrability cases. In two instances, both in dissenting opinions, the numbers are trending towards significance, although currently not statistically significant likely due to the small sample size. Those two categories are greater reliance on other federal statutes and greater reliance on non-FAA case law in arbitrability dissents compared to non-arbitrability dissents.

The Future of Arbitration Law?

Chart 3:

Tool of Interpretation	Percent Reliance on Tools of Interpretation by Subject (Arbitrability) & Opinion Type			
	A. Arbitrability Majorities	**B. Non-Arbitrability Majorities**	**C. Arbitrability Dissents**	**D. Non-Arbitrability Dissents**
Text	89%	84%	42%	48%
Whole Act	39%	38%	17%	13%
Other Fed Stat	17%	13%	25%	6%
FAA Precedent	83%	88%	50%	42%
Other Precedent	40%	47%	42%	29%
Language Canon	6%	19%	17%	3%
Subs Canon	0%	13%	8%	16%
Arb Canon	33%	53%	17%	3%
Legis Hist – All	11%	13%	8%	26%
Legis Inaction	0%	6%	0%	6%
Practical Conseq	44%	63%	50%	35%
Intent or Purpose	22%	36%	42%	55%

Despite the lack of statistical significance, some trends are still worth noting. For the arbitrability cases, the next sections look at trends in majority opinions and trends in dissenting opinions, followed by a discussion of the future of the arbitrability cases.

A. Majority Opinions

Majority opinions in the arbitrability caseload appear to be a microcosm of the arbitration docket as a whole, particularly as the textualist tools are considered. When looking at the purposivist tools, however, a few differences can be observed, even though none of them rise to the level of statistical significance.

For the textualist tools of reliance on the text, FAA precedent, and the whole act rule, the rate of reliance on these tools is extraordinarily close when comparing arbitrability majorities and non-arbitrability majorities. In arbitrability majorities, the Court relied on the text at a rate of 89%, compared to 84% in non-arbitrability majorities. The arbitrability majorities relied on FAA precedent 83% of the time, compared to 88% of the time in non-arbitrability majorities. Keep in mind, however, that although these numbers do not stand out within the arbitration caseload, they still represent an aberration compared to other types of cases. In *Standing on Its Own Shoulders*, I observed large discrepancies in the rate of reliance on the text and prior caselaw in the arbitration cases compared to other types of cases.[141] In other words, these findings are more important in the comparative study than in this analysis comparing different types of arbitration cases.

Reliance on the whole act rule is nearly identical when comparing the rates of reliance between arbitrability majorities (39%) and non-arbitrability majorities (38%). The two early FAA cases relied on the whole act rule, which is unsurprising as the Court grapples with the statute for the first few times.[142] *Prima Paint* famously relied on the whole act rule in order to establish the modern rule of arbitrability. In *Prima Paint*,[143] the Court grappled with the question of whether a court or arbitrator should determine whether a defense – such as fraud in the inducement – applied to the entire contract, thus potentially invalidating the contract and its arbitration clause.[144] To make this determination, the Court considered Sections 2, 3, and 4 combined. While the Court found the most on point language in holding that the court makes an initial determination as to the "making" of arbitration agreement in Section 4, it specifically noted that the analysis also applies to Section 3, which does not contain the same language.[145] Nearly forty years later, the Court extended this holding explicitly to Section 2, thus making the *Prima Paint* holding applicable not only in federal court but also in state court.[146] Although other areas of arbitration also relied on the whole act rule, this canon played a particularly important role in arbitrability cases.[147]

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[141] Blankley, *supra* note 3, at 122 (comparing the rates of reliance on the text of the FAA and prior FAA precedent cases compared to the rates of reliance on the text in other data sets).

[142] *See Anaconda*, 322 U.S. at 46 (reading Section 4 on compelling arbitration together with Section 8 providing specific admiralty relief); Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp., 293 U.S. 449, 453 (1935) (reading together Section 3 regarding a stay of proceedings with Section 4 regarding compelling parties to arbitrate).

[143] *See Prima Paint Corp.*, 388 U.S. at 395.

[144] *Id*. at 396–97 (stating the question for the Court).

[145] *Id*. at 404 (discussing how Sections 2, 3, and 4 should be read together).

[146] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447 (2006) (discussing how the *Prima Paint* rule can be read into Section 2 of the FAA).

[147] Southland Corp. v. Keating, 465 U.S. 1, 30 (O'Connor, J., dissenting). The *Prima Paint* case stands in stark contrast with the *Southland* case, which expressly rejects the whole act rule. In dissent, Justice O'Connor urges the application of the whole act rule, while simultaneously citing *Prima Paint*.

The Supreme Court relies on canons of interpretation less often in arbitrability majorities than non-arbitrability majorities. The most striking difference surround the use of the arbitration canon. As noted above,[148] the arbitration canon essentially states a rule of arbitrability – that questions about arbitration should be resolved in favor of arbitration.[149] Arbitrability majorities only cite the arbitration canon 33% of the time, compared to 53% of non-arbitrability majorities. No majority arbitrability opinion relied on any other substantive canon (compared to 13% of other majority opinions) and only 6% of the arbitrability majorities relied on language canons (compared to 19% of other majority opinions).

Turning to the purposivist tools, the majority arbitrability decisions relied on every category of purposivist tool at a lesser rate than other majorities, although many of the distinctions are slim. For instance, arbitrability majorities relied on legislative history only 11% of the time, but that number is nearly identical to the 13% of non-arbitrability majorities that relied on legislative history. As noted in the *Standing on its Shoulders* paper, the reliance rates on legislative history in the arbitration docket is low, even compared with other studies.[150]

The arbitrability majorities relied less often on both practical consequences and intent or purpose compared to other majority opinions. Among the categories examined in this paper, the reliance on practical consequences is lowest among arbitrability majorities compared to any other category of arbitration majority opinion. Both of these findings are surprising. Arbitrability is an inherently practical question, with ramifications for parties, courts, arbitrators, and case administration. *First Options v. Kaplan* recognized that the arbitrability question "has a certain practical importance."[151] All things being equal, I would have expected the use of these purposivist tools to be highest in the arbitrability cases compared to preemption or even conflicts of statutes.

The Court only relied on practical consequences in arbitrability majorities 44% of the time. Often, the type of practical consequences discussed in the arbitrability cases involve administrative concerns. For example, the *Waffle House* court considered the effects of an arbitration clause in a case in which the Equal Opportunity Employment Commission ("EEOC") held concurrent jurisdiction.[152] The Court recognized the concern of a potential double recovery – one in arbitration and one by the EEOC – and relied on doctrines related to double-recovery to remedy this practical concern.[153] When the arbitrability cases are also class action cases, the majority opinions cite concerns such as efficiency and the need to protect absent class members.[154]

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[148] *See supra* notes 95 and 96.

[149] *See, e.g.*, William N. Eskridge, *The New Textualism*, 27 UCLA L. REV. 621, 664 (1990) ("For example, the canon favoring arbitration is now an established proceduralist policy of the Court.").

[150] *See* Blankley, *supra* note 3, at 122–24 (comparing the rates of reliance on legislative history in the FAA cases compared to the rates of reliance on legislative history in other sets of data).

[151] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

[152] EEOC v. Waffle House, Inc., 534 U.S. 279, 297–98 (2002) (holding an arbitration agreement in an employment contract is not binding on the EEOC).

[153] *Id*. at 296–97 (reading the FAA to avoid the possibility of a double recovery).

[154] *See* Lamps Plus Inc. v. Varela, 139 S. Ct. 1407 (2019) (discussing the many differences in administration between class cases and bilateral cases); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238-39 (2013) (discussing the efficiencies present in bilateral arbitration that are likely not be present in class arbitration).

The arbitrability majority opinions relied on Congressional intent or purpose at a rate of 22%, compared to a rate of 36% of non-arbitrability majority opinions. Only three cases relied on Congressional intent, and an additional two cases reference intent without any analysis.[155] The 1985 case of *Dean Witter Reynolds Inc. v. Byrd*[156] conducts the most robust analysis of Congressional intent within this category of cases. In *Byrd*, the Court declared that the "preeminent concern of Congress in passing the Act was to enforce agreements" and relied on this intent, even if the result is an inefficient "piecemeal" process involving both arbitration and the court system.[157] In contrast, cases such as *Lamps Plus* relied on Congressional intent or purpose in holdings prohibiting class action arbitrations.[158] In all, however, Supreme Court majorities do not invoke the purpose of the FAA or the intent of Congress at the time of passing consistently enough to make any generalizations or observations in these areas.

B. Dissenting Opinions

For the most part, the dissenting opinions in arbitrability cases show similar trends to the non-arbitrability dissents. In two areas, the arbitrability dissents are trending towards significance and could reach statistical significance if the pattern continues in future cases. Those two areas involve the use of authority outside of the context of arbitration. Although other tools are worthy of discussion, they do not show a great variance of use between arbitrability dissents and non-arbitrability dissents.

At first glance, the use of outside authority in the arbitrability docket seems unusual – dissent or not. Questions of arbitrability are uniquely related to arbitration, and I would have expected this group of cases, more than other groups, to rely on the internal body of arbitration law. The *Waffle House* case is an example of a dissenting opinion's reliance on outside statutes to help interpret the FAA. As Justice Thomas grappled with the question of the interplay between the FAA and the Americans with Disabilities Act (ADA), he noted that the ADA encourages alternative dispute resolution (ADR), concluding that an employee with an arbitration clause in a contract should be limited to that sole remedy.[159] Justice Ginsburg's dissent in *Stolt-Nielsen* cited both outside statutory and case law – outside statutory law on a procedural issue and outside case law on an issue related to class actions.[160] Other cases relied on non-FAA arbitration law or other civil procedure law, both of which make sense as they have natural parallels to the FAA.[161]

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[155] Under my coding structure, the cases referencing, but not relying on a tool are not coded as "reliance" but rather as "referenced or rejected." Consider, for instance, the *Prima Paint* case in which the majority simply stated that Prima Paint's interpretation of Section 3 of the FAA was "not intended by Congress" without further elaboration. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967).

[156] *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).

[157] *Id.* at 221

[158] *Lamps Plus Inc.*, 139 S.Ct. at 1416 (noting that the FAA "envision[s]" bilateral arbitration).

[159] EEOC v. Waffle House, Inc., 534 U.S. 279, 313 (2002) (Thomas, J., dissenting).

[160] Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 559 U.S. 662, 690 (2010) (Ginsburg, J., dissenting) (citing laws regarding civil procedure); *id.* at 699 (Ginsburg, J., dissenting) (citing cases involving class actions).

[161] *See, e.g.*, *Lamps Plus Inc.*, 139 S. Ct. at 1425 (Breyer, J., dissenting) (citing Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017)); Rent-a-Center, W., Inc. v. Jackson, 561 U.S. 63, 79 (2010) (Stevens, J., dissenting) (citing AT&T Tech., Inc. v. Commc'n. Workers, 475 U.S. 643, 649 (1986)).

Considering the textualist tools, no real trends stood out among the arbitrability dissents. The text was relied upon somewhat consistently – 42% of arbitrability dissents, compared to 48% of non-arbitrability dissents. Dissenting opinions relied slightly more frequently on FAA precedent in arbitrability dissents – 50% of the time – compared to non-arbitrability dissents. Neither of these differences raised any appreciable concerns or questions. The use of canons has a much bigger discrepancy, but the canon use was inconsistent. For instance, arbitrability dissents relied on language canons and the arbitrability canon 17% of the time, compared to only 3% of non-arbitrability dissents. On the other hand, arbitrability dissents relied on other substantive canons only 8% of the time, compared to 16% of non-arbitrability dissents. In any event, the overall instances of canon use as a whole number was extraordinarily low (two instances for the language and arbitration canons and one instance of using another substantive canon) that generalizations were nearly impossible to make.

As for purposivist tools, reliance on practical consequences and purpose appeared more frequently. Legislative history, however, was not often used; only one dissent relied on legislative history in the arbitrability dissents. For the dissenting opinions that relied on practical consequences, most of those were concerned about fairness, particularly in the context of class action arbitrations.[162] The consequences discussed appeared to be motived more by the class action issue than the arbitrability issue, but in recent years, these two concepts are often related under the question of "can this class action be arbitrated?" Likewise, with the exception of *Prima Paint*, the reliance on the intent or purpose of the FAA is inextricably entwined with the class action question.[163] . In Justice Black's dissent in *Prima Paint*, he relied on a host of tools of statutory interpretation to support his argument that a court should determine contract defenses to the *entirety* of contract, rather than arbitrator, because an invalid contract cannot have a valid arbitration agreement.[164] He argued that Congress actually intended that arbitrators decide "factual controversies" in "valid contracts," rather than giving the arbitrator the ability in the first instance to determine the contract's legality.[165] His opinion also relied on legislative history and other purposivist tools.[166] Perhaps the most interesting observation is that these tools have not been highly relied on since *Prima Paint*, which may be due partly to Court personnel and partly to the Court treating the issue as settled, outside of the class action context.

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[162] *See, e.g.*, *Lamps Plus Inc.*, 139 S. Ct. at 1421 (Gingburg, J., dissenting) (noting that the circumstances in this case "cries out for collective treatment"); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 252 (2013) (Kagan, J., dissenting) ("In the hands of today's majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."); *Stolt-Nielsen SA*, 559 U.S. at 699 (Ginsburg, J., dissenting) ("When adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing,' i.e., without them, potential claimants will have little, if any, incentive to seek vindication of their rights.").

[163] *See Lamps Plus Inc.*, 139 S. Ct. at 1432 (Kagan, J., dissenting) ("The FAA was enacted to protect against judicial hostility toward arbitration agreements. But the Act provides no warrant . . . [to] give defendants the best terms possible."); *see Italian Colors Rest.,* 570 U.S. at 244 (Kagan, J., dissenting) (noting that Congress intended for parties to have the opportunity to vindicate statutory rights).

[164] *See generally* Prima Paint Corp. v. Flood & Cocklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting) (describing the courts holding as "fantastic").

[165] *Id.* at 407–08.

[166] *Id.* at 409–10 (discussing legislative history and the state of arbitration at the time of the FAA's passing).

C. Future of the Arbitrability Docket?

If the best indicator of the future is the past, then the future of the arbitrability docket is murky, at best. No particular factors appeared to be more persuasive in this set of cases compared to other types of arbitration cases. In recent years, many of the arbitrability cases implicate class action issues, so the tools that predict how class action cases are decided (such as the overreliance on the arbitration canon, for instance) likely supersede any particular reliance on tools related to arbitrability. To the extent that the Supreme Court pays particular attention to the text, prior FAA precedent, and the arbitration canon compared to other types of cases,[167] advocates should continue to rely on those factors as arbitrability cases continue to come before the Supreme Court.

V. CONFLICTS OF FEDERAL LAW FINDINGS

The set of "conflicts of federal law" cases in this dataset are those cases in which the question presented asks whether claims arising under federal statutes may be arbitrated at all, particularly if the federal statute, whether it be a civil rights statute or securities law, contains private right of action and federal court jurisdiction. This line of cases begins with *Wilko v. Swan*,[168] which held that actions under the Securities Act cannot be arbitrated,[169] later overruled by *Rodriguez*[170], ushering in a series of cases, all of which holding that rights afforded under federal law can be arbitrated.[171] While these cases also deal with an element of arbitrability, they use a distinct legal test, i.e., the "contrary congressional command" test that asks whether Congress clearly prohibits arbitration under another federal statute.[172]

This subset of cases is small - ten distinct cases and twenty-five different opinions. These cases span over fifty years, with two cases decided before 1980, three cases in the 1980s, two in the 1990s, one case in the first decade of the 2000s, and two cases in the 2010s. These cases involved a higher number of opinions per case than the other set of arbitrability cases. Five of the cases have three opinions, and the other five have two opinions. The average number of opinions per case is two and a half opinions. These cases involved highly divided voting patterns. Half of the cases (five of the ten) involved a vote of five to four, and an additional case with a five to three majority. One case involved a six to three split, and the two cases involved a seven to two split. Only two of these cases involved class actions.

Chart 4 shows the percentage of reliance on individual tools of statutory interpretation, comparing the majority opinions of conflicts cases to all other majority opinions, and the dissenting opinions of conflicts opinions compared to all other dissenting

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[167] Blankley, *supra* note 3, at 122.

[168] Wilko v. Swan, 346 U.S. 427 (1953).

[169] *Id.* at 438.

[170] Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989).

[171] *See* Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612, 1628 (2018) (that claims under the National Labor Relations Act can be subject to arbitration, despite contrary rulings by the National Labor Relations Board); CompuCredit Corp. v. Greenwood, 565 U.S. 95, 104–05 (2012) (holding that claims under the Credit repair Organization Act can be arbitrated); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (holding that claims under the AGE Discrimination in Employment Act can be arbitrated).

[172] *See, e.g., CompuCredit Corp.*, 565 U.S. at 98.

opinions. I ran a pairwise chi square analysis between these two categories of majority opinions and these two categories of dissenting opinions.

Only one pairwise comparison showed a significant difference. The pairwise comparison is the reliance on legislative inaction in conflicts dissenting opinions. In all of the arbitration dissenting opinions, the only ones relying on the tool of legislative inaction are those in this conflicts set.

Chart 4:

Tool of Interpretation	Percent Reliance on Tools of Interpretation by Subject (Conflicts) & Opinion Type			
	A. Conflicts Majorities	**B. Non-Conflicts Majorities**	**C. Conflicts Dissents**	**D. Non-Conflicts Dissents**
Text	.70 AB	.90 BA	.50 CD	.45 DC
Whole Act	.30 AB	.40 BA	.00 CD	.18 DC
Other Fed Stat	.00 AB	.18 BA	.00 CD	.15 DC
FAA Precedent	.90 AB	.85 BA	.60 CD	.39 DC
Other Precedent	.40 AB	.50 BA	.30 CD	.33 DC
Subs Canon	.20 AB	.05 BA	.20 CD	.12 DC
Arb Canon	.60 AB	.43 BA	.00 CD	.09 DC
Legis Hist – All	.10 AB	.13 BA	.20 CD	.21 DC
Legis Inaction	.00 AB	.05 BA	.20 CD*	.00 DC*
Practical Conseq	.70 AB	.53 BA	.50 CD	.36 DC
Intent or Purpose	.50 AB	.43 BA	.60 CD	.43 DC

* One asterisk (*) indicates a p-value between 0.05 and 0.01 in a chi square pairwise comparison between conflicts and non-conflicts majorities and dissents.

This section considers some notable patterns in both textualist tools and purposivist tools used in these cases dealing with conflicts between the FAA and other federal law. This set of data only coded the tools used to interpret the FAA and does not contain comparisons

as to the tools of interpretation used to interpret the other federal statute at issue.[173] The following sections consider the use of text and FAA precedent, as well as substantive canon use. In addition, this section considers the use of legislative inaction and practical consequences.

A. Text and FAA Precedent

Within the cases dealing with arbitrability of federal claims, the most interesting trends across both majority opinions and dissents involve the use of FAA precedent, the arbitration canon, and other substantive canons. In addition, the use of the text is notably lower in these majority opinions.

Starting with the text, the majority opinion in these cases relied on the text comparatively the lowest among any of these subgroups of arbitration cases. Cases that considered whether federal claims are arbitrable relied on the text 70% of time, compared to 100% of the time in preemption cases (and class action cases) and 89% of the time in more classic arbitrability cases. The reason for the lower reliance on the text in this set of cases is puzzling. While the FAA says nothing about the arbitrability of federal claims, it equally says nothing about preemption, class actions, or other types of arbitrability. Given the fact that this set of cases involves highly divided opinions, reasonable minds might conclude that reliance on the text would be higher – rather than lower – to ground controversial arbitration decisions. That said, 70% reliance rate on the text is still high, and the only tool with a higher percentage of reliance in majority opinions is the use of FAA precedent.

In terms of reliance on FAAA precedent, majority opinions considering the arbitrability of federal claims considered prior precent in 90% of cases, which is similar to the other sets of cases. As noted above,[174] these rates of reliance on prior precedent is high compared to other studies, but for the arbitration dataset, these reliance rates are consistent across types of arbitration cases. Even dissenting opinions relied highly on prior FAA precedent, at a rate of 60%, which is the highest rate among case type, but not alarmingly high.

B. Canon Use

In this set of cases, canon use has elements that are quite common and others that are more unusual. Overall, the use of canons is somewhat higher than in other slices of the arbitration docket. The use of the arbitration canon is consistently high for majority opinions (60%) and consistently low in dissenting opinions (in this case, 0%). Arbitration canon use is not particularly noteworthy in this dataset.

Other substantive canon use, however, is noteworthy, not for its frequency, but how it is used. Two cases in this set rely on substantive canons – both in the majority opinions and in the dissent. In *Vimar Seguros*, the majority opinion relied on the doctrine against implied repeal, that "absent a clearly expressed congressional intention to the contrary," the Court's role is "to regard each as effective."[175] The Court repeated the idea of giving effect to both

[173] *See supra* note 18-20.

[174] *See supra* note 21-24.

[175] Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995).

statutes most recently in *Epic Systems* and reframed this concept as one that involves "respect for the separation of powers."[176] The dissenting opinions also rely on substantive canons, but these opinions rely on substantive canons in a different way. In the *Vimar Seguros* case, Justice Stevens did not disagree that the two statutes at issue should be read harmoniously, if possible, but he thought that a different reading of the statutes would preserve both of them better.[177] In *Epic Systems*, Justice Ginsburg suggested relying on a different canon – notably the doctrine of implied repeal – to read two federal statutes together.[178] Under the doctrine of implied repeal, a later enacted statute would take precedence over a conflicting statute enacted earlier in time.[179]

Some scholars questioned the Supreme Court's choice to rely on the doctrine against implied repeal (i.e., preserving both statutes) over the canon that would prioritize the later-enacted statute.[180] The competing canons in this area serves as an example of the textualist criticism that canon use is highly selective and has the ability to lead to outcome-oriented results.[181]

C. Purposivist Tools

Regarding the purposivist tools used in this dataset, two deserve attention. First, the reliance on legislative inaction in dissenting opinion demonstrated a statistically significant difference. Second, the use of practical consequences, particularly in majority opinions, show interesting patterns.

The use of legislative inaction as a tool of statutory interpretation is one that I would have expected to be used more often than seen in the data. This tool is essentially a presumption that Congress is aware of and satisfied with the Court's interpretation of a statute if Congress not repeal or revise it.[182] Presumably, the Court would rely on this doctrine more frequently with statutes enacted decades (or even a century) ago. The FAA has existed largely unmodified for more than 95 years, and yet this tool of interpretation is infrequently invoked.

Among dissenting opinions, the *only* time the doctrine of legislative inaction is invoked is in these cases involving the arbitrability of federal statutes. All of these occasions involved dissents by Justice Stevens. The first dissent that relied on this tool can be found in the 1986 *Rodriguez* case, which overruled the 1956 decision of *Wilko v. Swan*. Unsurprisingly, Justice Stevens' dissenting opinion invoked this doctrine on the basis that

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[176] *Epic Sys. Corp.*, 138 S. Ct. at 1624 (2018).

[177] *Vimar Seguros y Reaseguros*, 515 U.S. at 555 (Stevens, J., dissenting) ("Although I agree with the Court that it is important to read potentially conflicting statutes so as to give effect to both wherever possible, I think the majority has ignored a much less damaging way to harmonize COGSA with the FAA.").

[178] *Epic Sys. Corp.*, 138 S. Ct. at 1646 (Ginsburg, J., dissenting) (discussing the use of implied repeal).

[179] *Id.*

[180] *See* Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 172 (2015) ("One answer would be to fall back again on the canons that give the edge to the more recently enacted or more specific statute."); *see also* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will Class Action Survive?*, 42 WM. & MARY L. REV. 1, 98–100 (2000) (suggesting that the Court use the familiar conflict of law analysis to determine whether class actions must be permitted under the underlying statute).

[181] *See* Blankley, *supra* note 3.

[182] Coffee County Bd. of Ed. v. City of Tullahoma, 574 S.W.3d 832, 847 (Tenn. 2019) ("Under that doctrine, legislative inaction following a contemporaneous and practical interpretation of a statute is considered persuasive evidence of the Legislature's intent to adopt that interpretation.").

Congress elected "not to amend" the FAA "during the ensuing 3 ½ decades" after *Wilko*, lending support for his opinion that statutory claims could not be arbitrated.[183] Justice Stevens continued to express dissatisfaction with the Court's direction as late as the 2009 in *Penn Plaza v. Pyett*.[184] Justice Stevens expressed a clear policy preference that Congress decide whether claims under federal statutes are arbitrable, not courts.[185]

Finally, this section considers the use of practical concerns as a tool of statutory interpretation in these cases. Among majority opinions, this tool appears to be highly influential as it is relied on 70% of the time, compared to only 53% of non-conflicts majority opinions. This set of cases relied on practical consequences at least 20% more compared to the preemption cases (50% of majority preemption opinions) and arbitrability decisions (44% of majority arbitrability cases). Many of these cases discussed the realities and competencies of arbitrators who would handle these federal claims. For instance, in *Wilko v. Swan*, the Court expressed the practical concern of whether arbitrators possessed the requisite competency to apply federal law,[186] particularly at a point in time when fewer lawyers served as arbitrators. Over time, the Court began to recognize the ability of arbitrators to competently handle cases involving federal claims, starting first in *Mitsubishi Motors* involving an antitrust claim among businesses,[187] and culminating in the *Gilmer* decision that goes to great lengths to discuss the adequacy of the arbitral forum and arbitrators handling individual cases.[188] The practical concerns regarding arbitrator competency, however, become overshadowed in cases involving class actions. In those cases, such as *Epic Systems*, the primary practical concern involved business interests, such as bet-the-company cases and undue pressure to settle.[189] In these cases, the Court seemed particularly inclined to rely on practical consequences, even if the underlying concerns change from case to case.

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[183] *Rodriguez*, 490 U.S. at 486 (Stevens, J., dissenting); *see also McMahon*, 482 U.S. at 268-69 (Stevens, J., concurring in part and dissenting in part) (finding legislative inaction persuasive in upholding the ruling of *Wilko v. Swan*).

[184] *Pyett*, 556 U.S. at 274 (Stevens, J., dissenting).

[185] *Id*. at 275 ("I dissented in those cases to express my concern that my colleagues were making policy choices not made by Congress.") (citations omitted).

[186] *Wilko*, 346 U.S. at 427 (discussing the limited procedures in arbitration and the consequences for the parties if arbitrators made a mistake in determining the law). Following *Wilko*, the next case in this series is the international arbitration case of *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). In contrast with *Wilko*, the *Scherk* case was particularly concerned about gamesmanship among international parties and held that arbitration agreements should be upheld to prevent "mutually destructive jockeying" in international contracts. *Scherk*, 417 U.S. at 516.

[187] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633-34 (1985) ("In sum, the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter."). In his dissent, Justice Stevens makes the argument that the arbitrator may not be capable of handling complex cases, such those in antitrust. *Id.* at 657 (Stevens, J., dissenting) ("Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets."). The Justices' opinions change over time regarding the importance of business interests as well thoughts regarding arbitrator competency, suggesting that these cases are decided in an outcome-determinative way as opposed to a more consistently principled approach.

[188] *Gilmer*, 500 U.S. at 30-32 (discussing in great detail the procedural mechanisms available for the Age Discrimination in Employment Act case at issue); *Scherk*, 417 U.S. at 528 (Douglas, J., dissenting) ("It is important that American standards of fairness in security dealings govern the destinies of American investors until Congress changes these standards.").

[189] *Epic Sys. Corp.*, 138 S.Ct. at 1632 (considering settlement pressures in class action cases).

Dissenting opinions relied on practical concerns half of the time (50%), which is comparable to other types of arbitration cases. The concerns among dissenting opinions were also widespread, but they changed over time. For instance, Justice Frankfurter's dissenting opinion in *Wilko v. Swan* suggested a lack of evidence that individual rights would be compromised.[190] When the Court reversed *Wilko*, the practical concerns among dissenting justices also predictably changed – particularly implications dealing with the employer/employee relationship grounded in fairness.[191] For instance, in *Epic Systems*, Justice Ginsburg's dissenting opinion relied on practical consequences such as whether the majority's opinion is fair to employees.[192]

D. Is the FAA a Super-Statute?

The Court's treatment of the FAA as it relates to other statutes begs the question – is the FAA a "super-statute"? Broadly speaking, a super-statute carries extra weight, particularly when a super-statute appears to conflict with another federal statute.[193] As the Supreme Court stated, a super-statue can displace "the normal operation of other federal laws"[194] when a question arises regarding the proper application of two or more laws. This Section concludes that the FAA today meets the definition of a super-statute, even though Congress likely did not consider it to be one when passed in 1925.[195]

Professors William Eskridge and John Ferejohn coined the term in 2001 to explain a phenomenon that the Court treated some statutes with a quasi-constitutional way, while understanding that those statutes could always be amended through the usual legislative, administrative, or judicial processes.[196] In their first article on super-statutes, Eskridge and Ferejohn proposed three requirements for this classification. The requirements are: 1) the statute establishes a new normative or institutional framework for a policy, 2) the statute has a lasting effect on public culture, and 3) the statute has a broad effect on the law, beyond the

[190] *Wilko*, 346 U.S. at 439 ("There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled.")

[191] *See Gilmer* 500 U.S. at 42-43 (Stevens, J., dissenting) (expressing concerns about the balance of power between employer and employee).

[192] *Epic Sys. Corp.*, 138 S.Ct. at 1647 (Ginsburg, J., dissenting) (arguing that the majority option will disincentivize workers from bringing legitimate claims).

[193] *See, e.g.*, Bostock v. Clayton County, Ga., 140 S.Ct. 1731, 1754 (2020) ("Because [the Religious Freedom Restoration Act (RFRA)] operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."); Korte v. Sebelius, 735 F.3d 654, 673 (7th Cir. 2013) (describing RFRA as a super-statute and giving it more weight than other statutes).

[194] *Bostock*, 140 S.Ct. at 1754.

[195] Other courts and commentators also conclude that the FAA is a super-statute, although no scholar has done a complete analysis of the FAA's status as such. *See* Capua v. Air Europa Lineas Aereas S.A. Inc., 2021 WL 965500, *8 (S.D. Fla.) (holding that the FAA should apply even if there is an arguably contrary regulation promulgated by the department of Transportation); Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 10 (2014) ("Courts have construed the FAA Beyond its original statutory reach, elevating the law to the status of a 'super-statute.'").

[196] William N. Eskridge Jr. & John A. Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216–17 (2001) (describing the quasi-constitutional status of super-statutes). Some examples of super-statutes include the Norris-LaGuardia Act, the Securities Act, the Exchange Act, and the National Labor Relations Act. *Id.* at 1227.

language of the statute.[197] While super-statutes generally "trump" other law, their application is not absolute, particularly when they clash with other super-statutes or with the Constitution.[198]

Under their theory, super-statutes must be embraced by the public at the time it is considered a super-statute, even if the statue was not originally celebrated or embraced.[199] As a matter of statutory interpretation, the authors contend that super-statutes should be construed liberally with an eye to the purposes of Congress, but perhaps not with a rigid adherence to some of the original expectations given the importance super-statues evolution over time.[200]

Eskridge and Ferejohn considered super-statutes as akin to constitutional change, but with a small "c."[201] Entrenchment of a statute into American life or culture is an essential element of super-statutes.[202] In the usual case, entrenchment is lengthy process driven by legislative and administrative processes, as opposed to the judicial process.[203] For example, the authors consider the Social Security Act to be a super-statute that was ill received by public at first, but later became a large part of American life.[204] Other scholars have adopted the "super-statute" language to describe statutes that appear to have more weight, heft, and staying power than a typical statute.[205]

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[197] *Id.* at 1216–17 (describing the requirements of a super-statute).

[198] *Id.* at 1216 ("Because super-statutes exhibit this kind of normative gravity, they have sufficient attraction to bend and reshape the surrounding landscape. Super-statutes do not always trump other sources of law, however, in party because they may clash not only with the Constitution but also with other super-statutes.").

[199] *Id.* at 1230–31 (discussing this requirement as it relates to the act that created the Bank of the United States).

[200] *Id.* at 1247.

[201] WILLIAM ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 12 (2010). In their book, Eskridge, Jr. and Ferejohn argue that that small "c" constitutional change is where most constitutional change occurs. Super-statutes may provide the way to provide both lasting effect while maintaining the ability evolve over time. *Id.* at 122.

[202] *See id.* at 111.

[203] *See id*. at 165 (discussing entrenchment). Some scholars reject the idea that entrenchment is necessary for a statute to have super-statute status. *See* Sam Simon, *How Statutes Create Rights: The Case of the National Labor Relations Act*, 15 U. PA. J. CONST. L. 1503 (2013) (arguing that the National Labor Relations Act should be interpreted in the manner of a super-statute, even if it does not contain some of the hallmarks of the designation).

[204] *See id.* at 186 (discussing the Social Security Act). Conversely, statutes can lose their status as super-statutes if public sentiment and support underpinning the statute dissipate over time. *Id.* at 122 (discussing deentrenchment). When agencies implement super-statutes, those interpretations are also subject to deference. *See id*. at 264–65 (considering the intersection of super-statutes and *Chevon* deference). Conversely, at least one scholar argues that a super-statute could be interpreted *against* the enforcing agency if the agency does not consider the people the law was intended to serve. *See* Twinette L. Johnson, *In the Room Where It Happens: Including the "Public's Will" in Judicial Review of Agency Action*, 72 ARK. L. REV. 467 (2019) (arguing that because the Higher Education Act is a super-statute, it should be interpreted in light of normative values, even if the Department of Education acts contrary to those values); Twinette L. Johnson, *50,000 Voices Can't Be Wrong, but Courts Might Be: How Chevron's Existence Contributes to Retrenching the Higher Education Act*, 103 KY. L.J. 605 (2015).

[205] *See, e.g.*, Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207 (2015) (considering the Administrative Procedure Act a super-statute but questioning whether the APA should be given such broad deference by the Supreme Court); Garrick B. Pursley, *Defeasible Federalism*, 63 ALA. L. REV. 801 (2012); Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641 (2014).

Although likely not intended to become a super-statute at the time, the FAA meets the Eskridge and Ferejohn three-part test. Under the first part, the FAA has undeniably altered "then-existing regulatory baselines."[206] Congress passed the FAA to reverse "judicial hostility" towards arbitration agreements and to make agreement to arbitrate enforceable under the theory of specific enforcement.[207] Although the legislative history suggests that Congress intended the FAA to apply to business disputes,[208] the post-enactment interpretation by the Court in extending the FAA to statutory claims,[209] claiming involving consumers,[210] and class action claims[211] all demonstrate that the FAA established a new norm for the resolution of private disputes.

Under the second part of the test, the FAA could be described as creating a new normative or institutional framework for arbitration. While many super-statutes have broad regulatory schemes interpreting them,[212] the FAA managed to create a new framework through a short and simple statute.[213] The FAA, however, is not the only procedural super-statute without an administrative scheme. Similar arguments have been made about the status of the Administrative Procedure Act (APA),[214] which is more robust than the FAA but also focused on procedure, rather than substantive rights.

The third prong of test considers whether the statute has a lasting effect on society. In their first paper on super-statutes, Eskridge and Ferejohn described the impact of civil rights and environmental statutes over time, focused on the impact the statutes have at the time of interpretation – not the time of enactment.[215] While the FAA has had lasting impact on society, particularly the creation of new norms of private dispute resolution,[216] the effects of

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[206] Eskridge Jr. & Ferejohn, *supra* note 196, at 1230.

[207] Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 719 (2015).

[208] *Id.* at 726–27 (describing legislative history, particularly the business interests who lobbied Congress for its passing).

[209] *See, e.g.*, Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (applying the FAA to individual investor claims under the Securities Act); Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989) (applying the FAA to individual investor claims under the Securities Act).

[210] *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (applying the FAA to cases involving predatory lending in the check-cashing industry); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012) (applying the FAA to cases involving the credit repair industry).

[211] *See* Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010) (finding that the arbitrator improperly certified a class); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (holding that California law invalidating class action waivers was preempted).

[212] *See supra* notes 194–95 (describing examples of super-statutes, most of which have broad regulatory schemes).

[213] The FAA only has sixteen provisions, most of which are short. *See* 9 U.S.C. §§ 1–16.

[214] *See* Kovacs, *supra* note 205 (discussing the status of the APA as a super-statute).

[215] *See* Eskridge Jr. & Ferejohn, *supra* note 196, at 1237–46 (describing the broad support for the general notions underlying these statutes).

[216] *See, e.g.*, Jane Flanagan & Terri Gerstein, *"Sign on the Dotted Line": How Coercive Employment Contracts are Bringing Back the Lochner Era and What We Can Do About It*, 54 U.S.F. L. REV. 441, 443 (2020) ("Coercive contracts have also threatened workers' abilities to exercise voice, most obviously through mandatory arbitration and class/collective action waivers, but also through broad confidentiality and non-disparagement clauses that may chill workers from discussing the terms and conditions of work with their colleagues."); Ashley M. Sergeant, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 157 (2015) ("Corporations quickly began to recognize arbitration as an alternative to litigation and began using this procedure to settle many employment disputes."); Carmen Comsti,

these norms are politically polarizing.[217] While most individuals can agree on the basic principles of concepts such as antidiscrimination and conservation, whether the same can be said about the benefits of arbitration is significantly less likely. While arbitration has become an entrenched concept among the business community, it does not carry the same popularity among the general public. However, given its prevalence in modern contract drafting, this prong could be considered satisfied.

The FAA is also interpreted in the same way as a super-statute. Super-statutes are often interpreted with purposivist tools of interpretation.[218] Eskridge and Ferejohn observed that super-statutes are read purposivistly even by Justices who commonly apply originalist tools.[219] In addition, the Court relies on deferential canons to give broad interpretation to super-statutes.[220] As noted in my previous research, these patterns are evident in interpretation of the FAA. The most prevalent tools of interpreting the FAA include the statutory text, prior FAA precedent (building on itself), and self-serving arbitration canons.[221] My research also uncovered the prevalence of purposivist tools such as the intent of the FAA and its practical consequences, even when interpreted by conservative justices.[222]

Super-statutes have a "gravitational" pull on other law.[223] In every case in which the Supreme Court considered a potential conflict between the FAA and another statute, the FAA prevailed, with the Court claiming that the statutes could be read together.[224] The Court has sided with the FAA even when it collides with other super-statutes. This trend includes the fact that the Supreme Court has found disputes arbitrable that fall under the Sherman Antitrust Act,[225] the Age Discrimination in Employment Act,[226] and the National Labor Relations Act..[227] In 2001, Eskridge and Ferejohn noted the FAA's super-statute status

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A Metamorphosis: How Forced Arbitration Arrived in the Workplace, 35 BERK. J. OF LAB. & EMP. L. 5, 6 (2014) ("Over the past twenty years, there has been movement away from the public enforcement of statutory workplace rights in favor of a private system of forced arbitration of employment disputes.").

[217] *See, e.g.*, David L. Noll & Zachary D. Clopton, *An Arbitration Agenda for the Biden Administration*, 2021 U. ILL. L. REV. ONLINE 104, 105 (2021) (discussing that tools are available for the executive to limit arbitration as a political matter); F. Paul Bland, et al., *From the Frontlines of the Modern Movement to End Forced Arbitration and Restore Jury Rights*, 95 CHI. KENT L. REV. 585, 586 (2020) ("Over the past decade, battles over the legality of forced arbitration have been waged all across the nation in courtrooms, legislative chambers, and boardrooms, pitting two sets of combatants against one another.").

[218] Eskridge Jr. & Ferejohn, *supra* note 196, at 1234 (a "super-statute will generally be applied in a purposive rather than simple text-bounded or originalist way").

[219] *Id.* (noting that the Burger and Rehnquist Courts interpreted Sherman Antitrust Act in a purposive way, despite the Courts' general trend of emphasizing plain meaning).

[220] *Id.* at 1249–52 (describing canon use with a super-statute).

[221] *See* Blankley, *supra* note 3.

[222] *Id*.

[223] Eskridge Jr. & Ferejohn, *supra* note 196, at 1236.

[224] Blankley, *supra* note 3.

[225] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc, 473 U.S. 614, 636-37 (1985) (holding that the claims under the Sherman Antitrust Act were subject to arbitration).

[226] Gilmer v. Interstate/Johnson Lane Corp. 500 U.S. 20, 35 (1991) ("We conclude that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act.")

[227] *See Epic Sys. Corp*., 135 U.S. 612, 1632 ("Because we can easily read Congress's statutes to work in harmony, that is where our duty lies."); Eskridge & Ferejohn, *supra* note 196, at 1227 (describing the NLRA as a super-statute).

beginning with the *Mitsubishi* case,[228] and subsequent Supreme Court cases solidify this conclusion.

Given this framework, the Court has certainly treated the FAA as a super-statute. It relied on the same interpretive tools as it used with other super-statutes. The creation of the arbitration canon buttressed the conclusion that the Court treated the FAA as a super-statute. The FAA's prevalence over other substantive law further supports this conclusion.

At least three facts suggest that the FAA *should not be* considered a super-statute, despite its treatment. First, the turning point for the FAA arrived in the mid-1980s, sixty years after its passage, and Congress likely intended the FAA to be ordinary. Second, the lack of a large regulatory scheme supporting the statute cuts against its status. Third, while entrenched in the business community, arbitration is not particularly well known or popular among the general public. Criticism aside, characterizing the FAA as a super-statute helps explain the Court's treatment of the FAA, particularly when it potentially conflicts with other federal law.

E. The Future of the Conflicts of Federal Law Docket?

The future of the arbitrability of federal claims is difficult to predict from tools of statutory interpretation, in part because of the low number of cases within this dataset. Judging by outcomes is certainly an easier task than judging by statutory tool. Since overturning *Wilko v. Swan*, the Court has never found a "contrary congressional command" that would prevent arbitration of claims falling under it.[229] In other words, unless Congress makes explicit a desire that claims under a federal statute *not* be arbitrated, the Court is highly likely to allow those claims to be arbitrated while citing the substantive canon favoring the reading of statutes harmoniously.[230] In this way, the FAA operates as a super-statute having an overweighted effect on other statues working in the same area as arbitration.

As for tools of interpretation, the Court's reliance on practical circumstances in this set of cases is noteworthy and one that may continue to be persuasive. Although the controlling practical considerations change over time, the Court invokes them time and time again. Practical considerations may be particularly important in this area given the fact that these cases involve two federal statutes, both of which may have competing interests and disparate impacts on parties, including employers, employees, consumers, and businesses. To the extent that these cases also involve class action issues (admittedly less frequently than other arbitration cases), the justices will also take into account the realities surrounding whether those cases proceed as a class or individually.

VI. CONCLUSION

This Article provides an in-depth analysis of the statutory tools of interpretation used by the Supreme Court as it interprets the FAA in different lines of arbitration cases. By breaking down the arbitration docket into the categories of class action cases, preemption

[228] Eskridge Jr. & Ferejohn, *supra* note 196, at 1262–63 (discussing *Mitsubishi* and the FAA's status as a super-statute).

[229] CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012) (citing *McMahon*, 482 U.S. at 226).

[230] *See supra* notes 175-77.

cases, arbitrability cases, and conflicts of federal law cases, new patterns begin to emerge, even if the data sets are too small to detect much statistical significance.

If the past is a predictor of the present, some trends are worth following. First, the class action cases will likely continue to build off of themselves, by relying on past precedent and the arbitration canon, creating a jurisprudence based, theoretically, on the text of the FAA, but a text that does not mention class actions at all. Second, the Court will likely continue to give the FAA broad preemptive power given not only its support across the Court but also because of the "Thomas Effect" preserving this power if necessary. Third, the arbitrability cases stand as a microcosm of the entire arbitration docket, even though they do not contain any strong trends. Finally, this paper begins a decision on whether the FAA is, or more importantly should be, a super-statute. Although the FAA appears to meet the definition of a super-statute in both interpretation and effect, future research should continue to answer questions about whether this treatment is justified.