Correcting a Flaw in the Arbitration Fairness Act

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The proposed Arbitration Fairness Act of 2013 will ban courts from enforcing arbitration agreements in the employment and consumer contexts. This law will protect America’s employees and consumers by keeping the courthouse door open to critical civil rights, employment, and consumer protection litigation. However, the proposed Arbitration Fairness Act suffers from a subtle flaw: it is uncertain whether the law will apply to the states. This flaw, which arises from one of the greatest constitutional errors the Supreme Court has ever made, must be corrected in order to provide the broadest protection to millions of American employees and consumers, and to prevent years of needless litigation and confusion.

INTRODUCTION

Millions of American consumers and employees are unjustly bound by arbitration agreements and forced into a secretive, second-class system of justice. Pursuant to the Federal Arbitration Act of 1925 (FAA), arbitration agreements are generally enforceable, and courts today routinely enforce arbitration agreements in the employment and consumer contexts. However, the FAA was never intended to apply broadly to all employment and consumer disputes. Instead, the Federal Arbitration Act was designed to facilitate the arbitration of simple contract disputes between two merchants.

Over the last few years, and most recently in the spring of 2013, members of Congress have introduced bills to amend and restore the original intent of the FAA. The 2013 bills, known as the Arbitration Fairness Act (AFA), prohibit the enforcement of arbitration agreements in employment and consumer transactions. The supporters of these bills desire to protect employees and consumers who are seeking a public court as a forum for enforcing some of the most important legislation in American history, such as civil rights, wage and hour, and consumer protection legislation.

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Unfortunately, the proposed AFA suffers from a subtle flaw that will undermine these good intentions. Left uncorrected, this flaw may lead to needless confusion, years of wasteful litigation, and weakened enforcement of civil rights, employment, consumer protection, and antitrust laws. As explored in more detail below, it is not clear whether the proposed AFA would apply solely in federal court, or whether the proposed bill would also bind state courts. This flaw exists because of a controversial Supreme Court decision, Southland Corp. v. Keating, which has been described as one of the greatest constitutional errors ever made by the Supreme Court. If Congress enacts the AFA in its current form, employers and large corporations may try to exploit this flaw and attempt to limit the application of the statute by arguing that the AFA is not applicable in state court. These arguments would involve much wasteful litigation and likely result in conflicting decisions. Some state courts would likely accept these arguments and continue forcing employees and consumers to submit their disputes to arbitration, thereby undermining the goals of the AFA.

The AFA should be amended so that all courts, both state and federal, are prohibited from enforcing arbitration agreements in the employment and consumer contexts. Part I of this article provides background on the need for the AFA. This part provides an overview of the FAA, the application of the FAA to employment and consumer disputes, and the proposal to amend the FAA through the enactment of the AFA of 2013. Part II of this article discusses the Supreme Court’s wrongly-decided Southland decision, and the resulting flaw in the AFA. Part III concludes with simple solutions to correct this flaw, in order to provide greater protection for millions of American employees and consumers.

I. THE NEED FOR THE ARBITRATION FAIRNESS ACT OF 2013

This section provides some background for understanding the need for the proposed AFA. First, this section examines the FAA and its original purpose: to facilitate arbitration of merchant-to-merchant disputes. Next, this section discusses how courts have misconstrued the FAA, applying it to employment and consumer disputes. This section concludes with an examination of the proposed AFA, which would amend the FAA and restore its original meaning.

A. The Original Intent Behind the Federal Arbitration Act of 1925

Arbitration is a method of dispute resolution in which parties submit their dispute to a neutral, private decision-maker, and arbitration has been used around the world since ancient times. However, in the United States, prior to the 1920s, courts generally refused to enforce arbitration agreements, particularly agreements

4. David S. Schwartz, Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act, 67 LAW & CONTEMP. PROBS. 5, 54 (2004) ("In Southland, the Court made an error of constitutional proportions that is in significant respects comparable to the error of Swift v. Tyson, which the Court famously corrected [almost one hundred years later].").
5. See, e.g., DEREK ROEBUCK, EARLY ENGLISH ARBITRATION (2008); DEREK ROEBUCK, ROMAN ARBITRATION (2004); DEREK ROEBUCK, ANCIENT GREEK ARBITRATION (2001).
to arbitrate future disputes. At the time, there was a prevailing belief that the enforcement of arbitration agreements would improperly allow private parties to limit government power and “oust” courts of the jurisdiction granted to them by the United States Constitution.

In 1925, arbitration law radically changed in the United States when Congress enacted the FAA, which generally makes arbitration agreements binding and enforceable.

Multiple factors contributed to the enactment of the FAA and similar state statutes during the 1920s. A changing, growing national economy fostered the desire for new laws making arbitration agreements binding and enforceable. Before the development of a nationalized, interconnected economy, when merchants primarily traded within small, local communities, merchants could utilize arbitration without the need for strong arbitration laws. Informal pressures, such as a desire to maintain one’s reputation and business relationships within a small community, encouraged local merchants to use arbitration and to voluntarily comply with arbitration awards, without the need for strong arbitration laws. However, such voluntary utilization and compliance with arbitration became more challenging as the American economy nationalized as the result of advances in technology, communication, industrialization, and transportation. Merchants trading on a national level were hesitant to litigate disputes in unfamiliar forums, and without a strong arbitration law to enforce arbitration agreements, they were also hesitant to rely on arbitration proceedings. Thus, as the economy became more nationalized, merchants desired an efficient, binding method of resolving disputes out of court.

A broken court system further contributed to the enactment of the FAA. In the early 1900s, merchants sought to avoid court, viewing the court system as a broken failure, with highly technical, complex procedures and overcrowded dockets. Merchants desired a quick, simple alternative to litigating in an antiquated court system that was unresponsive to business needs.

In response to strong lobbying from dozens of businesses and trade organizations, Congress enacted the FAA in 1925. The operative language of the FAA provided that arbitration agreements are “valid, irrevocable, and enforceable.”

As such, the FAA reversed the prior law under which courts would refuse to en-
force arbitration agreements. The FAA facilitates arbitration and provides for summary judicial enforcement of arbitration agreements and awards.\(^{15}\)

As explained below, the history of the FAA's enactment and testimony presented in Congress in support of the FAA clearly indicate that the FAA was intended to facilitate the arbitration of commercial disputes between merchants, not employment or consumer disputes.\(^{16}\) The prototypical dispute covered by the FAA was a simple contract dispute regarding the quality of goods sold between two merchants located in different states.\(^{17}\) However, the Supreme Court has expanded the meaning of the FAA far beyond its original purpose.

1. The Federal Arbitration Act Was Never Intended to Apply in the Employment Context

The FAA was never intended to apply to labor or employment disputes. When the FAA was enacted in 1925, Congress' power under the Commerce Clause of the United States Constitution was narrowly construed, and labor and employment disputes were generally considered to be local issues, not involving interstate commerce.\(^{18}\) Therefore, because the FAA was enacted pursuant to Congress' power under the Commerce Clause, the FAA generally could not be applied to labor or employment disputes.

Although labor and employment issues were generally beyond the scope of the Commerce Clause, one class of workers were viewed as engaged in interstate commerce when the FAA was enacted. Transportation workers who crossed state lines, such as railroad employees, were considered to be involved in interstate commerce and were, therefore, subject to Congressional regulation.\(^{19}\) However, section one of the FAA contained an exemption for such employees:

\[\text{[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.}\] \(^{20}\)


\(^{16}\) See infra, Sections I.A.1 and I.A.2.

\(^{17}\) For example, during a Congressional hearing in 1924, a witness testified that the FAA would help support arbitration of a dispute between a seller of a carload of potatoes from Wyoming and a dealer from New Jersey. Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations, Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924). See also id. at 30-31 (arbitration legislation would help reduce "business litigation" and encourage "business men" to settle their "business differences"); id. at 41 ("If business men desire to submit their disputes to speedy and expert decision, why should they not be enabled to do so?").

\(^{18}\) See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down as unconstitutional a federal child labor law because the Commerce Clause did not cover employees working within a state to produce items that will be shipped out of state), overruled by U.S. v. Darby, 312 U.S. 100 (1941).

\(^{19}\) Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 136 (2001) (Souter, J., dissenting) (citing The Employers' Liability Cases, 207 U.S. 463, 496, 498 (1908) (regulation of the employment relations of railroad employees engaged in the operation of interstate commerce is permissible under the Commerce Clause, but regulation of a railroad company's clerical force is not)).

This explicit exemption of the only employees then regulated by the federal government reveals that the statute was not intended to apply to employment disputes. When Congress enacted the FAA, the narrow scope of the Commerce Clause meant that most American workers were not covered by the statute. Additionally, the text of the FAA expressly exempts from its coverage the limited class of workers engaged in interstate commerce.

The earliest drafts of the FAA did not contain the labor and employment exemption now found in section one. There was no need for the exemption because the FAA was drafted and intended for use in commercial disputes between merchants, and because most employment and labor disputes were beyond the scope of Congress' Commerce Clause powers. A labor and employment exemption was eventually added to the bill in an abundance of caution.

When the bills that would become the FAA were first introduced in Congress in 1923, the bills were sent to the Judiciary Committee, which held hearings regarding the bills. In January 1923, before one of the hearings, Senator Thomas Sterling of South Dakota, a member of the Senate Judiciary Committee, received a letter from an important constituent, a prominent lawyer whose firm had significant clients with employees involved in interstate transportation, such as large railroad companies and parcel transportation businesses. The lawyer raised concerns about the FAA's applicability to workers engaged in interstate commerce. Senator Sterling shared these concerns with Charles L. Bernheimer and Julius H. Cohen, two leading, instrumental figures in the movement to reform America's arbitration laws during the 1920s.

In preparation for a January 1923 hearing on the bills, Cohen drafted several amendments in response to concerns raised by Senator Sterling and his constituent. One of these amendments was the labor and employment exemption now found in section one of the FAA. Cohen summarized this amendment as having the effect of "leav[ing] out labor disputes." Cohen did not view this section one exemption as materially changing the bill. The section one exemption merely clarified what was generally understood: the FAA was intended for commercial disputes between merchants, not labor or employment disputes.

Additionally, in January 1923, labor interests were raising concerns about arbitration. At the annual conference of the International Seamen's Union in New York, the union's president, who was influential in passing important maritime
laws protecting seamen, condemned the arbitration bills pending in Congress. He explained that seamen would have no choice and be forced to sign arbitration agreements as a condition of employment, and if these agreements were enforceable under the law, seamen would lose the important procedural and constitutional protections available in court. The exemption for labor and employment disputes now found in section one of the FAA was added as an amendment to the original bill in order to alleviate the concerns raised by labor interests.

Shortly before the January 1923 hearing, Charles Bernheimer, who was known as the Father of Commercial Arbitration and the driving force behind the enactment of the FAA, discussed these labor concerns with another supporter of the pending arbitration bills. Bernheimer explained that labor groups were keenly aware of any pending legislation that could "even remotely imperil [their] interests," and labor groups had "plenty of money to spend" to lobby and defeat legislation. Bernheimer and his colleague discussed how the FAA was intended for commercial disputes, not labor or employment disputes.

During the January 1923 hearing, William H. H. Piatt, a lawyer who served as the chairperson of the American Bar Association’s Committee on Commerce, Trade, and Commercial Law, testified in favor of the FAA, explaining that labor interests need not worry about the FAA, because

[I]t was not the intention of the bill to have any such effect [compelling arbitration of employment disputes.] It was not the intention of this bill to make an industrial arbitration in any sense.

In order to allay any concerns of labor interests, Piatt suggested that the bill be amended to include the labor and employment exemption now found in section one of the FAA. Piatt concluded his testimony by stressing the bill was intended to cover commercial disputes between merchants, not labor and employment disputes:

It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

Also in connection with the January 1923 hearing, Herbert Hoover, then the Secretary of Commerce, submitted a letter for the record, which illustrated that the
FAA was never intended to cover employment disputes. In the letter, Hoover recommended adding the exemption language to the pending bills. Hoover explained that the exemption should be added to prevent the “inclusion of workers’ contracts in the law’s scheme.”

About one month after the January 1923 Congressional hearing, Bernheimer sent a letter to an editor of the Saturday Evening Post, which confirms that the labor and employment exemption was added to section one of the FAA in order to alleviate the concerns of labor interests. In his letter, Bernheimer explained that the bills were being amended to add the labor exemption in response to the objections of the Seamen’s Union. Bernheimer emphasized that as a result of the amendment, “all industrial questions had been eliminated” from the reach of the FAA.

The text of the FAA, its legislative history, and the history behind its enactment, clearly reveal that the FAA was intended to facilitate the arbitration of commercial disputes between merchants, and that labor or employment disputes were expressly removed from the purview of the FAA.

2. The Federal Arbitration Act Was Never Intended to Apply to Take-It-Or-Leave-It Consumer Contracts

During the January 1923 hearing discussed above, Senator Thomas J. Walsh of Montana raised concerns about enforcing arbitration clauses presented by a party with stronger bargaining power on a “take-it-or-leave-it” basis, such as a standard, non-negotiable contract drafted by an insurance company. Senator Walsh explained that such contracts are “not really voluntary contracts.” Piatt, the American Bar Association lawyer who was testifying in favor of the FAA, agreed with the Senator and explained that the FAA was not intended to apply to such take-it-or-leave-it contracts. Rather, the purpose of the FAA was to facili-
tate the resolution of commercial disputes between merchants who knowingly and voluntarily agreed to arbitrate.45

The jurisdictional scope of the FAA in 1925 also helps demonstrate that the FAA was not intended to cover consumer disputes. At the time the FAA was enacted, in order for a federal court to have jurisdiction over a dispute, the dispute had to involve at least $3,000.46 If adjusted for inflation, this amount of $3,000 in 1925 would be about $40,000 in 2013.47 Thus, disputes of small dollar amounts were not intended to be heard by the federal judiciary. In an early draft of the FAA, it was proposed that the $3,000 minimum be removed, so that the FAA would cover disputes involving small dollar amounts.48 However, Congress rejected this early draft of the FAA.49 Consequently, when the FAA was enacted, it only applied to disputes where at least $3,000 was in controversy, an amount that far exceeded the value of routine consumer transactions. Thus, the vast majority of consumer contracts formed at the time of the FAA’s enactment would not have met the jurisdictional threshold of $3,000. As such, it is clear that Congress never intended for the FAA to cover routine consumer contracts.

B. Courts Today Are Misconstruing the Federal Arbitration Act

The FAA was never intended to apply to employment disputes or consumer contracts of adhesion. However, today it is common for courts to apply the FAA in these two circumstances, forcing employees and consumers to submit their disputes to private arbitration.

In a 2001 case, Circuit City Stores, Inc. v. Adams, the Supreme Court held that the FAA applies to employment disputes.50 In this case, the former consumer electronics retailer, Circuit City, invoked the FAA in federal court to enforce an arbitration agreement with an employee.51 Circuit City filed its suit in order to enjoin the employee from pursuing an employment discrimination lawsuit in state court.52 The federal district court compelled arbitration of the employee’s discrimination claims.53 The Ninth Circuit Court of Appeals reversed, holding that the FAA did not apply to employment disputes.54 The Supreme Court granted Circuit City’s petition for certiorari in order to resolve a circuit split as to whether the FAA applied to employment disputes.55

As explained above, the drafters of the FAA added the section one exemption in order to make clear that the statute did not cover employment disputes.56 How-

45. Id.
48. SZALAI, supra note 9, at 123, 134, 181, 182.
49. Id.
51. Id. at 110.
52. Id.
53. Id.
54. Id. at 105; see also Circuit City Stores, Inc. v. Adams, 194 F.3d 1070, 1071-1072 (9th Cir. 1999).
56. See supra notes 18-41 and accompanying text.
ever, in *Circuit City*, the Court interpreted the section one exemption very narrowly, construing it to reach the opposite conclusion. The majority interpreted the exemption to refer solely to *transportation* workers, not all workers.\(^{57}\) Although the section one exemption refers broadly to any "class of workers engaged in foreign or interstate commerce" as being beyond the purview of the statute,\(^{58}\) the majority reasoned that this broad reference to workers should be interpreted narrowly to refer solely to *transportation* workers because the exemption begins with more specific references to seamen and railroad employees.\(^{59}\) The majority relied on a canon of statutory construction, providing that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."\(^{60}\) Under this rationale, the general reference to workers in the exemption should be interpreted narrowly as exempting only transportation workers from the reach of the FAA.\(^{61}\) Because the majority believed that the language of the FAA was clear, the Court found it inappropriate to examine the FAA's legislative history.\(^{62}\) Under the Supreme Court's *Circuit City* holding, only transportation workers are excluded from the FAA's coverage, and thus, all other employment relationships fall within the FAA's coverage.\(^{63}\)

Justices Stevens and Souter each wrote strong dissenting opinions, both of which were joined by the other dissenter as well as Justices Ginsburg and Breyer.\(^{64}\) The dissenters criticized the majority for "playing ostrich" with the history and background of the FAA.\(^{65}\) The dissenters explained that the FAA was intended to cover only commercial disputes,\(^{66}\) and that at the time of the FAA's enactment, employment relationships were not considered to be within the scope of Congress' Commerce Clause power.\(^{67}\) The only employment relationships subject to such power were workers who were actually engaged in interstate commerce, like railroad workers.\(^{68}\) And, as discussed above, Congress chose to explicitly remove such workers from the reach of the FAA. Considering the historical context and the legislative history, the dissenters explained that Congress intended to exclude all employment relationships from the coverage of the FAA.\(^{69}\)

Following the majority opinion in *Circuit City*, courts today routinely enforce arbitration agreements in the employment context, and employees are forced to bring many important discrimination, harassment, and wage and hour disputes to
private arbitrators in proceedings with very limited procedural rights. However, Congress never intended to create this scheme of private arbitral tribunals for employment disputes.

It has also become routine for courts to order consumers to submit their disputes to arbitration, even where the consumer clearly lacked bargaining power and the arbitration agreement is contained in a contract of adhesion. The Supreme Court has found consumer claims to be subject to arbitration in connection with credit card agreements, cell phone agreements, nursing home contracts, and check cashing transactions. Lower courts also routinely compel arbitration of consumers' claims. However, as explained above, the FAA was intended to cover commercial disputes between merchants, not small consumer disputes arising from "take-it-or-leave-it" contracts between parties with unequal bargaining power.

C. The Arbitration Fairness Act of 2013

Over the past few years, Congress has made numerous attempts to limit the use of arbitration and the scope of the FAA. However, to date, the legislature has only successfully restricted the use of arbitration in limited, particular circumstances. For example, in 2001, Congress passed a law prohibiting automobile manufacturers from requiring franchisees to enter into pre-dispute arbitration agreements. Also, in 2010, as a part of the Dodd–Frank Wall Street Reform and Consumer Protection Act, Congress authorized the newly-created Consumer Financial Protection Bureau to regulate arbitration agreements in contracts for consumer financial products and services. Although there have been some limited successes in restricting the use of arbitration and scaling


71. See supra notes 18-41 and accompanying text.


73. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).


77. See supra notes 42-49 and accompanying text.

78. Thomas V. Burch, Regulating Mandatory Arbitration, 2011 UTAH L. REV. 1309, 1332-34 (2011) (recognizing that between 1995 and 2010, 139 bills were introduced in Congress to eliminate or restrict the use of arbitration, and only 5 of these bills became law).

79. 15 U.S.C. § 1226(a)(2) (2012) ("Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.").

back the scope of the FAA, the more ambitious legislative attempts to ban arbitration broadly in the consumer and employment contexts have thus far failed. Over the past decade, several bills have been introduced in Congress to limit the use of arbitration in the consumer and employment contexts, and these bills have generally died in committee, without making it to the floor of the House or Senate for a vote.

The most recent legislative attempt to enact a broad ban was in the spring of 2013, when Senator Al Franken of Minnesota and Representative Hank Johnson of Georgia introduced identical bills in Congress known as the Arbitration Fairness Act of 2013 (AFA). The introduction to the AFA includes several Congressional findings. The introduction recognizes that the FAA was originally intended to cover disputes between commercial entities with relatively equal bargaining power, and explains that the Supreme Court has expanded the scope of the FAA, applying it to consumer and employment disputes, contrary to the intent of Congress. The introduction further explains that most consumers and employees have no meaningful choice in whether to submit their claims to arbitration, and they often are not aware that they have given up the right to go to court. Additionally, the introduction recognizes that arbitration can "undermine the development of public law."

The principal provision of the AFA, titled "Validity and enforceability," states that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." This section, which amends the FAA, would broadly ban arbitration agreements in contexts where they are commonly used today.
According to its sponsors, the AFA seeks to "[r]estore[] the original intent of the FAA . . . ." By ignoring and twisting the original meaning of a statute enacted by the legislative branch, the judiciary creates a breakdown in America’s democratic, constitutional system of government. The AFA is justified on the basis of restoring the original intent of Congress in enacting the FAA and overturning flawed, expansive Supreme Court decisions.

In addition to correcting this separation of powers problem, there are other justifications for the AFA. Although not explicitly stated in the AFA’s introductory findings, statements of sponsors have made it clear that the AFA is intended to address recent Supreme Court decisions relying on the FAA in order to limit the availability of class proceedings:

This series of [Supreme Court] holdings erodes the rights of consumers and further immunizes corporations from accountability. The [FAA] was originally passed to ensure that the courts enforced commercial arbitration agreements between two companies, not between companies and consumers. The Supreme Court’s expanded interpretation of the FAA allows companies to insulate themselves from liability when they defraud a large number of customers of a relatively small amount of money.

Class actions have played an important role in American society by providing collective relief to large groups of individuals when the pursuit of individual claims would not be feasible. However, current interpretations of the FAA threaten the availability of class actions. Requiring arbitration of consumer disputes is very attractive to companies, because if a plaintiff consumer seeks to certify a class action in court, the court will be required to compel arbitration, and the plaintiff will generally be required to arbitrate his claim on an individual basis. Compelling individual arbitration effectively forecloses the pursuit of a class action in court and helps insulate companies from class action liability, and a class action is one of the few swords available to consumers with small damages.

However, it was never the intent of Congress for the FAA to be used as a shield for class action liability. When Congress enacted the FAA in 1925, modern, complex class-action litigation did not even exist, making it impossible for Congress to have contemplated that arbitration agreements could prohibit parties from pursuing class action relief in court. If the AFA is enacted, arbitration clauses could

93. Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.") (alteration in original).
94. Although representative actions were allowed in equity for limited types of relief, class actions for damages did not become available in America until the adoption of the Federal Rules of Civil Procedure in 1938. Modern class actions did not really exist until 1966, when Rule 23 of the Federal Rules of Civil Procedure was significantly overhauled. WILLIAM B. RUBENSTEIN ET AL., I NEWBERG ON CLASS ACTIONS §§ 1.12-1.15 (5th ed. 2011).
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no longer be used as a shield against class action liability, and consumers and employees would be able to pursue class actions in court.95

Another justification for the enactment of the AFA is the importance of developing public law. The introductory section of the AFA recognizes that "[m]andatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators’ decisions."96 Forcing consumers and employees into arbitration can undermine important civil rights and consumer protection laws. When disputes are arbitrated, there is rarely an opportunity for appellate review, as the standard of review for arbitral awards is “among the narrowest known at law,”97 requiring that courts affirm even “grave error[s]” by an arbitrator.98 Conversely, when disputes are litigated in court, errors by the trial court are typically reversible on appeal.99 Appellate review helps ensure that important laws, like civil rights laws and consumer protection laws, are being applied correctly.100 Public access to trial and appellate court decisions contributes to the development and better understanding of law. A body of publicly-available precedent assists judges in deciding cases and applying the law uniformly, and such publicly-available decisions can help inform the public about the meaning of a law. Of course, courts can reach conflicting decisions, but having publicly accessible decisions can highlight close legal questions for legislatures and appellate courts to address and clarify. Often, conflict between the decisions of various jurisdictions is what notifies legislatures of a need for legislative action or reform. Publicly-available judicial decisions aid development, understanding, and compliance with the law.101

When voluntarily entered into, arbitration can be fair and mutually advantageous to both parties involved in a proceeding. However, arbitration can also be used to disadvantage weaker parties. Stronger parties, like employers and corporations, can tilt the scales in their favor, as the party drafting the arbitration agreement. The party that drafts such agreements controls the terms and can take

95. Also, as mentioned above, the AFA exempts antitrust disputes from the coverage of the FAA, but only if the plaintiff is seeking class relief. S. 878, 113th Cong. § 3 (2013); H.R. 1844, 113th Cong. § 3 (2012). This definition is not limited to particular categories of plaintiffs, like consumers or employees. Thus, corporate franchisees seeking to bring antitrust class actions against a franchisor could rely on the protections of the AFA, and such disputes could not be subject to a binding pre-dispute arbitration clause. As a result, the AFA would in effect overrule the result in American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013), where the Supreme Court reversed the Second Circuit’s invalidation of an arbitration clause in connection with an antitrust class action. Id. at 2308-2312.

96. S. 878 § 2(4); H.R. 1844 § 2(4).

97. Raymond James Fin. Servs., Inc. v. Bishop, 596 F.3d 183, 184 (4th Cir. 2010) (“We are mindful that vacatur of an arbitration award is, and must be, a rare occurrence because a federal court employs a standard of review ‘among the narrowest known at law.’”) (alteration in original) (citation omitted). See also 9 U.S.C. § 10(a) (setting forth the standards for vacatur of an arbitration award).

98. Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064, 2070 (2013) (“All we say is that convincing a court of an arbitrator’s error—even his grave error—is not enough.”).

99. See, e.g., Elvis Presley Enters., Inc. v. Capece, 141 F.3d 188, 196 (5th Cir. 1998) (“We review questions of law de novo and questions of fact for clear error.”).


101. See, e.g., State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (discussing how stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process”) (citation omitted).
the opportunity to impose severe limitations and unfair provisions, making it more challenging for employees and consumers to bring claims.

In Hooters of America, Inc. v. Phillips, an employer drafted an arbitration agreement requiring arbitration procedures that a court later described as "egregiously unfair" and "utterly lacking in the rudiments of even-handedness." The arbitration agreement required the employee to provide the employer notice of the claim from the outset, together with a list of fact witnesses, while the employer was not required to reciprocate with a responsive pleading, notice of its defenses, or any information about the employer's witnesses. The agreement further required that the employee select an arbitrator from a list generated exclusively by the employer, and summary judgment procedures were only available to the employer. In addition, the employer drafted appellate procedures allowing the employer to bring suit to vacate an award if the employer could show, by a preponderance of the evidence, that the arbitrators exceeded their authority. However, such appellate rights were not granted to employees. The court found that the employer had unfairly set up a "sham" system, and refused to enforce the arbitration agreement. Of course, not all arbitration agreements will be as extreme as the one described in Hooters, involving unfairness at all stages of arbitration. However, employers and corporations can draft arbitration provisions that, while not as severe as those imposed by Hooters, place a thumb on the scales of justice, making it more difficult for employees and consumers to vindicate their statutory rights. For example, employers and corporations can draft arbitration agreements limiting the time in which claims can be brought, limiting discovery rights, and adopting procedures that make it more difficult for individuals to bring a claim successfully. And, despite the intent of Congress in enacting the FAA, courts have enforced such agreements against consumers and employees.

Unfair arbitration agreements have weakened the impact of some of the nation's most important laws. Civil rights laws, wage and hour laws, and laws disallowing unfair business practices provide invaluable protections to vulnerable

103. Id. at 938.
104. Id. at 938-39.
105. Id. at 939. Prior to 2008, there was a circuit split regarding whether parties could expand the scope of judicial review of an arbitration award beyond the statutory grounds provided by the FAA. The Supreme Court resolved this circuit split by holding that the FAA provides the exclusive grounds for judicial review. Hall St. Assoc., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008).
106. Hooters, 173 F.3d at 939.
107. Id. at 940.
108. Id.
groups. The same policies that underlie legislation protecting vulnerable employees and consumers also provide support for the AFA. Enactment of the AFA would help preserve a public forum with broad procedural opportunities to enforce employee and consumer rights. When a court finds that an employer has violated civil rights or wage and overtime laws, the negative publicity surrounding such a ruling may have a shaming effect and discourage future wrongdoing by the defendant, as well as other employers. However, if such an employer has arbitration agreements with all of its employees, the employer’s wrongdoing may not easily come to light. Employees bound by arbitration agreements with limited procedural rights, such as limited discovery, may find it difficult to obtain counsel. Counsel may find arbitration, with its limited procedural rights, more challenging and less lucrative than litigation, with its broad procedural rights, including broad discovery and the right to a jury trial. As a result, many employees who hoped to vindicate their statutory rights may not even be able to bring a claim because of the difficulty in obtaining counsel. Even if a claim is brought to arbitration, the entire dispute may remain confidential, and the benefits of a public ruling are lost.

Finally, the AFA would reinforce the legitimacy of arbitration and build public confidence in the American justice system. Courts have compelled arbitration in situations where employees were not aware of an arbitration clause buried in their employment agreement or in a company manual, and where customers did not know of an arbitration clause kept behind the counter at a store. In cases such as these, consent to arbitrate does not truly exist. Absent actual consent to arbitrate disputes, compelling arbitration undermines the legitimacy of the arbitration proceeding itself, as the power of the arbitrator is supposed to be derived from the agreement of the parties. Additionally, compelling arbitration under these circumstances damages the public’s trust in the equity of our justice system. Forcing employees and consumers into arbitration when they were completely unaware of an arbitration clause, under the auspices of the FAA, in order to clear crowded dockets, undermines the public’s confidence in our legal system. By disallowing pre-dispute arbitration agreements in the employment and consumer contexts, the AFA will help ensure that the submission of disputes to arbitration is always a voluntary and conscious choice.

In sum, there are several justifications supporting the enactment of the AFA. Among other things, the AFA addresses a serious separation of powers problem, restores the availability of class actions for consumers and employees, promotes

111. See, e.g., Tinder v. Pinkerton Sec., 305 F.3d 728, 735-36 (7th Cir. 2002), aff’d No. 00-C-0170-C, 2000 WL 34237496 (W.D. Wis. Sept. 25, 2000) (enforcing arbitration agreement distributed as a “payroll stuffer” included with a paycheck, even though employee was not aware of the payroll stuffer); Scrivner v. ACE USA, No. 07-1329, 2007 WL 4124497, at *2 (E.D. Pa. Nov. 20, 2007) (“The plaintiff’s argument that she did not know the contents of, and was never given, the [Employee Guide containing the employer’s arbitration policy] is unavailing.”).
112. See James v. McDonald’s Corp., 417 F.3d 672 (7th Cir. 2005) (McDonald’s customer was bound to arbitrate because of language appearing on a french fry carton, which in turn directed the customer to read rules posted near the service counter).
113. See Filho v. Safra Nat. Bank of New York, 489 F. App’x 483, 484 (2d Cir. 2012) (“consent is the foundation of arbitration”) (citations omitted).
the development of law, and supports the policies underlying critical consumer rights and civil rights legislation.

II. THE ARBITRATION FAIRNESS ACT OF 2013 FAILS TO ADDRESS THE SUPREME COURT'S FLAWED SOUTHLAND DECISION

A. The Federal Arbitration Act is a Procedural Statute, Only Applicable in Federal Court

The FAA was originally intended to be a procedural statute applicable solely in federal court, not state court. The late Professor Ian Macneil wrote an excellent book thoroughly explaining the original intent in enacting the statute. As pointed out by Macneil, there is a strong textual argument that the FAA was never intended to apply in state court. The FAA is a fully "integrated, unitary statute." Sections one and two of the statute set forth key definitions and the core principle that arbitration agreements are valid, irrevocable, and enforceable. The remaining provisions of the FAA all support and implement the core principle of section two. One of these implementing sections, section four, provides the procedure by which "United States District Court[s]" may compel arbitration. Section four does not mention state courts. Because the FAA is a fully integrated, unitary, procedural statute, the specific reference in section four to federal courts makes it clear that the FAA was drafted for use only in the federal courts, not state courts.

As Professor Macneil explains, the enforcement of arbitration agreements at the time of the FAA’s enactment was viewed as a remedial issue, within the exclusive jurisdiction of the forum court where enforcement was sought. In other words, arbitration was considered merely a procedure to resolve a dispute, and the enforcement of arbitration agreements was within the law of procedure, not substantive law. As a result, the issue of whether an arbitration agreement is enforceable is a question of procedure and determined by the procedural law of the court where a proceeding is brought, not a matter of substantive law of the forum where the contract was made. Testimony before Congressional committees and Congressional reports confirm this understanding, that the FAA, as a procedural statute, was limited in applicability to federal courts, not the state courts.

115. Id. at 102-107.
116. Id. at 105. The statute sets forth a key principle, that an agreement to arbitrate is binding, and every provision of the FAA supports this key principle. None of the provisions of the FAA can stand alone or are meant to be interpreted separately from the rest of the statute. Id. at 105-06.
117. Id. at 102.
118. Id. at 102-05.
119. 9 U.S.C. § 4 (2012); MACNEIL, supra note 114, at 102-03.
120. 9 U.S.C. § 4 (2012); MACNEIL, supra note 114, at 102-03.
122. Id. at 109-11.
123. Id.
124. Id.
125. Id. at 110-13.
Macneil also emphasized that when the FAA was enacted, there was a complete lack of opposition. If the FAA were intended to apply in state courts and force states to grant specific performance of arbitration agreements, then the FAA would likely have been viewed, and opposed at least by some, as an "extraordinary expansion" of federal power and a "massive interference with state law." However, the complete lack of opposition to the FAA’s enactment substantiates the evidence that the FAA was intended to be applicable only in the federal courts.

In sum, for about six decades, from the FAA’s enactment in 1925 until about 1984, the FAA was considered a procedural statute applicable only in federal court. Because of the text of the FAA, which clearly limited its application solely to federal court, and because the enforcement of an arbitration agreement was a procedural remedy, governed by the law of the forum court, states were free to develop their own laws regarding arbitration.

B. The Supreme Court’s Flawed Southland Decision

In the 1984 case, Southland Corp. v. Keating, a majority of Supreme Court justices ignored the history and language of the FAA and transformed the FAA into a statute applicable in both federal and state court. The Southland case started when franchisees filed lawsuits in California state court against the Southland Corporation, the owner and franchisor of 7-Eleven convenience stores. The plaintiffs alleged fraud, breach of contract, breach of fiduciary duty, and violations of disclosure requirements under the California Franchise Investment Law. Southland responded by asking the court to enforce the arbitration clause in the franchise agreement. The lower court granted Southland’s motion to compel arbitration with respect to all claims, except for those arising out of the California franchise law. The trial court found, and the California Supreme Court affirmed, that claims based on the California franchise law could not be subject to arbitration because the law guaranteed a judicial forum for such claims, and waivers of the statute’s protections were void.

The Supreme Court of the United States granted Southland’s petition for certiorari, reversed the California Supreme Court, and changed the meaning and reach of the FAA. Instead of reading the statute as a unified whole, the Supreme Court’s decision analyzed only section two of the FAA in isolation; section two provides that arbitration agreements are valid, irrevocable, and enforceable.

126. Id. at 115-17.
127. Id. at 115.
128. Id. at 115-17.
129. See Wesley A. Sturges, A Treatise on Commercial Arbitration and Awards 88-96 (1930) (exploring differences in the arbitration laws of various states from the 1920s).
131. Id. at 1, 4.
132. Id. at 4.
133. Id.
134. Id.
135. Id. at 4-5, 10.
136. Id. at 1-2.
137. Id. at 10; see also 9 U.S.C. § 2 (2012).
The Supreme Court explained that this section mandates the enforceability of arbitration agreements, and there is nothing to indicate that this “broad principle of enforceability is subject to any additional limitations under State law.” The Supreme Court next explained that the FAA “rests on the [power] of Congress to enact substantive [laws] under the Commerce Clause,” and that such laws are generally enforceable in both state and federal courts.

The Supreme Court found that the non-waiver provisions of the California franchise law violated the Supremacy Clause of the Constitution. The Court reasoned that when Congress enacts a substantive law, the law is enforceable in both state and federal court. Additionally, the Court ruled that, in passing the FAA, Congress intended to foreclose states’ legislative attempts to undermine the enforceability of arbitration agreements. Thus, the Court reversed the California Supreme Court’s decision denying enforcement of the arbitration clause.

Justice O’Connor, joined by Justice Rehnquist, authored a forceful dissent. Justice O’Connor explained that the majority’s decision was motivated by an “understandable desire to encourage the use of arbitration,” but that Congress never intended for state courts to apply the FAA. Justice O’Connor cited several parts of the legislative history, demonstrating that the drafters viewed enforcement of arbitration agreements as part of the law of remedies. As such, they designed the FAA as a rule of procedure derived from Congress’ power to dictate procedure for federal courts, not a substantive law. Hence, the FAA, as a procedural law, would apply only in federal court.

The dissent also noted that the structure of the FAA contradicted the majority’s ruling. Section four of the FAA implements the core principle established in section two, that arbitration agreements are valid, irrevocable, and enforceable, and section four applies only in federal court. The dissent concluded by explaining that the majority’s decision was an “exercise in judicial revisionism,” “unfaithful to Congressional intent, unnecessary, and, in light of the FAA’s antecedents and the intervening contraction of federal power, inexplicable.”

After Southland, other Supreme Court Justices joined the ranks of the Southland dissenters, O’Connor and Rehnquist, and agreed that the Southland decision was deeply flawed. About a decade after Southland, in a case called Allied-Bruce Terminix Cos. v. Dobson, Justice Thomas wrote a strong dissent explaining why

139. Id. at 11-12.
140. Id. at 10, 16.
141. Id. at 16.
142. Id.
143. Id. at 17.
144. Id. at 21-36 (O’Connor, J., dissenting).
145. Id. at 22-23.
146. Id. at 25-28.
147. Id.
148. Id. Justice O’Connor’s argument is quite brief: “Congress believed that the FAA established nothing more than a rule of procedure, a rule therefore applicable only in the federal courts.” Id. at 26 (alteration in original). The idea is that Congress has the constitutional power to control procedure in the federal courts, not state courts. Id. at 25-28.
149. Id. at 29.
Correcting a Flaw in the Arbitration Fairness Act

*Southland* was wrongly decided. As a procedural statute used to resolve underlying disputes, the FAA governs only in federal courts because Congress cannot “prescribe procedural rules for state courts.” Justice Thomas further explained that if *Southland* were correct that section two of the FAA created a substantive right, section two would establish federal subject matter jurisdiction. However, the remaining sections of the FAA are drafted as if federal subject matter jurisdiction does not automatically exist. For example, section four of the FAA provides that jurisdiction to enforce an arbitration agreement exists if a federal court would have subject matter jurisdiction over the underlying dispute to be arbitrated. Such jurisdictional language would be unnecessary if section two created substantive rights establishing federal subject matter jurisdiction. Justice Scalia joined Justice Thomas’ dissent in *Allied-Bruce*, adding that, in the future, he would “stand ready to join four other Justices in overruling *Southland*, since *Southland* will not become more correct over time...”

It is important to emphasize how *Southland* helped transform the FAA. *Southland* transformed the FAA from a procedural statute, applicable solely in federal court, into a substantive statute, applicable in state court and preempting state laws. Additionally, *Southland* helped transform the FAA into a statute covering small consumer disputes. Pursuant to section four of the FAA, there is a $75,000 jurisdictional minimum in order for a federal court to have subject matter jurisdiction in connection with a FAA proceeding to compel arbitration of a non-federal, contractual dispute. For example, under the original, pre-*Southland* understanding of the FAA as a statute applicable solely in federal court, a federal court would have jurisdiction to compel arbitration of a fraud or contract dispute arising from the purchase of a product or service only if the dispute exceeded $75,000, and most routine consumer transactions would never trigger such a high jurisdictional threshold. Pre-*Southland*, a high amount in controversy requirement in federal court had the intended effect of keeping relatively small contractual disputes outside of the scope of the FAA. However, when the Supreme Court decided *Southland*, the Supreme Court ignored the unified, comprehensive nature of the FAA and held that section two of the FAA, by itself, applied in state court...
courts, which tend not to have jurisdictional minimums. Thus, as a result of Southland, the $75,000 jurisdictional minimum established by section four of the FAA is not a requirement in state court. Through Southland, the FAA could cover contractual disputes of relatively small dollar amounts in state court, and Southland thereby helped open the door for the FAA to cover relatively small consumer disputes.

In sum, the Supreme Court in Southland transformed the FAA into a statute also applicable in state court, and this flawed Southland decision is still the governing law today. As originally enacted, however, the FAA was intended to apply solely in federal court.

C. It is Unclear How the Arbitration Fairness Act Interacts with the Flawed Southland Decision

It is not entirely clear how the proposed AFA interacts with the flawed Southland decision. It is not clear whether the AFA is adopting the pre-Southland or post-Southland view of the FAA. This ambiguity makes it uncertain whether states must abide by the AFA’s prohibitions regarding the arbitration of antitrust, employment, civil rights, and consumer disputes. If the AFA is adopting the pre-Southland view, the AFA’s prohibitions would bind only federal courts, but if the AFA is adopting the post-Southland view, both federal courts and state courts must follow the AFA’s prohibitions. There are arguments in favor of both views.

1. The Post-Southland Interpretation of the Federal Arbitration Act

Perhaps the drafters of the AFA are treating Southland as good law, and they regard the FAA as applicable in both federal and state courts. If the drafters are adopting this post-Southland understanding of the FAA, the AFA would effectively prohibit both state courts and federal courts from compelling arbitration of antitrust, employment, civil rights, and consumer disputes. There are some arguments in favor of reading the AFA as embodying a post-Southland understanding of the FAA. If the AFA presumes that Southland remains good law, its prohibitions will bind both state and federal courts. The supporters of the AFA have emphasized the protections that it would provide to workers and consumers, and the post-Southland view would provide greater protections to these parties than would the pre-Southland view. Additional support for the view that the AFA incorporates the post-Southland understanding of the FAA is found in the AFA’s definition of “antitrust dispute.” The AFA defines an “antitrust dispute” as a claim for alleged violations of federal or state antitrust laws in which the plaintiffs seek class certification under Rule 23 of the Federal Rules of Civil Procedure, or comparable state class action rules. This definition of antitrust dispute, by referring to state class action procedures, suggests that the drafters intend for the AFA to apply to state, as well as federal, courts, at least with respect to antitrust disputes.

2. The Pre-Southland Interpretation of the Federal Arbitration Act

If the drafters of the AFA intend to restore the FAA to its pre-Southland original meaning, as a statute applicable solely in federal court, the passage of the AFA would mean that both statutes would apply only in federal courts. As such, the AFA would only prohibit federal courts from enforcing arbitration agreements in connection with antitrust, employment, civil rights, and consumer disputes. As a result, the AFA would have a lesser impact, and state courts would be free to continue enforcing arbitration agreements in these contexts.

There are some arguments that the AFA is adopting the pre-Southland view. Supporters of the AFA have described its purpose as “restor[ing] the original intent of the FAA,”163 and as explained above, the original intent behind the FAA is a statute applicable solely in federal court. This argument finds further support in the introductory findings of the AFA, which describe the Supreme Court as having issued flawed decisions expanding the meaning of the FAA.164 These findings strengthen the argument that the AFA is intended to correct flawed Supreme Court decisions regarding the FAA, like Southland, and to restore the pre-Southland interpretation that the FAA is only applicable in federal court. Thus, under the pre-Southland view, the AFA’s restrictions would apply only to federal courts.

In addition to the statements of the supporters and the Congressional findings, there is a textual and structural argument that the AFA is adopting the pre-Southland view. The AFA is amending section two of the FAA and leaving the remaining sections and the unified, comprehensive nature of the FAA untouched. The AFA would effectively amend section two of the FAA, by making arbitration agreements in the antitrust, employment, civil rights, and consumer settings unenforceable. The AFA adds language directly to the end of section two, the heart of the FAA.165 If the AFA is enacted, section two of the FAA would declare that arbitration agreements are generally valid, irrevocable, and enforceable, except as provided in a new chapter of the FAA, which would contain the AFA’s prohibitions against compelling arbitration of antitrust, employment, civil rights, and consumer disputes.166 Thus, the AFA would be built upon or incorporated through section two of the FAA, and the AFA would leave section four of the FAA intact. As discussed above, section four, by its very terms, applies solely to federal courts.167 Because the FAA was enacted as a unified, comprehensive statute, section four cannot be read separately from section two.168 Thus, the drafters

163. Sen. Franken Leads Charge to Protect Legal Right to Day in Court, SEN. AL FRANKEN (May 7, 2013), http://www.franken.senate.gov/?p=press_release&id=2392 (“[O]ver the years, the Supreme Court has slowly broadened the reach of the FAA, ignoring evidence that the FAA was never intended to apply to consumer or employment disputes, or to supersede all other federal laws protecting consumers, workers, and small businesses.”); Rep. Johnson Re-Introduces Bill to Protect Legal Rights of Consumers, REP. HANK JOHNSON (May 7, 2013), http://hankjohnson.house.gov/press-release/rep-johnson-re-introduces-bill-protect-legal-rights-consumers.
164. S. 878, 113th Cong. § 2(2) (2013); H.R. 1844, 113th Cong. § 2(2) (2013). Without mentioning any case names, the Congressional findings vaguely mention how the Supreme Court is expanding the FAA.
165. S. 878 § 3; H.R. 1844 § 3.
166. S. 878 § 3; H.R. 1844 § 3.
167. See MACNEIL, supra notes 114-18 and accompanying text.
168. See MACNEIL, supra notes 114-18 and accompanying text.
of the AFA are adding language to the core principle set forth in section two of the FAA, without changing any of the implementing sections of the FAA. The unified nature of the FAA and the AFA’s failure to address the implementing sections of the FAA, like section four, suggest that the AFA is adopting the pre-Southland interpretation.

These ambiguities are not merely theoretical. The AFA will likely have strong supporters and strong opponents. Advocates of consumer and employee rights will likely favor adoption of the AFA as a statute providing the broadest possible protections to consumers and employees. The post-Southland view would most resonate with such interests because this view would prohibit both state and federal courts from enforcing arbitration agreements in the antitrust, employment, civil rights, and consumer contexts. Conversely, corporate interests will likely oppose the enactment of the AFA. If the AFA is enacted, the corporate lobby will seek to limit the impact of the AFA by advocating for the pre-Southland interpretation, which would allow states to continue to broadly enforce arbitration agreements.

If the current version of the AFA is enacted, it is almost certain that corporations and employers, desiring to continue enforcing arbitration agreements in the consumer and employment settings, will argue that the pre-Southland view is correct and that state courts are free to enforce arbitration agreements in these settings. Such arguments in favor of the pre-Southland view are not outside of the realm of possibility, and can be made in good faith. Because the AFA does not clearly communicate its position with regard to Southland, advocates for both interpretations of the AFA will likely try to exploit this ambiguity in arguing that their interpretation is correct. If the AFA is enacted in its current form, the result could be a maddening mess of conflicting court decisions across the country. Because of the ambiguity in the AFA, state courts will inevitably reach conflicting decisions as to whether the AFA is adopting the pre-Southland or post-Southland view. There will be years of expensive, needless litigation over this threshold issue, and important statutory rights may be held in limbo while parties fight over the meaning of the AFA. To avoid such problems, the AFA should clarify how it relates to Southland.

Aside from potential battles between the jurisdictions’ differing interpretations of the AFA, the possible overruling of Southland also raises concerns. As explained below, if the Supreme Court were to overrule Southland, this overruling would undermine the potential impact of the AFA.

Overruling Southland is not outside the realm of possibility. Two current Justices, Scalia and Thomas, have stated in decisions they are ready to join with others to overrule Southland. In Allied-Bruce, Justice Scalia stated that he would no longer dissent from future FAA cases on the grounds that Southland is wrongly decided, but he would “stand ready” to overrule Southland if four other Justices agreed to do so.169 Justice Thomas has continued to dissent whenever the Supreme Court is reviewing a state court decision involving the FAA because he believes Southland should be overruled.170 The makeup of the current Supreme Court, however, makes it unlikely that Southland will be overruled.

Court is of course different from when *Southland* was decided in 1984, and if three other Justices would join Justices Scalia and Thomas, the Supreme Court could overrule *Southland*. Perhaps Justices sympathetic to states' rights would be willing to overrule *Southland* and allow states to decide for themselves whether arbitration agreements should be enforceable. Also, some Justices who dislike the broad preemptive effect of the FAA may be willing to limit the FAA's application by overruling *Southland*.

Thus, with a new makeup of the Supreme Court, it is possible that the Supreme Court may overrule *Southland*. The Supreme Court's overruling of *Southland* would undermine the potential impact of the AFA. Recall that the current version of the AFA explicitly amends section two of the FAA.

According to section two, as amended by the proposed AFA, arbitration agreements are generally binding except as provided in a new chapter of the FAA, which would contain the AFA's prohibitions against compelling arbitration of antitrust, employment, civil rights, and consumer disputes. If the Supreme Court suddenly overrules *Southland*, the original meaning of the FAA would be restored, and section two will then become applicable solely in federal court. Because it seems that the AFA's amendments to the FAA are structurally linked to section two, one can argue that if section two suddenly applies solely in federal court as a result of the overruling of *Southland*, the AFA would in turn apply only in federal court as well. In other words, section two of the FAA creates an obligation to honor arbitration agreements, and the AFA builds on section two by carving out exceptions. The overruling of *Southland* would suddenly shrink the scope of section two such that section two would apply solely in federal court, and in turn, section two's exceptions created by the AFA would likewise shrink and become applicable solely in federal court. Under the current version of the AFA, which is linked to section two of the FAA, the AFA's scope can contract or expand depending on the continued validity of *Southland*. If the drafters of the AFA intend its protections to extend to state court, the overruling of *Southland* would frustrate this intent.

In sum, it is unclear how the AFA will interact with the Supreme Court's *Southland* opinion. If Congress enacts the AFA in its current form, there will be bitter, long, expensive fights in state courts around the country regarding whether courts should interpret the AFA from a pre-*Southland* perspective or post-*Southland* perspective. Such wasteful litigation is contrary to the FAA's goal of providing for the quick, inexpensive resolution of disputes outside of court. Also, if the Supreme Court were to suddenly overrule *Southland*, such an overruling would limit the AFA's protections for workers and consumers.

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171. For example, in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented and believed that the majority's opinion was wrong to construe the FAA as having a broad, preemptive effect over California state law. *Id.* at 1756-62.


173. S. 878 § 3; H.R. 1844 § 3.
III. CORRECTING THE ARBITRATION FAIRNESS ACT TO AVOID UNNECESSARY CONFUSION AND ENSURE THE GREATEST PROTECTIONS FOR CONSUMERS AND EMPLOYEES

The proposed AFA does not clearly establish its position regarding the Supreme Court’s flawed Southland opinion. Congress should amend the AFA before it is enacted in order to clarify the reach of the AFA and avoid confusion and wasteful litigation. If the sponsors of the AFA truly want to restore the FAA to its original, pre-Southland intent, allowing the states to decide whether or not to enforce arbitration agreements in the employment, consumer, civil rights, and anti-trust settings, Congress should clarify that the AFA is overruling Southland.

However, if the sponsors of the AFA want to give the broadest possible protections to consumers and employees, then the AFA should be clarified so that no court -- state or federal -- can enforce a pre-dispute arbitration agreement in the consumer or employment context. It is likely that the sponsors would prefer to grant the broadest possible protections to employees and consumers by granting them unwaivable access to the federal and state judiciaries, and as explained above, there are several justifications for such a view.174

To implement broader protections for consumers and employees and to clarify the AFA and avoid years of wasteful litigation, there are some simple fixes that Congress could make to the AFA before it is enacted. The full text of suggested amendments appears in an appendix to this Article, but the following is an overview of simple changes that could be made to clarify the AFA.

First, in the introductory section of the AFA, Congress included numerous findings.175 A new finding should be added, recognizing that both federal and state courts routinely enforce arbitration agreements involving employees and consumers. Such a finding would emphasize that Congress is aware that the issues regarding the enforceability of arbitration agreements exist in both state and federal courts. Such a finding would also communicate that Congress is enacting the AFA in an effort to rectify a problem in both state and federal courts.

Second, the current version of the AFA amends section two of the FAA by incorporating the AFA’s exceptions by reference.176 As mentioned above, the AFA is linked to, and builds upon, section two.177 If the Supreme Court were to overrule Southland and limit the application of section two to federal courts, the AFA’s restrictions would similarly shrink in scope and only be applicable to federal courts.178 To insulate the effectiveness of the AFA from possible changes arising from an overruling of Southland, the AFA’s provisions should be disassociated from section two. Section two of the FAA should remain untouched in its current form, without any reference to the AFA. Thus, the AFA would not be impacted by any changing interpretations regarding section two. Also, the next suggestion would help ensure that the scope of the AFA would no longer be dependent on the continued validity of Southland.

174. See supra notes 90-113 and accompanying text.
175. S. 878 § 2; H.R. 1844 § 2.
176. S. 878 § 3; H.R. 1844 § 3.
177. See supra notes 165-66 and accompanying text; S. 878 § 2; H.R. 1844 § 2.
178. See supra notes 173-74 and accompanying text.
Third, the core provision of the AFA currently provides that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.” Although this provision sets forth a command, this statement fails to indicate who must follow this command. It is ambiguous whether this command applies solely to federal courts, or if it applies to both federal and state courts. Rephrasing the AFA by explicitly stating who must follow the law would avoid needless confusion. Congress should amend the principal mandate of the proposed AFA to provide that “no predispute arbitration agreement shall be valid or enforced in State or Federal court if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.” With such an amendment and clear prohibition applicable to both state and federal courts, corporate interests would not be able to argue the AFA is ambiguous and limited solely to federal court. Also, if Southland is overruled and the FAA becomes applicable solely in federal court, the AFA’s clear prohibitions would still restrict both state and federal courts.

Fourth, the current version of the AFA does not clearly state under which constitutional power Congress is enacting the AFA. Under a literal reading of the current version of the AFA, the statute would prohibit enforcement of an arbitration agreement involving a purely intrastate consumer transaction. However, Congress does not have such broad authority. Although the AFA does not explicitly state the constitutional authority for its enactment, Representative Hank Johnson of Georgia, who introduced the AFA in the House, submitted a statement for the Congressional Record recognizing that Congress has the power to enact the AFA pursuant to the Commerce Clause. To help clarify that Congress has the power to instruct state courts not to enforce arbitration agreements in certain situations, the AFA should include a reference to interstate commerce, perhaps in the core section of the AFA. The core section of the AFA could provide that “No predispute arbitration agreement in connection with a transaction involving interstate commerce shall be valid or enforced by a State or Federal court if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.” Including this limitation would help insulate the AFA from constitutional challenges.

In sum, through a few, simple fixes, Congress could amend the AFA to avoid the many issues arising from the AFA’s ambiguous relationship to the Supreme Court’s flawed Southland ruling.

179. S. 878 § 3; H.R. 1844 § 3 (“(a) In General- Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”).
180. 159 CONG. REC. H2484-01 (May 7, 2013) (statement of Rep. Johnson) (“Congress has the power to enact this legislation pursuant to the following: Article I, Sec. 8, Cl. 3.”).
181. The AFA must be limited to disputes involving interstate commerce. It would be unconstitutional for the AFA to govern intrastate commerce. If Congress uses its Commerce power to ban arbitration agreements, Congress could restrict the ability of both the states and the federal courts to enforce employment and consumer arbitration agreements involving interstate commerce. U.S. CONST. art I, § 8, cl. 3.
Arbitration law plays an important role in American society by defining the role of the judiciary in facilitating private dispute resolution. With the Supreme Court’s ongoing expansion of the FAA, both the state and federal judiciaries have lost much of their power to resolve disputes. While the AFA seemingly strips the courts of some of their adjudicative authority, by prohibiting courts from enforcing certain arbitration agreements, the AFA restores the broader judicial power to resolve significant employment, consumer, civil rights, and antitrust disputes.

Unfortunately, the current version of the AFA contains a subtle flaw that will undermine the purpose of the law and lead to costly, unnecessary, protracted litigation over its meaning. Before enacting this important statute, which would restore power to the courts and protect millions of Americans, Congress must correct this flaw and clarify that the AFA addresses both the state and federal judiciaries.
Below is the text of some suggested amendments to the Arbitration Fairness Act of 2013, and these suggestions address the problems raised above in the Article. Major additions to the current version of the Arbitration Fairness Act appear below in italics, but not all changes from the current version are italicized or highlighted below. For example, to address some of the problems raised in the Article, the following proposal deletes certain language currently appearing in the Arbitration Fairness Act, and deletions are not identified or highlighted in the draft below.

Section 1. Short Title

This Act may be cited as the “Arbitration Fairness Act of 2013”.

Section 2. Findings

The Congress finds the following:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) The Supreme Court of the United States in a series of decisions has interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.

(3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. State and Federal courts routinely enforce arbitration agreements involving consumers and employees, and often, consumers and employees are not even aware that they have given up their rights to sue in State or Federal courts.

(4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators’ decisions.

(5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

Section 3. Arbitration of Employment, Consumer, Antitrust, and Civil Rights Disputes

Definitions:

(1) the term “antitrust dispute” means a dispute—
(A) involving a claim for damages allegedly caused by a violation of the antitrust laws (as defined in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12)) or State antitrust laws; and

(B) in which the plaintiffs seek certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law;

(2) the term “civil rights dispute” means a dispute—

(A) arising under—

(i) the Constitution of the United States or the constitution of a State; or

(ii) a Federal or State statute that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the Federal Government or State government, including any statute enforced by the Civil Rights Division of the Department of Justice and any statute enumerated in section 62(e) of the Internal Revenue Code of 1986 (relating to unlawful discrimination); and

(B) in which at least 1 party alleging a violation of the Constitution of the United States, a State constitution, or a statute prohibiting discrimination is an individual;

(3) the term “consumer dispute” means a dispute between an individual who seeks or acquires real or personal property, services (including services relating to securities and other investments), money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit;

(4) the term “employment dispute” means a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203); and

(5) the term “predispute arbitration agreement” means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

No predispute arbitration agreement in connection with a transaction involving interstate commerce shall be valid or enforced by a State or Federal court if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.
Section 4. Applicability

(1) IN GENERAL – An issue as to whether the Arbitration Fairness Act of 2013 applies to an arbitration agreement shall be determined under Federal law. The applicability of the Arbitration Fairness Act of 2013 to an agreement to arbitrate and the validity and enforceability of an agreement to which the Arbitration Fairness Act of 2013 applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

(2) COLLECTIVE BARGAINING AGREEMENTS – Nothing in the Arbitration Fairness Act of 2013 shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.

Section 5. Technical and Conforming Amendments

(1) IN GENERAL- Title 9 of the United States Code is amended—

(A) in section 1, by striking “of seamen,” and all that follows through “interstate commerce”;  

(B) in section 208—

(i) in the section heading, by striking “Chapter 1; residual application” and inserting “Application”; and

(ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with the Arbitration Fairness Act of 2013.”; and

(C) in section 307—

(i) in the section heading, by striking “Chapter 1; residual application” and inserting “Application”; and

(ii) by adding at the end the following: “This chapter applies to the extent that this chapter is not in conflict with the Arbitration Fairness Act of 2013”.

(2) TABLE OF SECTIONS-
(A) CHAPTER 2- The table of sections for chapter 2 of title 9, United States Code, is amended by striking the item relating to section 208 and inserting the following:

“208. Application.”.

(B) CHAPTER 3- The table of sections for chapter 3 of title 9, United States Code, is amended by striking the item relating to section 307 and inserting the following:

“307. Application.”.

Section 6. Effective Date

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises on or after such date.