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In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act

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ARTICLES

IN DEFENSE OF *SOUTHLAND*: REEXAMINING THE LEGISLATIVE HISTORY OF THE FEDERAL ARBITRATION ACT

*Christopher R. Drahozal**

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INTRODUCTION

The Supreme Court's decision in *Southland Corp. v. Keating*,¹ which held that the Federal Arbitration Act ("FAA")² applies in state courts and preempts conflicting state law,³ is of central importance in modern American arbitration law.⁴ In *Southland*, the Court effectively "federalized" United States arbitration law, "restrict[ing] state legislative rights" so as "to guarantee the 'unobstructed enforcement' of arbitration agreements."⁵ Following *Southland*, courts have held literally dozens of state laws to be preempted by the FAA.⁶ The widespread use of arbitration clauses in consumer and employment contracts,

1 465 U.S. 1 (1984).

2 9 U.S.C. §§ 1-16 (2000). When enacted, section 14 of the Act provided that "this Act may be referred to as 'The United States Arbitration Act.'" Act of Feb. 12, 1925, ch. 213, § 14, 43 Stat. 883, 886 (current version at 9 U.S.C. §§ 1-16). In 1947, Congress codified the United States Arbitration Act ("USAA") as Title 9 of the United States Code and deleted the section 14 popular-name provision. Act of July 30, 1947, Pub. L. No. 80-282, ch. 392, 61 Stat. 669 (1947) (current version at 9 U.S.C. §§ 1-16). Since then, "[w]hile Congress did not rename the act, it has now become customary to refer to it as the FAA." 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 5.3.1, at 5:6 n.3 (Supp. 1999). To avoid confusion and despite the anachronism, I will refer to the Act as the FAA, even when in the original sources it is called the USAA.

3 *Southland*, 465 U.S. at 15-16.

4 See, e.g., 1 MACNEIL ET AL., *supra* note 2, § 10.6.1, at 10:25 (revision by Ian R. Macneil) (describing *Southland* as an "exceptionally important" case); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haogen)*, 29 McGEORGE L. REV. 195, 197 n.8 (1998) (describing application of the FAA in state court as an "enormously important" question).

5 THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 162 (2d ed. 2000).

6 See 1 MACNEIL ET AL., *supra* note 2, § 10.8.3, at 10:96-101.

called the "consumerization" of arbitration by Tom Stipanowich,⁷ is due at least in part to *Southland*, under which state laws restricting the arbitration of such disputes are preempted.⁸

Yet the majority opinion in *Southland*, written by Chief Justice Burger, is widely held to be an illegitimate exercise in judicial lawmaking, flatly inconsistent with congressional intent in enacting the FAA. Commentators have lined up behind Justice O'Connor, whose dissent derided the Chief Justice's majority opinion as an "exercise in judicial revisionism" that ignored the "unambiguous" legislative history of the FAA as a procedural statute applicable only in federal court.⁹ Paul Carrington and Paul Haagen, for example, declare that "the opinion of the Court was an extraordinarily disingenuous manipulation of the history of the 1925 Act,"¹⁰ and that "the Court relied almost wholly on its bogus legislative history" in holding the FAA applicable in state court.¹¹ Edward Brunet states that "[t]he *Southland* decision is remarkable for its preemption holding that blatantly ignores legislative intent."¹² According to Robert Gorman, "*Southland* has been persuasively criticized as a perversion of the legislative history of the Act, which rather clearly was intended to apply only to litigation in the federal courts."¹³ Even those who otherwise ardently defend the Supreme Court's arbitration decisions concede that, "Unfortunately, *Southland* did not acknowledge the original understanding of the FAA as procedural law governing only in federal court."¹⁴

7 See Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 Nw. U. L. REV. 1, 9 (1997); Thomas J. Stipanowich, *The Growing Debate over 'Consumerized' Arbitration: Adding Cole to the Fire*, DISP. RESOL. MAG., Summer 1997, at 20; see also Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1072 (1998) (discussing consumerization of arbitration).

8 See Sarah R. Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 786-88 & nn.92-100 (2001) (cataloguing current and pending state laws that restrict consumer and employment arbitration).

9 *Southland Corp. v. Keating*, 465 U.S. 1, 25, 36 (1984) (O'Connor, J., dissenting).

10 Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 380.

11 *Id.* at 381.

12 Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1469 n.33 (1996).

13 Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 677 n.133.

14 STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 2.7, at 30 (2001). Elsewhere, Professor Ware notes, "I have argued that, with one possible exception, the Court has faithfully applied the Federal Arbitration Act." Ware, *supra* note 4, at 197. "The one possible exception," according to Ware,

The leading critic of *Southland's* historical analysis is Ian R. Macneil, who exhaustively analyzes the legislative history of the FAA in his book, *American Arbitration Law: Reformation, Nationalization, Internationalization*.¹⁵ Professor Macneil canvasses the hearings, reports, and floor debates on the FAA, contemporaneous writings by supporters of the Act and others, and state and federal cases in the years immediately following enactment of the Act.¹⁶ He concludes that the FAA's legislative history "more than justifies" Justice O'Connor's statement in *Southland* that "[o]ne rarely finds a legislative history as unambiguous as the FAA's."¹⁷ According to Macneil, "[t]here is no serious ambiguity here":¹⁸ "the proposed [FAA] was intended to apply only in federal courts. It was never intended to create substantive federal regulatory law superseding state law under the Supremacy Clause of the federal Constitution."¹⁹ Macneil has described Chief Justice Burger's opinion as reflecting a "painfully misleading history of the FAA":²⁰

not only does he find ambiguities where no real ones exist, but [he] . . . dismisses as mere ambiguities the vast and unambiguous mass of the legislative history, not the few scraps he himself produces. And "dismisses" is truly the right word because in spite of the dissent's presentation of a large part of that unambiguous mass, the Chief Justice never so much as deigns to cast it a further glance.²¹

In the *1999 Supplement to Federal Arbitration Law*, the arbitration treatise of which Macneil is a co-author, the conclusion is colorful and blunt: "there is really only one pillar supporting *Southland*: legislative history. It is truly a pillar of sand."²²

is the enormously important question of whether the FAA is a procedural statute governing only in federal court or substantive law governing in all courts and preempting inconsistent state law. Ian Macneil argues convincingly that the FAA was originally understood to be a procedural statute governing only in federal court.

Id. at 197 n.8; see also Stephen J. Ware, *Arbitration and Unconscionability after Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1006-08 (1996) (describing the expansion of the FAA into state courts).

15 IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992).

16 *Id.* at 83-147.

17 *Id.* at 121 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting)).

18 *Id.*

19 *Id.* at 117.

20 1 MACNEIL ET AL., *supra* note 2, § 10.2, at 10:5.

21 MACNEIL, *supra* note 15, at 140.

22 1 MACNEIL ET AL., *supra* note 2, § 10.5.3, at 10:20.

I agree that Chief Justice Burger's analysis in *Southland* of the FAA's legislative history leaves much to be desired. But that is because it is incomplete, not because the conclusion it reaches is wrong. In my view, the Chief Justice reached the correct conclusion about the FAA's legislative history: that "[a]lthough the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts."²³ Contrary to Professor Macneil's analysis, there are "strong indications" in the legislative history that the drafters of the FAA intended it to apply in state court, and that at least some contemporaries of the Act so understood it. If, as Macneil argues, "what counts is largely the intentions of the reformers as known to Congress,"²⁴ then there is a strong argument that Chief Justice Burger actually got it right.

The key points in my analysis are the following:

(1) Materials submitted to Congress by the principal drafter of the FAA, Julius Henry Cohen, provide strong evidence that the FAA was intended to apply in state court. In the materials, Cohen argued that Congress had the power to make arbitration agreements enforceable in state court.²⁵ The context of the argument makes clear that it does not reflect merely a "wish in [Cohen's] heart of hearts"²⁶ or "lawyerly caution,"²⁷ as Macneil argues. Indeed, Cohen identified the "primary purpose" of the FAA as making arbitration agreements enforceable in federal court, implying that a secondary purpose of the Act was to make arbitration agreements enforceable in state court.

(2) Cohen discussed Congress's power to make arbitration agreements enforceable in state court not only in the materials he submitted to Congress, but also in two law review articles he co-authored after the enactment of the FAA.²⁸ In addition, at least one other contemporaneous commentary, which Macneil does not mention, flatly concludes that "[t]he act is broad enough to apply to actions commenced in state courts as well as to those instituted in federal courts,

23 *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

24 1 MACNEIL ET AL., *supra* note 2, § 10.2, at 10:7. By "reformers," Macneil means those advocating reform of arbitration laws. See MACNEIL, *supra* note 15, at 25-30 (discussing sources of the reform movement). I commonly refer to the same group as "supporters" of the FAA.

25 See *infra* Part III.C.1.

26 MACNEIL, *supra* note 15, at 114.

27 *Id.* at 223 n.61.

28 See *infra* text accompanying notes 279-95, 311-20.

and it was so intended by those who drafted it.”²⁹ Such statements belie the commonly asserted notion that no one at the time the FAA was enacted believed it applied in state court, either because arbitration matters were procedural or because it would have been too great an infringement on state sovereignty.

(3) The vast majority of statements in the legislative history, relied on by Justice O’Connor and Professor Macneil to argue that the FAA applies only in federal court, state simply that the FAA applies in federal court, not that it applies only in federal court.³⁰ Given that the “primary purpose” of the FAA was to make arbitration agreements enforceable in federal court, such statements are not surprising. But they do not exclude the possibility that the Act applies in state court as well. Likewise, supporters’ arguments that the Act was constitutional based on Congress’s power to establish rules of procedure in federal court do not demonstrate that the Act applies only in federal court. Because of doubts about the constitutionality of the FAA, its supporters relied on both Congress’s power to regulate the federal courts and its power to regulate interstate commerce. The applicability of the Act in state court, by comparison, obviously could be grounded (and was in fact grounded) solely on the commerce power. Finally, occasional statements in the legislative history to the effect that the FAA does not infringe on the authority of the states to regulate arbitration agreements, again read in context, refer not to section 2 of the FAA but to provisions of the Act creating procedures for enforcing arbitration agreements in federal court, i.e., sections 3 and 4 of the Act.³¹

(4) The usual discussions of the historical setting of the FAA incorrectly focus on the fact that the Act predates the decision in *Erie Railroad v. Tompkins*.³² Prior to *Erie*, arbitration was viewed as a procedural matter governed by the law of the forum. On that view, the decision in *Erie* transformed arbitration from a procedural matter to a substantive one, and thus the FAA from a statute applicable only in federal court to one applicable in state court. Instead, the more important historical reason for such transformation of the FAA as has occurred is the post-New Deal expansion in the scope of Congress’s commerce power. Today, the FAA applies to a vastly wider array of cases than it did in 1925, both in federal court and in state court. Thus, the lack of opposition to the Act at the time of enactment is

29 See Alfred N. Heuston, *The Settlement of Disputes by Arbitration*, 1 WASH. L. REV. 243, 258 (1926); see *infra* text accompanying notes 326–32.

30 See *infra* Part III.C.

31 See *infra* Part III.C.

32 304 U.S. 64 (1938).

much less surprising than it otherwise might seem.³³ Likewise, a plausible reason for the lack of reported state court cases considering the FAA for several decades after its enactment is the narrow reach of the Act during much of that time.³⁴ Indeed, the first reported state court case to consider the FAA was decided in 1944,³⁵ only two years after the Supreme Court's expansive interpretation of the scope of the commerce power in *Wickard v. Filburn*.³⁶

To be clear: I do not claim that the legislative history of the FAA unambiguously demonstrates that Congress intended the Act to apply in state court. As Chief Justice Burger wrote in *Southland*, the legislative history is "not without ambiguities."³⁷ Instead, my argument is more limited. First, I conclude that the legislative history does not unambiguously demonstrate the opposite—i.e., it does not demonstrate that, as Professor Macneil has contended, the FAA applies only in federal court. Second, in my view, construing the Act as applicable in state court is more consistent with the legislative history—that is, it leaves fewer ambiguities unexplained—than the Macneil interpretation.³⁸

Reexamining the legislative history of the FAA is not merely an academic exercise, although certainly a proper understanding of historical events itself is valuable. Questions about *Southland's* legitimacy

33 See *infra* Part III.B.

34 See *infra* Part III.F.

35 French v. Petrinovic, 46 N.Y.S.2d 846 (City Ct. 1944), *aff'd*, 54 N.Y.S.2d 179 (App. Term 1945).

36 317 U.S. 111 (1942).

37 *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

38 Of course this entire discussion assumes, as does Professor Macneil, the legitimacy both (1) of using legislative history in interpreting statutes and (2) of imputing statements by supporters of the FAA to Congress. For a sample of the literature on the first issue, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3–47 (1997); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39; William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); and Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231. As for the second issue, the committee reports and floor debates concerning the FAA provide little insight into the applicability of the Act in state court. As a result, the legislative history debate concerning the FAA is based almost exclusively on statements by the private parties—those outside of Congress—who drafted the FAA and who testified in support of its enactment. My argument here assumes that such materials are useful, at least in this case, and analyzes the materials accordingly.

continue to have important implications for American arbitration law.³⁹ State judges continue to construe the FAA narrowly while reciting that *Southland* was wrongly decided. Advocates of legislation restricting pre-dispute arbitration agreements cite to Congress the incorrectness of the *Southland* decision. At the same time, misinterpreting the legislative history of the FAA gives rise to the possibility that some courts will adopt too broad a view of FAA preemption, unduly restricting state arbitration law.

Part I describes the Supreme Court's analysis of the legislative history of the FAA, both in *Southland* and in the Court's subsequent decision in *Allied-Bruce Terminix Cos. v. Dobson*.⁴⁰ Part II summarizes Professor Macneil's criticism of the *Southland* majority's legislative history analysis. Part III reexamines the legislative history of the FAA in detail, and concludes that Chief Justice Burger likely reached the correct conclusion in *Southland*. Finally, Part IV explains the significance of properly interpreting the legislative history of the FAA.

I. *SOUTHLAND CORP. V. KEATING* AND THE LEGISLATIVE HISTORY OF THE FAA

This Part describes the Supreme Court's competing interpretations of the legislative history of the Federal Arbitration Act. It first presents the procedural history of *Southland Corp. v. Keating*,⁴¹ including the California state court opinions and a brief description of the U.S. Supreme Court decision. Next, it examines the opinions in *Southland* in more detail, focusing on the analysis of the FAA's legislative history in Chief Justice Burger's majority opinion and in Justice O'Connor's dissenting opinion. The Chief Justice found that the legislative history was "not without ambiguities," but concluded that it nonetheless provided "strong indications" that the FAA applied in state court.⁴² By contrast, according to Justice O'Connor in dissent, "One rarely finds a legislative history as unambiguous as the FAA's," and "that history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in the federal courts."⁴³ Finally, this Part examines the Court's subsequent decision in *Allied-Bruce Terminix Cos. v. Dobson*,⁴⁴ in which the majority

39 See *infra* Part IV.

40 513 U.S. 265 (1995).

41 465 U.S. 1 (1984).

42 *Id.* at 12.

43 *Id.* at 25.

44 513 U.S. 265 (1995).

reaffirmed *Southland* on grounds of stare decisis,⁴⁵ while Justice Thomas in dissent renewed the criticisms of *Southland*.⁴⁶

Based on the analysis in the Supreme Court opinions, Justices O'Connor and Thomas plainly get the better of the legislative history argument. But as Part IV will show, that is only because Chief Justice Burger's opinion inadequately analyzed the legislative history, not because it reached the wrong conclusion.

A. *The Southland Case: "Another Chapter [in] the FAA's Already Colorful History"*⁴⁷

Southland Corporation, the franchisor of 7-Eleven convenience stores, was sued by a number of its franchisees in state court in California. The actions brought by individual franchisees were consolidated with a class action brought by Richard D. Keating, another franchisee.⁴⁸ The franchisees alleged that Southland had misrepresented certain information and failed to disclose other information in connection with the sale of its franchises. They raised a variety of state and federal law claims, including a claim alleging that Southland had violated the disclosure requirements of the California Franchise Investment Law.⁴⁹ Southland filed a petition to compel arbitration of the franchisees' claims, including the Franchise Investment Law claim, relying on an arbitration clause in the franchise agreement.⁵⁰ The trial court granted the petition to compel arbitration as to all the claims except the Franchise Investment Law claim.

The California Court of Appeal reversed the trial court as to the Franchise Investment Law claim and ordered all claims to arbitration.⁵¹ The court first held that, as a matter of state law, nothing in the Franchise Investment Law precluded arbitration of claims arising

45 *Id.* at 271–73.

46 *Id.* at 286–93 (Thomas, J., dissenting).

47 *Southland*, 465 U.S. at 35 (O'Connor, J., dissenting).

48 *Keating v. Superior Court*, 167 Cal. Rptr. 481, 484 & n.1 (Ct. App. 1980), *rev'd*, 645 P.2d 1192 (Cal. 1982), *rev'd sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

49 CAL. CORP. CODE §§ 31000–31516 (West 1977).

50 *Keating*, 167 Cal. Rptr. at 484 & n.2 (reproducing text of arbitration clause).

51 *Id.* at 495. The court of appeal required the trial court, on remand, to consider whether the arbitration should proceed on a class-wide basis, and, if so, "to devise methods to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement." *Id.* at 490–92. *See generally* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) (examining class-wide arbitration proceedings).

under the act.⁵² Further, if the Franchise Investment Law were interpreted to preclude arbitration of claims arising under the act, it would conflict with the FAA and be preempted.⁵³ In so holding, the court of appeal relied principally on a decision of the Washington Supreme Court, which concluded that “[t]he majority rule . . . appears to be that the act does apply and requires a state court to enforce an arbitration clause despite a contrary state law or policy.”⁵⁴

The California Supreme Court reversed the court of appeal and held that the Franchise Investment Law claim could not be arbitrated.⁵⁵ The court first found that claims under the Franchise Investment Law were not arbitrable as a matter of state law. It reasoned that “[t]he evidence is persuasive that in drafting the Franchise Investment Law California legislators looked to the Securities Act of 1933 as their model,” and the U.S. Supreme Court had held in *Wilko v. Swan* that claims under the 1933 Securities Act were not arbitrable.⁵⁶ The court then rejected Southland’s argument that the FAA preempted the California nonarbitrability rule. Although finding “nothing in the legislative history of the statute to suggest that Congress considered its application to state courts,” the court nonetheless “assume[d] that Congress intended to insulate interstate contracts from judicial hostility regardless of forum . . . and to establish for such contracts certain uniform rules of interpretation.”⁵⁷ According to the court, however, California’s exclusion of Franchise Investment Law claims from arbitration neither “reflect[s] hostility toward arbitration” nor “constitute[s] an obstacle to the general enforcement of arbitration agreements in a manner consistent with federal law.”⁵⁸ The court concluded that it was “highly improbable” that “Congress intended, through the FAA, to override state policies of that nature.”⁵⁹

52 *Keating*, 167 Cal. Rptr. at 493–94.

53 *Id.* at 494.

54 *Id.* at 494–95 (quoting *Allison v. Medicab Int’l, Inc.*, 597 P.2d 380, 382 (Wash. 1979)).

55 *Keating v. Superior Court*, 645 P.2d 1192, 1198 (Cal. 1982), *rev’d sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984).

56 *Id.* at 1198–200 (citing *Wilko v. Swan*, 346 U.S. 427 (1953)). *Wilko*, of course, was overruled by the U.S. Supreme Court in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

57 *Keating*, 645 P.2d at 1202.

58 *Id.*

59 *Id.* The court directed the trial court on remand to consider whether class-wide arbitration was appropriate on the facts of the case. *Id.* at 1209–10. The trial court was to consider “not only the factors normally relevant to class certification, but the special characteristics of arbitration as well.” *Id.* at 1209.

The U.S. Supreme Court found the case to be within its appellate jurisdiction⁶⁰ and held that the FAA applied in state court and preempted the California law.⁶¹ Chief Justice Burger wrote the majority opinion, joined by Justices Brennan, White, Marshall, Blackmun, and Powell.⁶² Justice O'Connor dissented, joined by Justice Rehnquist.⁶³ Justice Stevens concurred in part and dissented in part.⁶⁴ Although Justice Stevens agreed with Justice O'Connor's analysis of the legislative history, he was "persuaded that the intervening developments in the law compel the conclusion" that the FAA applies in state court.⁶⁵ Nevertheless, Justice Stevens would have upheld the California statute on the ground that the state's public policy against arbitration of Franchise Investment Law claims was a "ground[] as exist[s] at law or in equity for the revocation of any contract" permitted under section 2 of the Act.⁶⁶

Central to both the majority opinion and Justice O'Connor's dissent was the legislative history of the FAA. The following two sections describe in detail their respective analyses of that legislative history.

B. "Not Without Ambiguities".⁶⁷ *The Majority's Analysis of the FAA's Legislative History*

Chief Justice Burger's majority opinion began by discussing the language of section 2 of the FAA and briefly considering *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁶⁸ and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁶⁹ It concluded by responding to Justice O'Connor's and Justice Stevens's opinions. The heart of the majority opinion, however, was its analysis of the FAA's legislative history.⁷⁰

60 *Southland Corp. v. Keating*, 465 U.S. 1, 6–8 (1984). The Supreme Court refused to consider Southland's argument that the FAA preempted the California rule permitting class-wide arbitration. According to the Court, Southland relied only on state law in opposing class-wide arbitration in the lower courts, and the California Supreme Court did not rule on the federal law issue. *Id.* at 8–9 & n.3.

61 *Id.* at 16.

62 *Id.* at 3.

63 *Id.* at 21 (O'Connor, J., dissenting).

64 *Id.* at 17 (Stevens, J., concurring in part and dissenting in part).

65 *Id.* (Stevens, J., concurring in part and dissenting in part).

66 *Id.* at 18–21 (Stevens, J., concurring in part and dissenting in part) (quoting 9 U.S.C. § 2 (2000)).

67 *Id.* at 12.

68 388 U.S. 395 (1967).

69 460 U.S. 1 (1983).

70 1 MACNEIL ET AL., *supra* note 2, § 10.5.3, at 10:19–20 ("The decision in *Southland* putatively rests on two pillars: precedent, consisting of *Prima Paint* and [*Moses H.*

The majority's analysis began, "Although the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts."⁷¹ The opinion found support in three different parts of the legislative history.

First, it quoted House Report 96 as "plainly suggest[ing]" that Congress intended "more comprehensive objectives" than adopting rules applicable only in federal court: "[t]he purpose of this bill is to make valid and enforceable [sic] agreements for arbitration contained *in contracts involving interstate commerce* or within the jurisdiction or [sic] admiralty, or which may be the subject of litigation in the Federal courts."⁷²

Although Burger explained the reference no further, the point of the quotation is its suggestion that the FAA applies to contracts either "involving interstate commerce" or "which may be the subject of litigation in the Federal courts." If the FAA did not apply in state court, the House Report presumably would have used "and" instead of "or." By describing the coverage of the act in the alternative, the House Report suggests the possibility of contracts involving interstate commerce but not the subject of litigation in federal court—thus, necessarily, in state court.

Second, the majority opinion quoted two statements from the legislative history of the Act indicating that its purpose was to overcome the common law's refusal to provide specific enforcement of arbitration agreements. The first quote was from the remarks of Senator Walsh during the 1923 Senate Hearings on the Act, stating that the Act "sought to 'overcome the rule of equity, that equity will not specifically enforce an[y] arbitration agreement.'"⁷³ The second was from House Report 96, noting the need for "'legislative enactment'" to override this principle, which was "'firmly embedded'" in common law precedent.⁷⁴ Burger's opinion concluded, "Surely this makes clear that the House Report contemplated a broad reach of the Act,

Cone], and legislative history. Since, however, both *Prima Paint* and *Moses Cone* rest on legislative history, there is really only one pillar supporting *Southland*: legislative history. It is truly a pillar of sand.")

71 *Southland*, 465 U.S. at 12.

72 *Id.* at 12–13 (quoting H.R. REP. NO. 68-96, at 1 (1924) (emphasis added and alteration in original)).

73 *Id.* at 13 (quoting *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 6 (1923) [hereinafter *1923 Hearings*] (remarks of Sen. Walsh)) (alteration in original).

74 *Id.* (quoting H.R. REP. NO. 68-96, at 1–2 (1924)).

unencumbered by state-law constraints.”⁷⁵ According to the majority, the applicability of the Act to state courts “can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce.”⁷⁶

Third, the majority opinion relied on Congress’s asserted “awareness of the widespread unwillingness of state courts to enforce arbitration agreements . . . and that such [state] courts were bound by” inadequate state arbitration laws.⁷⁷ In support of the first proposition, the majority cited the *1923 Senate Hearings*, presumably a statement that some state courts have held arbitration agreements invalid.⁷⁸ In support of the second proposition, the majority quoted a portion of the testimony of W.H.H. Piatt at the *1923 Hearings*, who described “the arbitration statute of the state of Missouri” as providing for “‘technical arbitration by which, if you agree to arbitrate under the method provided by the statute, you have an arbitration by statute[;] but [the statutes] ha[d] nothing to do with validating the contract to arbitrate.’”⁷⁹ The majority summarized its legislative history analysis as follows:

[t]he problems Congress faced were therefore twofold: the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.⁸⁰

Finally, the majority responded in two ways to Justice O’Connor’s argument (based on the legislative history) that the FAA was a procedural statute applicable only in federal court. First, the majority argued that the interstate commerce requirement in section 2 of the FAA made sense only if Congress intended the Act to apply in state

75 *Id.*

76 *Id.*

77 *Id.* at 13–14.

78 *Id.* at 13 (quoting *1923 Hearings*, *supra* note 73, at 8 (testimony of Mr. Piatt)) (“Some of our courts have held, I think notably Massachusetts not long ago, that an agreement to arbitrate and to permit A and B to fix the fees of the arbitrators and so make a final award is invalid, in that it invades the province of the court and sets up another tribunal that is not provided by law, and in a sense, as some people put it, is immoral.”).

79 *Id.* at 14 (quoting *1923 Hearings*, *supra* note 73, at 8 (testimony of Mr. Piatt)) (alteration in original).

80 *Id.*

court; second, it contended that limiting the FAA to federal court would “encourage and reward forum shopping.”⁸¹ The majority acknowledged in footnotes that the FAA did not create federal subject-matter jurisdiction⁸² and that only section 2 of the FAA, not sections 3 or 4, applied in state court.⁸³

C. *Justice O'Connor's Dissent and the “Clear Congressional Intent Underlying the FAA”*⁸⁴

In dissent, Justice O'Connor criticized the majority as “utterly fail[ing] to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.”⁸⁵ In a direct jibe at Chief Justice Burger's majority opinion, Justice O'Connor began her analysis of the legislative history as follows:

[o]ne rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.⁸⁶

Justice O'Connor's first argument was that Congress characterized the FAA as procedural and not substantive, and thus believed it applicable only in federal court. She cited a number of statements as to the procedural nature of the Act, both in the congressional materials and contemporaneous commentaries. She concluded that “Congress *believed* that the FAA established nothing more than a rule of procedure, a rule therefore applicable only in the federal courts.”⁸⁷

Second, according to Justice O'Connor, “If characterizing the FAA as procedural was not enough, the draftsmen of the Act, the House Report, and the early commentators all flatly stated that the Act was intended to affect only federal-court proceedings.”⁸⁸ Again, she cited excerpts from the congressional hearings and reports, as

81 *Id.* at 14–15.

82 *Id.* at 15 n.9.

83 *Id.* at 16 n.10.

84 *Id.* at 23 (O'Connor, J., dissenting).

85 *Id.* at 22–23 (O'Connor, J., dissenting). Justice Black had made similar arguments almost twenty years earlier in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 418–20 (1967) (concluding that “there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts”).

86 *Southland*, 465 U.S. at 25 (O'Connor, J., dissenting).

87 *Id.* at 26 (O'Connor, J., dissenting).

88 *Id.* (O'Connor, J., dissenting).

well as contemporaneous commentaries, including, for example, the House Report on the proposed Act, which stated that “[t]he bill declares that such agreements shall be recognized and enforced by the courts of the United States.”⁸⁹

Finally, Justice O’Connor looked to the “powers Congress relied on in passing the Act” as support for limiting the FAA to federal courts.⁹⁰ Although acknowledging the references in the legislative history to Congress’s power to regulate interstate commerce, she contends that “[m]ore numerous, however, are the references to Congress’s pre-*Erie* power to prescribe ‘general law’ applicable in all federal courts.”⁹¹ So long as “Congress relied *at least in part* on its Art. III power over the jurisdiction of the federal courts,”⁹² according to Justice O’Connor, it demonstrates that Congress intended the FAA to apply only in federal court.

Her conclusion from analyzing the legislative history was direct and to the point:

[t]he foregoing cannot be dismissed as “ambiguities” in the legislative history. It is accurate to say that the entire history contains only one ambiguity, and that appears in the single sentence of the House Report cited by the Court That ambiguity, however, is definitively resolved elsewhere in the same House Report . . . and throughout the rest of the legislative history.⁹³

Her opinion then proceeded to examine the structure of the FAA, making two main points. First, Justice O’Connor noted that sections 3 and 4, the “implementing provisions” of the Act, apply only in federal court.⁹⁴ Second, she asserted that the fact that the FAA does not create federal subject-matter jurisdiction is further evidence that it was to apply only in federal court. The dissent concluded, “Today’s decision is unfaithful to congressional intent, unnecessary, and, in light of the FAA’s antecedents and the intervening contraction of federal power, inexplicable. Although arbitration is a worthy alternative to litigation, today’s exercise in judicial revisionism goes too far.”⁹⁵

89 *Id.* at 27 (O’Connor, J., dissenting) (quoting H.R. REP. NO. 68-96, at 1 (1924)).

90 *Id.* at 27–28 (O’Connor, J., dissenting).

91 *Id.* at 28 (O’Connor, J., dissenting).

92 *Id.* at 28 n.14 (O’Connor, J., dissenting).

93 *Id.* at 29 (O’Connor, J., dissenting).

94 *Id.* (O’Connor, J., dissenting).

95 *Id.* at 36 (O’Connor, J., dissenting).

D. *Allied-Bruce Terminix Cos. v. Dobson: Reaffirming an "Edifice of Its Own Creation"?*⁹⁶

The Supreme Court again considered whether the FAA applied in state court in *Allied-Bruce Terminix Cos. v. Dobson*.⁹⁷ The principal issue in *Allied-Bruce* was the interstate commerce nexus required for the FAA to apply. The Court held that the Act extends to the full reach of Congress's commerce power⁹⁸ and that a contract need involve only "commerce in fact," rejecting any requirement that at the time of contracting the parties have "contemplated substantial interstate activity."⁹⁹ Although the Court acknowledged that "[t]he pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case," it relied on other cases in which it had decided that "the scope of a statute should expand along with the expansion of the Commerce Clause Power itself."¹⁰⁰

Before reaching the interstate commerce issue, the Court considered a request by twenty state attorneys general that it overrule *Southland*.¹⁰¹ The attorneys general devoted a significant portion of their brief to a critique of the *Southland* majority's legislative history analysis, concluding that "the legislative history proves precisely the opposite of what the *Southland* majority believed."¹⁰² In addition, the attorneys general relied on the "powerful interests of federalism at

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

97 *Id.* at 265. Previously, the Court had applied *Southland* to hold that the FAA preempted section 229 of the California Labor Code, which precluded arbitration of a state law action for wages. *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987). In dissent, Justice Stevens commented that "[i]t is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend." *Id.* at 493 (Stevens, J., dissenting). Justice O'Connor likewise dissented, adhering to her *Southland* dissent. *Id.* at 494 (O'Connor, J., dissenting).

98 *Allied-Bruce*, 513 U.S. at 273-77.

99 *Id.* at 277-80 (quoting *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (1961)).

100 *Id.* at 275.

101 *Id.* at 272; see Brief of Amici Curiae Attorneys General of Alabama et al. in Support of Respondents, *Allied-Bruce*, 513 U.S. at 265 (No. 93-1001). The states that signed on to the brief were Alabama, Alaska, Arkansas, Colorado, Florida, Hawaii, Illinois, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, South Carolina, Utah, and Vermont. *Id.*

102 Brief of Amici Curiae Attorneys General of Alabama in Support of Respondents et al. at 11, *Allied-Bruce*, 513 U.S. at 265 (No. 93-1001). While the brief cited various commentators critical of the *Southland* decision, it did not cite Professor Macneil's book. See *id.* at 14-15 n.19.

issue here,"¹⁰³ arguing that *Southland* "dramatically alter[ed] the balance between federal and state judicial systems."¹⁰⁴

The *Allied-Bruce* Court, in an opinion written by Justice Breyer, rejected the request and reaffirmed *Southland*. In what Professors Carrington and Haagen describe as an "almost apologetic opinion of the Court,"¹⁰⁵ the majority relied solely on the doctrine of stare decisis to support its decision. The majority explained,

The *Southland* Court . . . recognized that the pre-emption issue was a difficult one, and it considered the basic arguments that respondents and *amici* now raise (even though those issues were not thoroughly briefed at the time). Nothing significant has changed in the ten years subsequent to *Southland*; no later cases have eroded *Southland*'s authority; and no unforeseen practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying upon *Southland* as authority. Further, Congress, both before and after *Southland*, has enacted legislation extending, not retracting, the scope of arbitration. For these reasons, we find it inappropriate to reconsider what is by now well-established law.¹⁰⁶

The majority did not revisit the FAA's legislative history.

Justice O'Connor concurred. She reiterated her view that "Congress never intended the Federal Arbitration Act to apply in state courts," explaining that "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."¹⁰⁷ On the basis of stare decisis, however, she "acquiesce[d]" in the judgment, calling on "Congress to correct this interpretation if it wishes to preserve state autonomy in state courts."¹⁰⁸

Justice Thomas, joined by Justice Scalia,¹⁰⁹ dissented.¹¹⁰ Justice Thomas flatly concluded that the decision in *Southland* was "wrong"

103 *Id.* at 8.

104 *Id.* at 10.

105 Carrington & Haagen, *supra* note 10, at 383.

106 *Allied-Bruce*, 513 U.S. at 272.

107 *Id.* at 283 (O'Connor, J., concurring).

108 *Id.* at 284 (O'Connor, J., concurring).

109 Justice Scalia also wrote a separate dissent, indicating that in the future he would not dissent from judgments relying on *Southland*. *Id.* at 285 (Scalia, J., dissenting). He made clear, however, that he "stand[s] ready to join four other Justices in overruling [*Southland*], since *Southland* will not become more correct over time, the course of future lawmaking seems unlikely to be affected by its existence, and the accumulated private reliance will not likely increase beyond the level it has already achieved (few contracts not terminable at will have more than a 5-year term)." *Id.*

110 *Id.* at 285 (Thomas, J., dissenting).

and voted to overrule it.¹¹¹ Justice Thomas argued, as had Justice O'Connor before him in *Southland*, that arbitration was viewed as a procedural matter in 1925, and that "[i]t would have been extraordinary for Congress to attempt to prescribe procedural rules for state courts."¹¹² Given the historical background, which Justice Thomas describes in detail,¹¹³ "no one"—Congress, commentators, or the courts—construed the FAA as attempting to do so.¹¹⁴ As for the legislative history itself, Justice Thomas largely relied on a citation to Justice O'Connor's *Southland* dissent,¹¹⁵ although he did cite several contemporaneous commentaries and highlighted the lack of state court cases addressing the FAA.¹¹⁶

After *Allied-Bruce*, the Court applied *Southland* to hold preempted a Montana statute that invalidated arbitration agreements formed without conspicuous notice.¹¹⁷ Only Justice Thomas dissented, relying on his dissent in *Allied-Bruce*.¹¹⁸ Subsequently, while construing narrowly the employment exception to the FAA, the Court in *Circuit City Stores, Inc. v. Adams*¹¹⁹ rejected an argument "that a state statute ought not be denied state judicial enforcement while awaiting the outcome of arbitration."¹²⁰ The Court made clear that "[t]hat matter . . . was addressed in *Southland* and *Allied-Bruce*, and we do not revisit the question here."¹²¹

II. THE MACNEIL CRITIQUE OF *SOUTHLAND*'S "PATHOLOGICAL HISTORY"¹²²

The leading critic of *Southland*'s legislative history analysis is Professor Ian Macneil, who in his book, *American Arbitration Law*, undertakes a detailed and thorough examination of the FAA's legislative history.¹²³ Unlike the majority and dissenting opinions in *Southland*, Macneil's analysis presents a complete picture of that legislative his-

111 *Id.* at 285–86 (Thomas, J., dissenting).

112 *Id.* at 287–88 (Thomas, J., dissenting).

113 *See infra* text accompanying notes 169–71.

114 *Allied-Bruce*, 513 U.S. at 288 (Thomas, J., dissenting).

115 *Id.* (Thomas, J., dissenting) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 25–29 (1984) (O'Connor, J., dissenting)).

116 *Id.* (Thomas, J., dissenting).

117 *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

118 *Id.* at 689 (Thomas, J., dissenting).

119 532 U.S. 105 (2001).

120 *Id.* at 124.

121 *Id.*

122 MACNEIL, *supra* note 15, at 170.

123 *Id.* at 92–121.

tory, considering not only those pieces that favor his interpretation but also those that might cut against that interpretation. This Part briefly summarizes Macneil's criticisms of the majority opinion in *Southland*, which persuasively demonstrates the inadequacy of Chief Justice Burger's analysis.

Macneil's critique is based on at least two underlying premises about the FAA. These "premises" are not logical premises in the sense that if disproven his argument fails. But they clearly color his legislative history analysis, and at several points he relies on these premises as a reason to reject what he otherwise finds to be ambiguities in the legislative history.¹²⁴

First, in Macneil's view, the FAA is "a comprehensive integrated modern arbitration law containing everything needed for a complete system of arbitration, other than the basic contract law underlying any such system."¹²⁵ He notes that the drafters of the FAA based the Act on New York's state arbitration law, which also is an integrated statute. Further, no arbitration law, according to Macneil, has included only provisions making arbitration agreements "valid, irrevocable, and enforceable" (sections 1 and 2 of the FAA) without also including provisions setting out the procedures governing enforcement (such as sections 3 and 4 of the FAA).¹²⁶ "[G]iven that [Congress] was enacting an integrated statute," Macneil concludes, it "must also have meant sections 1 and 2 to be applicable only in federal courts, in spite of the generality of the language of those two sections when viewed discretely."¹²⁷

Second, Macneil cites the lack of opposition to the FAA as a reason to believe it was not intended to apply in state court. No witnesses opposed enactment of the FAA during the congressional hearings on the bill, there was little discussion on the floor of the House or Senate, and the bill passed unanimously.¹²⁸ If the FAA were intended to apply in state court, Macneil argues, "it would have been viewed in 1925 as a massive interference with state law."¹²⁹ Macneil explains:

[a] mandatory federal requirement that the state courts grant such specific performance in cases involving interstate commerce would have been a major and extraordinary expansion of federal power. It would hardly have started another Civil War, but it would certainly have been enough to cause an immense stir in legislative and legal

124 See *infra* text accompanying notes 208, 258.

125 MACNEIL, *supra* note 15, at 102.

126 *Id.* at 106-07.

127 *Id.*

128 *Id.* at 101, 115.

129 *Id.* at 115.

circles. This was particularly so in 1925, when only three of the forty-eight states had modern arbitration statutes.¹³⁰

The interference with state law would be particularly pronounced, if, as Macneil contended, the FAA was an integrated statute applicable in its entirety in state court. Macneil concludes, "Thus the fact that there was no opposition to the [FAA] reinforces what all the rest of the evidence makes patent: the [FAA] was intended to be applicable only in federal courts"¹³¹

As for the legislative history itself, I will defer detailed consideration of Macneil's arguments for the next Part. Instead, I will summarize briefly Macneil's critique of the *Southland* majority's analysis. Recall from Part I that Chief Justice Burger made three principal arguments based on the legislative history of the FAA.¹³² Macneil harshly criticizes each of those three arguments.¹³³

First, Macneil calls the majority's reliance on the word "or" in the House Report—that the FAA was "to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts"¹³⁴—"pure and simple nonsense."¹³⁵ First, Macneil contends that the use of the word "or" in the House Report "was in fact a simple clerical or typographical mistake,"¹³⁶ an argument that I will examine in more detail in the next section.¹³⁷ Second, he points out, quite correctly, that under Chief Justice Burger's interpretation, the language must mean either that all cases in federal court, even those that do not involve interstate commerce, are subject to the FAA—which would have implicitly overruled *Bernhardt v. Polygraphic Co.*¹³⁸—or that only cases in federal or state court and involving interstate commerce are subject to the FAA—

130 *Id.*

131 *Id.* at 116.

132 *See supra* text accompanying notes 71–83.

133 Macneil also criticizes a quotation Chief Justice Burger takes from *Prima Paint*, which in turn quotes from the House Report to the effect that the FAA "is based upon . . . the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" MACNEIL, *supra* note 15, at 140 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984)). For the relevant excerpt from the House Report, see *infra* text accompanying note 261.

134 MACNEIL, *supra* note 15, at 141 (quoting H.R. REP. NO. 68-96, at 1 (1924) (emphasis added by Macneil)).

135 *Id.*

136 *Id.*; *see also id.* at 118–19.

137 *See infra* text accompanying notes 257–60.

138 350 U.S. 198 (1956).

which is inconsistent with the plain meaning of the sentence.¹³⁹ In either case, Burger places too much weight on that single sentence in the House Report.

Second, according to Macneil, Chief Justice Burger used “a collage of excerpts taken out of context” to argue that Congress was addressing a problem of large importance that could only be dealt with by making the Act applicable in state court.¹⁴⁰ As Macneil rightly argues, none of the excerpts quoted by the Chief Justice contains any suggestion that the FAA applied in state court.

Third, as for Chief Justice Burger’s final argument, which does at least rely on references to state arbitration laws, Macneil argues that the Chief Justice makes one failure of state law “quite artificially . . . into two failures”;¹⁴¹ relies on testimony from the *1923 Hearings* to the exclusion of testimony from the *1924 Hearings*; and asserts as “‘problems’ of state law” failings that “had never even been submitted to Congress, much less addressed by it.”¹⁴² In short, Chief Justice Burger’s argument was, according to Macneil, “simply a figment of the Chief Justice’s imagination.”¹⁴³ While I would not go so far as Professor Macneil, I agree that Chief Justice Burger’s argument ultimately is unpersuasive. It seems likely that the state law references were merely intended to illustrate the sorts of limitations supporters sought to have the FAA remedy, not that the FAA necessarily was intended to preempt those particular state laws. In addition, the supporters of the FAA certainly recognized that state arbitration laws were necessary to deal with the vast majority of cases in state court, which were not within the scope of the FAA.

The influence of Macneil’s book has been substantial.¹⁴⁴ It is now the accepted wisdom that Congress intended the FAA to apply

139 MACNEIL, *supra* note 15, at 118–19.

140 *Id.* at 141.

141 *Id.* at 144.

142 *Id.*

143 *Id.*

144 See, e.g., Carrington & Haagen, *supra* note 10, at 380 (Macneil “amply demonstrated [that] the opinion of the Court was an extraordinarily disingenuous manipulation of the history of the 1925 Act”); Gorman, *supra* note 13, at 677 n.133 (“*Southland* has been persuasively criticized as a perversion of the legislative history of the Act, which rather clearly was intended to apply only to litigation in the federal courts.”); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 182–83 (2002) (citing Macneil for proposition that “the legislation’s proponents sought a federal statute that would enact a pro-arbitration policy in *federal* courts,” and concluding “[t]hat the Act was meant to extend only to the validation and enforcement of arbitration agreements in *federal* courts is clear from every direction”); G. Richard Shell, *Federal Versus State Law in the Interpretation of*

only in federal court and not in state court.¹⁴⁵ The next Part reevaluates the evidence and makes the case that Chief Justice Burger should have made in *Southland*.

III. REEXAMINING THE LEGISLATIVE HISTORY OF THE FAA

Chief Justice Burger's analysis of the FAA's legislative history in *Southland* provided an easy target for critics, such as Professor Macneil, who have persuasively demonstrated the weaknesses of Burger's analysis. This Part reexamines that legislative history, with particular (although not exclusive) focus on Professor Macneil's own analysis. As noted above, Macneil's analysis has been exceptionally influential. It also is remarkably upfront and candid—while concluding confidently that Chief Justice Burger's interpretation is wrong, it acknowledges possible ambiguities in the historical record. In my view, those "ambiguities" support an alternative reading of the legislative history: the drafters of the FAA intended the Act to apply in state court. This Part explains my reasons for so concluding.

First, I describe briefly the text and structure of the FAA and the historical context in which it was enacted. Then I proceed in detail through all aspects of the history of the Act, including congressional reports, hearings, and debates, and contemporary commentaries and cases. Contrary to Professor Macneil's analysis, I conclude that in fact Chief Justice Burger reached the right conclusion in *Southland*. While there certainly are ambiguities in the legislative history, "there are

Contracts Containing Arbitration Clauses: Reflections on Mastrobuono, 65 U. CINN. L. REV. 43, 51 n.33 (1996) ("[Macneil] demonstrated beyond doubt that the *Southland* Court's account of the legislative history of the FAA is a pillar built entirely of 'sand' and based largely on figments 'of the Chief Justice's imagination.'"); see also Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 890 (2002) (finding "persuasive and substantial indications that Congress intended only that the FAA be a procedural law that is applicable only in federal courts," but not citing Macneil). Some commentators are more equivocal. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 350 (2d ed. 2001) ("It is, in truth, very hard to figure out what Congress thought it was doing when it enacted the FAA in 1925."); Barbara Ann Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61, 83-84 (1985) (arguing that "determination of the Act's preemptive effect is problematic"). For a very thoughtful article arguing that *Southland* was wrongly decided and should be overruled, see David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 66 LAW & CONTEMP. PROBS. (forthcoming 2003) (on file with author). Schwartz adds some new twists to the critique of the *Southland* legislative history, which I address later in this Article, see *infra* notes 243, 343, and he emphasizes the federalism implications of *Southland*.

145 See *supra* text accompanying notes 10-14.

strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts.”¹⁴⁶

A. *Text and Structure*

The FAA as enacted in 1925 is virtually identical to Chapter 1 of the FAA as in force today.¹⁴⁷ Section 1 of the Act defines “maritime transactions” and “commerce,” phrases used in section 2, and then excludes certain employment contracts from the scope of the Act.¹⁴⁸ Section 2, the provision the *Southland* Court held applicable in state court, provides as follows,

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁴⁹

The language of section 2 broadly makes “valid, irrevocable, and enforceable” both pre-dispute and post-dispute arbitration agreements. Nothing in the language of the section limits its application to cases in the federal courts.

By contrast, the remaining sections of the FAA by their terms apply only in federal court. Section 3 provides for stays pending arbitration in “any of the courts of the United States,”¹⁵⁰ while section 4 authorizes a petition to compel arbitration in “any United States dis-

¹⁴⁶ *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

¹⁴⁷ Sections 15 and 16 of the FAA, as well as Chapters 2 and 3, have been added since 1925. The rest remains almost identical to the FAA as originally enacted, except as changed to reflect the adoption of the Federal Rules of Civil Procedure. See 1 MACNEIL ET AL., *supra* note 2, § 5.3.1, at 5:6 n.2.

¹⁴⁸ 9 U.S.C. § 1 (2000). The employment exception provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” *Id.* In *Circuit City Stores, Inc. v. Adams*, the Supreme Court held that “Section 1 exempts from the FAA only contracts of employment of transportation workers,” rejecting the argument that the provision excludes all employment contracts from the Act. 532 U.S. 105, 119 (2001).

¹⁴⁹ 9 U.S.C. § 2.

¹⁵⁰ *Id.* § 3. The phrase “courts of the United States” does not include state courts, but rather means only federal courts. See *Southland*, 465 U.S. at 29 n.18 (O’Connor, J., dissenting); *Hayford & Palmiter*, *supra* note 144, at 183 n.30.

trict court.”¹⁵¹ Under section 5, which deals with appointing arbitrators, “the court shall designate and appoint an arbitrator or arbitrators.”¹⁵² Section 6 addresses the procedure applicable to “[a]ny application to the court hereunder.”¹⁵³ Although neither section specifies federal courts, from the context it seems clear that is what was intended. By contrast, section 7 permits a petition to compel attendance at an arbitration proceeding to be filed in “the United States district court for the district in which such arbitrators . . . are sitting,”¹⁵⁴ and section 8 deals with cases brought in federal court on the basis of admiralty jurisdiction.¹⁵⁵ Sections 9 through 11 set out procedures for enforcing and challenging arbitral awards. All three sections permit actions in “the United States court in and for the district wherein the award was made,”¹⁵⁶ while sections 12 and 13 deal with the procedures in such actions.¹⁵⁷

Macneil argues that “[t]he structure of the [FAA] reveals an unquestionably integrated, unitary statute, consisting of core provisions and provisions supplementing them.”¹⁵⁸ New York state arbitration law was the source for the FAA; the New York arbitration law applied only in New York and did not purport to “bind[] courts of jurisdictions other than New York.”¹⁵⁹ Moreover, no other arbitration law at the time (or since, according to Macneil) applies differently in different jurisdictions. Thus, Macneil concludes, “[a]ny reading of the . . . [FAA] leading to substantive and procedural parts with different applicability creates a monstrosity found nowhere else in the world of American arbitration.”¹⁶⁰

I disagree. As the above description of the FAA demonstrates, the language of the Act supports construing section 2 to apply more broadly than the rest of the Act. Section 2 alone by its terms applies to maritime transactions and transactions in interstate commerce, which could cover proceedings both in federal and state court. The rest of the Act creates procedures applicable only in federal court. I do not suggest that the language of the Act requires this interpretation, but it certainly is a plausible one.

151 9 U.S.C. § 4.

152 *Id.* § 5.

153 *Id.* § 6.

154 *Id.* § 7.

155 *Id.* § 8.

156 *Id.* § 11; *see also id.* §§ 9–10.

157 *Id.* §§ 12–13.

158 MACNEIL, *supra* note 15, at 105–06.

159 *Id.* at 106.

160 *Id.* at 107.

Moreover, the fact that the FAA is based on New York arbitration law—which does not bind courts other than New York courts—does not show that the FAA likewise applies only in a single jurisdiction. Macneil disregards a key distinction between the New York arbitration law and the FAA: the drafters of the FAA inserted the phrase “maritime transactions and contracts evidencing a transaction involving commerce” into section 2. Obviously, no such jurisdictional nexus was present in the original New York law.¹⁶¹ Plainly, the drafters of the FAA knew that they were drafting a statute for a federal system, in which federal law is supreme over state law. Their use of the New York model does not demonstrate that section 2 is limited to a single jurisdiction, i.e., federal court. Finally, it is not surprising that there is no similar statute elsewhere in American arbitration law, since the FAA was designed to be enacted by the national government in a federal system, while other arbitration laws are enacted by the states.¹⁶²

At bottom, neither the language of the FAA nor its drafting origins support treating it as a unitary statute either wholly applicable in state court or not applicable at all. Instead, while most of the Act plainly applies only in federal court, section 2 by its terms is broader, and applies to all maritime transactions and transactions in interstate commerce. Nothing in section 2 limits its application to federal court, which, as subsequent sections explain, is what the Act’s drafters intended.

B. *Historical Setting*

Congress enacted the FAA, which was then called the United States Arbitration Act, in 1925. As described in detail by Macneil, the Act was the product of years of drafting and lobbying by business groups and the ABA.¹⁶³ The ABA Committee on Commerce, Trade

161 1920 N.Y. Laws 275, *quoted in* Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 289 (1921).

162 That sections 3 and 4 of the FAA do not apply in state court does not mean that a state, consistent with the Act, could refuse specific performance of arbitration agreements. Such a rule likely would be preempted by section 2 to the extent it “would effectively nullify the federal right.” See Note, Erie, Bernhardt, and *Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 YALE L.J. 847, 865 (1960). *But see* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 293 (1995) (Thomas, J., dissenting) (finding “no textual basis for *Southland’s* suggestion that § 2 requires the States to enforce [arbitration] agreements through the remedy of specific performance”).

163 MACNEIL, *supra* note 15, at 84–101.

and Commercial Law prepared the original draft of the bill, and Congress enacted it into law with only minor amendments.¹⁶⁴

The usual point of emphasis in describing the history of the FAA is that it was enacted while *Swift v. Tyson*¹⁶⁵ was still good law. At the time, rules governing the enforcement of arbitration agreements were seen as procedural, not substantive, and so were governed by the law of the forum. Accordingly, federal courts would not apply state arbitration statutes, and a federal arbitration statute was necessary to make arbitration agreements enforceable in federal court. Only after *Erie Railroad v. Tompkins*¹⁶⁶ was decided—indeed, not until the Supreme Court's 1956 decision in *Bernhardt v. Polygraphic Co.*¹⁶⁷—did the Court recognize the enforceability of agreements to arbitrate as substantive matters to be governed by state law in federal diversity cases beyond the scope of the FAA.¹⁶⁸

Justice Thomas, in his dissent in *Allied-Bruce*, stated the implications of this usual story for the *Southland* majority's analysis:

[a]t the time of the FAA's passage in 1925, laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance, because they were directed solely to the mechanisms for resolving the underlying disputes It would have been extraordinary for Congress to attempt to prescribe procedural rules for *state* courts. And because the FAA was enacted against this general background, no one read it as such an attempt.¹⁶⁹

Thomas explained further that the reason federal courts "refused to apply state arbitration statutes in cases to which the FAA was inapplicable"¹⁷⁰ was

not the outgrowth of this Court's decision in *Swift v. Tyson*, which held that certain categories of state judicial decisions were not 'laws' for the purposes of the Rules of Decision Act and hence were not binding in federal courts; even under *Swift*, state statutes unambiguously constituted 'laws.' Rather, federal courts did not apply the

164 *Id.* at 84–91.

165 41 U.S. (16 Pet.) 1 (1842).

166 304 U.S. 64 (1938).

167 350 U.S. 198 (1956).

168 *Id.* at 203–04.

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

170 *Id.* at 288.

state arbitration statutes because the statutes were not considered *substantive* laws.¹⁷¹

In short, when it enacted the FAA in 1925, the story goes, Congress would not have considered the Act as applicable in state court because the subject of the Act was procedural and thus to be governed by state arbitration laws.

But this story only proves so much. The most important implication of the procedural nature of arbitration statutes was that state arbitration laws did not apply in federal court.¹⁷² As a result, the FAA was necessary to make arbitration agreements enforceable in cases in federal court. Thus, the references in the FAA's legislative history to the procedural nature of arbitration statutes, as will be seen below, are used to explain the Act's application in federal court, not used to demonstrate its inapplicability in state court. But the fact that arbitration statutes were procedural did not preclude Congress from making arbitration statutes enforceable in state court, as the supporters of the Act informed Congress.¹⁷³ Instead, the procedural nature of arbitration statutes provided an additional constitutional basis on which Congress could rely in enacting the FAA—its power to regulate procedure in the federal courts.

Moreover, this story ignores another historical sea change that transformed the FAA in more significant ways than *Erie*: the dramatic expansion of Congress's power to regulate interstate commerce. The FAA was enacted in 1925, seven years after the Court in *Hammer v. Dagenhart* struck down a congressional statute prohibiting the interstate shipment of goods made with child labor.¹⁷⁴ The New Deal transformation of congressional power was more than a decade away. Thus, although some precedent at the time might have provided support for a broader interpretation of the commerce power,¹⁷⁵ the Court did not build on that precedent until well after the FAA was enacted.¹⁷⁶

171 *Id.*; see also Hayford & Palmiter, *supra* note 144, at 191 (“[I]n 1925 a congressional attempt to eradicate state animosity toward arbitration would have usurped jurisdictional boundaries.”).

172 MACNEIL, *supra* note 15, at 132–33.

173 See *infra* Parts III.C.1–2.

174 247 U.S. 251 (1918).

175 Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645, 647 (1946).

176 Rotunda and Nowak describe the state of Commerce Clause doctrine prior to the New Deal as follows:

[a]s we turn to the period of the New Deal, we can see several distinct lines of decisions regarding the commerce power. Under the *Shreveport Rate Case*,

The narrow scope of the commerce power when the FAA was enacted is shown by the following exchange in the *1923 Hearings* on the bill. In response to Senator Walsh's assertion that insurance contracts are not entered into voluntarily because they are offered on a take-it-or-leave-it basis, W.H.H. Piatt, one of the supporters of the Act, stated that "it is not the intention of this bill to cover insurance cases."¹⁷⁷ At the time, of course, in *Paul v. Virginia*¹⁷⁸ and subsequent cases, the Supreme Court had held that "[t]he business of insurance is not commerce"¹⁷⁹ and so was beyond Congress's power to regulate. As Professor Macneil himself has stated: "In 1925 narrow views of the scope of interstate commerce prevailed, and countless important transactions in state courts would have remained uncovered by a modern arbitration act, even with such an extension."¹⁸⁰

The New Deal expansion of the commerce power began in 1937 with *NLRB v. Jones & Laughlin Steel Corp.*,¹⁸¹ which adopted a much broader interpretation of Congress's power to regulate interstate commerce. Not until 1941 did Congress overrule *Hammer v. Dagenhart*.¹⁸² In 1942, the Court decided *Wickard v. Filburn*,¹⁸³ with its broad extension of the commerce power to a wholly in-state transaction that, when "taken together with that of many others similarly situated," had a sufficient effect on interstate commerce.¹⁸⁴

Thus, at the time it was enacted, the FAA did not dramatically alter the federal-state balance when it made certain arbitration agreements enforceable in state court, at least not to the degree it does now under modern conceptions of the commerce power. Subsequent

Congress could regulate activities which had an economic effect on commerce among the states. The Court, however, did not apply this theory beyond the railroad regulation cases. The Court had also allowed the regulation of single-state activities which were a part of the stream or current of commerce, but this theory required a tangible connection of the activity to interstate commerce. The Court would allow other regulation of commerce only if the subject matter had a "direct" effect on interstate commercial transactions.

1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.6, at 388 (2d ed. 1992).

177 *1923 Hearings*, *supra* note 73, at 9 (testimony of Mr. Piatt).

178 75 U.S. (8 Wall.) 168 (1869).

179 *N.Y. Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495, 508 (1913); *Hooper v. California*, 155 U.S. 648, 655 (1895).

180 MACNEIL, *supra* note 15, at 234 n.85; *see also* Hayford & Palmiter, *supra* note 144, at 192.

181 301 U.S. 1 (1937).

182 *See* *United States v. Darby*, 312 U.S. 100 (1941).

183 317 U.S. 111 (1942).

184 *Id.* at 128.

events have changed that: in *Allied-Bruce Terminix Cos. v. Dobson*¹⁸⁵ the Supreme Court held that the current broad conception of the commerce power, not the narrow conception prevailing at the time of enactment, governs under the FAA.¹⁸⁶ Subsequently, the Court in *Circuit City Stores, Inc. v. Adams*¹⁸⁷ construed the employment exception to the FAA narrowly, as limited essentially to transportation workers.¹⁸⁸ Thus, the reason for the transformation of the FAA is not, as usually argued, the decision in *Erie*,¹⁸⁹ but the expansion in Congress's commerce power since its enactment.¹⁹⁰

As a result, extending the FAA to state courts would not, at the time, have resulted in the dramatic expansion of federal authority that Macneil suggests. Certainly there were questions about the constitutionality of the Act, and Congress's authority to extend the Act to state courts was shakier than its authority to make the Act applicable in federal court.¹⁹¹ But it is not as surprising that there was little or no opposition to the Act on federalism grounds as it might otherwise seem with modern hindsight.

Moreover, the narrow understanding of the commerce power at the time offers at least a partial explanation for the twenty-year gap between enactment of the FAA and the first reported state court case considering the Act. Because of the narrow conception of the commerce power, and thus the scope of the FAA, the vast majority of cases to which it applied were in federal court; few were in state court. Indeed, even in federal court, early commentators concluded, "The greater number of arbitration agreements that federal courts will, in

185 513 U.S. 265 (1995).

186 *Id.* at 275.

187 532 U.S. 105 (2001).

188 *Id.* at 114–15.

189 See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *Erie* and its progeny may well have led to the rediscovery of the FAA's applicability in state court. See Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1308–37 (1985) (tracing effect of *Erie* on interpretations of FAA).

190 The expansion of the commerce power likewise explains the much criticized application of the FAA to consumer contracts. At the time the FAA was enacted, most consumer contracts would not have had a sufficient nexus to interstate commerce for the Act to apply. Thus, the support for the proposed Act was from merchants (and lawyers) who wanted to make arbitration agreements among merchants enforceable. As the Supreme Court has construed the commerce power more broadly and consumer transactions have become more national in scope, the FAA has come to cover increasing numbers of consumer transactions.

191 See Heuston, *supra* note 29, at 258.

all likelihood, be called upon to enforce, will fall within the scope of the state laws.”¹⁹²

The key to understanding the legislative history of the FAA, then, is not in its historical setting, but in the congressional materials themselves. I now turn to these materials.

C. Congressional Materials

This section analyzes in detail the congressional materials that make up the legislative history of the Federal Arbitration Act. Those materials consist of hearings in 1923 and 1924, a House report and a Senate report, and “exceptionally meagre” floor debates.¹⁹³ Congress itself had little to say about the FAA, and the Act as passed was virtually identical to the original bill as drafted and approved by the ABA.¹⁹⁴ Thus, Macneil argues,

It must always be remembered that the FAA drafts were presented to Congress in whole cloth by reformers acting through the A.B.A. The FAA was thus not a bill manufactured in Congress. The legislative history of the FAA can, therefore, be understood only in terms of what Congress understood was being presented to it, rather than in the more usual terms, i.e., what Congress thought it was creating and presenting to the nation. This is a subtle but important difference, since what counts is largely the intentions of the reformers as known to Congress. Only from them can the intentions of the legislators be inferred.¹⁹⁵

The analysis that follows is roughly in chronological order, with one major exception—the brief in support of the Act, submitted by Julius Henry Cohen at the 1924 congressional hearings, with which I begin.

1. Cohen Brief

The author of the first draft of the FAA was Julius Henry Cohen, general counsel for the New York Chamber of Commerce and member of the ABA Committee on Commerce, Trade and Commercial Law.¹⁹⁶ In addition to testifying at the *1924 Hearings on the Act*,¹⁹⁷

192 Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. REV. 428, 445 (1931).

193 *Id.* at 429.

194 See *supra* text accompanying notes 163–64.

195 1 MACNEIL ET AL., *supra* note 2, § 10.2, at 10:7; see also Pittman, *supra* note 144, at 824–25. I proceed on that assumption as well. See *supra* note 38.

196 MACNEIL, *supra* note 15, at 85.

197 For Cohen’s testimony at the hearing, see *infra* text accompanying notes 249–54.

Cohen submitted a brief at the hearings, which is reprinted in its entirety in the hearing transcript.¹⁹⁸ Cohen incorporated portions of the brief in subsequent articles that he published in the *ABA Journal*¹⁹⁹ and the *Virginia Law Review*,²⁰⁰ explaining the Act. According to Macneil, “[t]his brief is one of the most important aspects of the legislative history of the [FAA].”²⁰¹ Based on the Cohen Brief, Macneil concludes: “Had there ever been any doubt—there was not—concerning the limitation of the [FAA] to the federal courts, Cohen’s brief certainly would have removed it.”²⁰²

I agree with Professor Macneil that the Cohen Brief is an extremely important piece of the FAA’s legislative history, but for the opposite reason. It is important because the Cohen Brief is the strongest evidence there is that the supporters of the FAA believed that the Act applied in state court and communicated that belief to Congress. If, as Macneil says, “what counts is largely the intentions of the reformers as known to Congress,”²⁰³ then this brief is strong evidence that Congress intended the FAA to apply in state court.²⁰⁴

The key section of the brief is its discussion of Congress’s power to make arbitration agreements enforceable in state court. I will begin by considering that section, and then will address the rest of the brief. Because of its importance, I reproduce that section of the Cohen Brief at length:

[s]o far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States. It seems probable, however, that Congress has ample power to declare that all arbitration agreements connected with interstate commerce

198 See *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Judiciary*, 68th Cong. 33–41 (1924) [hereinafter *1924 Hearings*] (brief submitted to committee by Julius Henry Cohen [hereinafter Cohen Brief]).

199 Comm. on Commerce, Trade and Commercial Law, ABA, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153 (1925); see *infra* text accompanying notes 279–95.

200 Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926); see *infra* text accompanying notes 311–20.

201 MACNEIL, *supra* note 15, at 97.

202 *Id.* at 114; see also *id.* at 97 (“If there were ever any doubt about congressional understanding as to what it was doing respecting the applicability of the act, this brief would remove that doubt.”).

203 1 MACNEIL ET AL., *supra* note 2, § 10.2, at 10:7.

204 See Atwood, *supra* note 144, at 77, 83 (“Cohen’s concern over the potential reach of the commerce power suggests that the drafters intended the basic mandate of enforceability to apply to state courts *if* Congress had power to support such an application.”).

or admiralty transactions shall be recognized as valid and enforceable even by the State courts. In both cases the Federal power is supreme. Congress may act at its will, and having acted, no law or regulation of a State inconsistent with the congressional act can be given any force or effect even in the courts of the State itself. They are as much bound to carry out the provisions of such a Federal statute as though it was an act of their own legislature. This rule is so well settled that it is no longer subject to question or discussion

It is not only the actual and physical interstate shipment of goods which is subject to the interstate commerce powers of the Federal Government, but these powers govern every agency or act which bears so close a relationship to interstate commerce that they can reasonably be said to affect it. Contracts relating to interstate commerce are within the regulatory powers of Congress

The only questions which apparently can be raised in this connection are whether the failure to enforce an agreement for arbitration imposes such a direct burden upon interstate commerce as seriously to hamper it or whether the enforcement of such a clause is of material benefit. If either of these questions can be answered in the affirmative, we believe it to be beyond question that Congress can legislate concerning the matter.

Even if, however, it should be held that Congress has no power to declare generally that in all contracts relating to interstate commerce arbitration agreements shall be valid, the present statute is not materially affected. The primary purpose of the statute is to make enforceable in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.²⁰⁵

At a minimum, the discussion belies the notion that no one at the time even considered the possibility that the FAA applied in state court. Here, Cohen not only considers that possibility, but argues that Congress has the power to so act.

More importantly, the clear import of this excerpt is that the FAA was intended to apply in state court. Cohen argues that “so far as” the Act applies in federal courts, “it does not encroach upon the province of the individual states.” Cohen thus implies that “so far as” the Act applies in state courts, it does encroach on the province of the states, and Congress has the power to do so. The last paragraph of the excerpt confirms this reading. The clause—“[e]ven if . . . it should be held that Congress has no power” to regulate arbitration agreements in state court—necessarily supposes litigation over that issue, litigation

205 Cohen Brief, *supra* note 198, at 38.

that would not occur unless the FAA applied in state court. Moreover, a holding of unconstitutionality would “not materially affect[]” the statute (although it would affect it immaterially), according to Cohen, because the “primary purpose” of the Act was to make arbitration agreements enforceable in federal court. Thus, making arbitration agreements (at least those in interstate commerce) enforceable in state court is, while not the primary purpose, at least a secondary purpose of the statute. The reason for the lack of any “material” effect is, as discussed above,²⁰⁶ the narrow reach of Congress’s commerce power at the time.

Macneil acknowledges that “[t]he first sentence of this paragraph taken by itself contains a slight ambiguity.”²⁰⁷ He explains,

“So far as” can be interpreted to mean that the proposed statute does something more than govern the federal courts. The phrase also can be interpreted as simply laying a ground for the proposition that since Congress *could* control the state courts under the commerce and admiralty clauses the proposed bill, even though limited to federal courts, has an additional constitutional support. Taken out of context, the former might seem the more reasonable interpretation; in context it is a most unreasonable one.²⁰⁸

Macneil then dismisses this portion of the Cohen Brief as reflecting either “lawyerly caution”²⁰⁹ or “Cohen’s undoubted wish in his heart of hearts to see arbitration agreements enforceable everywhere.”²¹⁰

Macneil’s first reason for rejecting the obvious interpretation of this language is that it is inconsistent with what Cohen writes elsewhere in the brief. I will deal with that question in detail shortly. Macneil’s other explanations for the language are even less convincing. Perhaps Cohen did “wish in his heart of hearts” that the Act would be enforceable in state court. But by expressing that “wish” in the materials he submitted to Congress (and in subsequent publications discussing the Act),²¹¹ it was no longer merely in his “heart of hearts.” Instead, Cohen was stating his understanding that the statute

206 See *supra* text accompanying notes 174–90.

207 MACNEIL, *supra* note 15, at 114.

208 *Id.* at 223 n.60.

209 *Id.* at 223 n.61 (“Mr. Cohen’s insertion of this additional constitutional authority for congressional enactment of the statute is more likely attributable to lawyerly caution than it is to any attempt to slip in by the back door a major change in the statute, one contrary to everything else he said about it.”).

210 *Id.* at 114; see also Schwartz, *supra* note 144 (manuscript at 17 n.61, on file with author) (characterizing language as Cohen merely “float[ing] a hopeful trial balloon”).

211 See *supra* text accompanying notes 199–200.

did, in fact, apply in state court. Moreover, Macneil's suggestion of "lawyerly caution" is inconsistent with Macneil's argument elsewhere in the book—that making the FAA applicable in state court would have prompted substantial opposition to the Act.²¹² If, in fact, there would have been as much opposition to having the FAA apply in state courts as Macneil has asserted, "lawyerly caution" would dictate the opposite of what Cohen did. Cohen would have bent over backwards to deny that the FAA applied in state court rather than raising the possibility that it did. Cohen made no such denial.

At bottom, Macneil interprets this section of the Cohen Brief as "simply noting that Congress probably could require state courts to enforce arbitration agreements in interstate commerce or admiralty, not that this proposed statute does so."²¹³ Macneil asserts that this "is made clear in the paragraphs following, particularly" the last paragraph quoted above, in which Cohen states that the "primary purpose" of the Act is to make arbitration agreements enforceable in federal court.²¹⁴ Macneil merely quotes the paragraph without explanation.²¹⁵ But the paragraph is contrary to Macneil's interpretation: that the "primary purpose" of the Act is directed toward federal courts suggests that the secondary purpose of the Act is directed toward state courts. Macneil simply does not consider this obvious reading of the Cohen Brief, which supports, rather than undercuts, a finding that the FAA applies in state court.

Macneil seeks to overcome the plain meaning of this section of the Cohen Brief based on context—what Cohen says about the FAA in the rest of the brief. But the rest of the brief is fully consistent with interpreting the FAA as applying in state courts.

The first sentence of the brief states that "[a]t the last session of Congress, there was introduced a bill which would make valid, and enforceable by the Federal courts, certain agreements for arbitration."²¹⁶ That description of the bill is accurate, of course. In fact, the qualifier "by the Federal courts" modifies only "enforceable," not "valid." Even disregarding the comma after "valid," nothing suggests that the description purports to be exclusive, i.e., that the bill only applies in federal court.

The brief then describes the provisions of the proposed Act, beginning with sections 1 and 2:

212 See *supra* text accompanying notes 128–31.

213 MACNEIL, *supra* note 15, at 114.

214 See *supra* text accompanying note 205.

215 MACNEIL, *supra* note 15, at 114.

216 Cohen Brief, *supra* note 198, at 33–34.

[b]y a bill a provision for arbitration contained in any contract which involved maritime transactions (matters which would be embraced within admiralty jurisdiction) and interstate commerce as generally defined is made "valid, enforceable and irrevocable," except upon the grounds for which any contract may be revoked. The same rules apply to a submission to arbitration of an existing controversy. (Secs. 1 and 2.)²¹⁷

Nothing in the description of these sections, just as nothing in sections 1 and 2 of the FAA, limits the reach of the provisions to federal court. By comparison, the next paragraph of the brief describe sections 3 and 4 of the Act, which plainly do apply only in federal court, as the description makes clear:

[t]he Federal courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would normally have jurisdiction of a controversy between the parties There are two possible steps in such enforcement. First, any suit commenced in a Federal court upon an issue referable to arbitration may be stayed until arbitration is had, unless the applicant for the stay is in default with the arbitration. (Sec. 3.) Secondly, the court may order the arbitration to proceed in accordance with the agreement, appointing an arbitrator itself, if appointment under the agreement can not be had. (Secs. 4 and 5.)²¹⁸

217 *Id.* at 34.

218 *Id.* The first sentence of this excerpt indicates that the FAA (as ultimately enacted) does not extend federal subject-matter jurisdiction to cases that could not already have been brought in federal court. Justice O'Connor in *Southland*, among others, argues that "this puzzle"—of Congress creating a "federal substantive right that cannot be enforced in federal court under the jurisdictional grant of 28 U.S.C. § 1331"—indicates "that in 1925 Congress did not believe it was creating a substantive right at all." *Southland Corp. v. Keating*, 465 U.S. 1, 30 n.19 (1984) (O'Connor, J., dissenting). In fact, as proposed, the FAA would have eliminated any amount-in-controversy requirement for diversity cases under the Act, effectively extending federal jurisdiction over actions to enforce arbitration agreements and awards. See S. 1005, 68th Cong. § 8 (1924), reprinted in *1924 Hearings*, *supra* note 198, at 3. That the extension of jurisdiction was to be based on diversity rather than federal question jurisdiction is not surprising given that the discussions of the bill focused on interstate businesses. The Senate Judiciary Committee, however, deleted section 8 without explanation, see S. REP. NO. 68-536, at 1 (1924), and the provision was not part of the FAA as passed by Congress. Macneil argues that the deletion of section 8 "reflects the intention of the A.B.A. (and of Congress) that the [FAA] be applicable only in federal court" because "[t]he provision would have been largely unnecessary if the act governed state as well as federal courts." MACNEIL, *supra* note 15, at 105. That is not so, as discussed *infra* text accompanying notes 319–20.

Thus, Macneil's reliance on the first and third sentences of this quotation²¹⁹ is misplaced. The paragraph is discussing only section 3 of the FAA, not section 2. Thus, these paragraphs do not indicate that the FAA applies only in federal court; if anything, they suggest the opposite.

As one of the justifications for the Act ("the evil to be corrected"),²²⁰ the brief then describes the unenforceability of arbitration agreements in many of the states:

[b]ecause of the fact that in New York and New Jersey, in the United States and in many foreign countries with whom the United States has a large number of commercial transactions, arbitration agreements are enforceable, while in the remainder of the United States they are not enforceable, parties who reside in the jurisdictions recognizing arbitration agreements are at a disadvantage compared with those residing in jurisdictions where they are not enforceable. The party residing in the first class of jurisdictions is bound to respond to his agreement, either voluntarily or under the order of the court. His coparty, residing in the second class of jurisdictions, may refuse as arbitrarily or dishonestly as he pleases to carry out his agreement, and his coparty has no remedy against him, except through an ordinary action in the courts.²²¹

The solution, according to Cohen, is as follows:

[t]o meet the situation where, through dishonesty or mistake or otherwise, one party to an arbitration agreement refuses to perform it, statutes such as those adopted in New York and New Jersey are advocated and have met favor. To correct the same defect and also to assure justice where one of the parties lives in a State not recognizing arbitration agreements, the present Federal statute is proposed.²²²

Macneil does not cite or quote this excerpt, even though it might be read to suggest that the FAA is designed to deal with cases in federal court (where there would be diversity jurisdiction) and state arbitration laws would deal with cases in state court. Given the narrow reach of the federal commerce power, as described above,²²³ state arbitration statutes would be necessary to deal with the vast bulk of cases in state court. And the FAA obviously applies in federal court. But nothing in this excerpt excludes the possibility that the FAA also applies to

219 MACNEIL, *supra* note 15, at 112.

220 Cohen Brief, *supra* note 198, at 34.

221 *Id.* at 35.

222 *Id.*

223 See *supra* text accompanying notes 174-90.

the relatively small number of cases (at that time) in state court within the scope of the federal commerce power.

The next section of the Cohen Brief, the “Legal Justification” for the Act, begins by listing the relevant constitutional provisions, including both the Commerce Clause and Congress’s power to establish federal courts.²²⁴ The next two paragraphs then state,

It has been suggested that the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress. This is not the fact.

The statute as drawn establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power. This principle is so evident and so firmly established that it can not be seriously disputed.²²⁵

Again, Macneil quotes both of these paragraphs as evidence that the FAA applies only in federal court.²²⁶ Again, they do not support such a conclusion. First, the excerpt states that the statute “establishes a procedure in the Federal courts for the enforcement of arbitration agreements.” That it most certainly does—section 2 makes arbitration clauses enforceable, and sections 3 and 4 establish a procedure in Federal courts for enforcement. Nothing in the statement excludes application of section 2 in state court.

Second, the brief notes the two possible sources of constitutional authority for the Act—the Commerce Clause and Congress’s power to establish lower federal courts—and states that the constitutionality of the FAA does not “depend[] for its validity” on the commerce power. Macneil (and Justices O’Connor and Thomas) take the fact that Congress in enacting the FAA relied on its power to regulate the federal courts as demonstrating that it did not intend the FAA to apply in state court. But that is incorrect. In this excerpt, Cohen made clear that the FAA—as it applies in federal court—is based on both the commerce power and the power to regulate the federal courts. He recognized that there were questions about whether the Act was constitutional, and not surprisingly offered alternative sources of Congressional authority for the Act. Thus, the Act does not “depend” on the commerce power, because there is an alternative source of authority on which Congress also relied. But Cohen does not assert that the

224 Cohen Brief, *supra* note 198, at 37.

225 *Id.*

226 MACNEIL, *supra* note 15, at 112.

commerce power is irrelevant to the constitutionality of the Act as applicable in federal court. And, regardless, nothing in the discussion here even purports to address the constitutional authority for Congress to make the FAA applicable in state court, which, as already discussed,²²⁷ Cohen attributes solely to the commerce power.

Third, the paragraph sets the context for the next several paragraphs of the brief. Those paragraphs, as does this one, deal with the FAA as it applies to the federal courts. Read in context, references in the next several paragraphs to the fact that the FAA will not affect the states are references to the extent to which the Act regulates the federal courts. The references do not address the effect of section 2 on state courts.

Thus, the brief continues in the following passage (the first paragraph of which is quoted by Macneil),²²⁸

A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made. But whether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought.

That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts.

....

Neither is it true that such a statute, when it declares arbitration agreements to be valid, declares their existence as a matter of substantive law. The courts have always recognized that such agreements have existed but have refused to enforce them. It was often said loosely that arbitration agreements were void, even under the common-law rule. This statement was not accurate. While the courts refused to enforce arbitration agreements specifically, they recognized their existence because they gave another remedy. From the earliest times it was held that for a breach of arbitration agreement the aggrieved party was entitled to damages.

In no proper sense, therefore, was the arbitration agreement void. It was valid in the same sense that most contracts are valid[,]

227 See *supra* text accompanying notes 205–06.

228 MACNEIL, *supra* note 15, at 112–13.

i.e., while specific performance would not be given, a remedy for a breach existed in the right to recover damages.²²⁹

As stated above, all of the references in these paragraphs refer back to the preceding paragraph, which discusses the procedure for enforcing arbitration agreements in federal court. Indeed, the discussion of the constitutional authority for Congress to make arbitration agreements enforceable in state court follows immediately after this section of the brief. Recall that Cohen begins that discussion with the statement that “[s]o far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States.”²³⁰

The final section of the Cohen Brief discusses public policy arguments in support of the Act. Interestingly, unlike the discussion above of Congress’s power to make the FAA applicable in state court, which appears in all of Cohen’s subsequent publications, this policy section does not appear in Cohen’s later publications. Macneil quotes the Cohen Brief:

[n]or can it be said that the Congress of the United States[,] directing its own courts no longer to recognize this anachronism in the law, would infringe upon the provinces or prerogatives of the States. As we have already shown and as the *Berkovitz* case, *supra*, declares again, the question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced, and a change in the jurisdiction in which it was made is of no effect. Every one of the States in the Union might declare such agreement to be valid and enforceable, and still in the Federal courts it would remain void and unenforceable unless the Supreme Court of the United States felt at liberty itself to reverse a rul[e] recognized for centuries. This, in the absence of a congressional declaration, it has so far felt itself unable to do.²³¹

The Cohen Brief also states that

[t]here is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute can not have that effect. It is desired only that the Federal Government shall declare the validity of arbitration agreements in the field where necessarily it is supreme and where without this action no remedial action by the States ever can be effected. It is peculiarly within the province of

229 Cohen Brief, *supra* note 198, at 37–38 (internal citations omitted).

230 *Id.* at 38.

231 *Id.* at 39–40, *quoted in* MACNEIL, *supra* note 15, at 113 (referring to *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261 (1921)).

the Federal Government, we submit, to assure the citizens of different States that in dealing with each other they shall stand upon an equal footing. If one of them is bound to arbitrate because he lives in a State enforcing arbitration agreements, the other should equally be bound and surely has no moral right to arbitrarily abandon all his obligations.²³²

Macneil finds in this section “[f]urther indication that the statute was intended to be limited to federal courts”²³³

The only “field” where Congress was supreme *and* the State could not provide for the effective enforceability of arbitration agreements was that of cases in *federal* courts. The States at that time had unquestioned power to allow their own courts to enforce arbitration agreements, whether such agreements involved interstate commerce or not.²³⁴

Macneil cites the first sentence in the closing paragraph as “Cohen’s most colorful disclaimer of any intention to have the USAA govern in state courts.”²³⁵

But Macneil reads too much into this section. He construes it as stating that the FAA does not apply at all in state court, even to contracts involved in interstate commerce. But under such a reading, Cohen’s statement that “the statute can not have that effect” contradicts his earlier conclusion that Congress can, i.e., has the power to, make the FAA applicable in state court. Instead, the paragraph is asserting, quite correctly, that Congress can only act using its limited powers and cannot force an “individual State” (“by means of the federal bludgeon”) to make all arbitration agreements enforceable. Nevertheless, when interstate commerce is involved (affecting more than one individual state) federal law is necessary to provide effective relief, mostly—but not exclusively—by making arbitration agreements enforceable in federal court. Certainly, the excerpt highlights the enforceability of arbitration agreements in federal court (as does the rest of the legislative history), but that is to be expected given that it was the “primary purpose” of the FAA. But making arbitration agreements in interstate commerce enforceable in state court also is a field in which the federal government is supreme and in which—as Cohen already had concluded—Congress has the power to legislate. Thus, the conjunction “and” on which Macneil places so much weight does not exclude action in state court, even though states in some cases

232 Cohen Brief, *supra* note 198, at 40.

233 MACNEIL, *supra* note 15, at 113.

234 *Id.* (footnote omitted).

235 *Id.* at 114.

might effect a remedy. Instead, the (admittedly ambiguous) passage reasonably could be read as referring to arbitration agreements in interstate commerce, which includes both those in federal court and those in state court.

In sum, while it certainly is plausible to construe the Cohen Brief as Professor Macneil has done, construing it as acknowledging that the FAA applies in state court is more faithful to the document and results in fewer ambiguities than Macneil's interpretation.

2. Hearings

Congress held two hearings on the proposed FAA, one in 1923 and one in 1924. The *1924 Hearings* are noteworthy because of the Cohen Brief,²³⁶ which is attached to the hearing transcript. The testimony at both hearings is consistent with the FAA being applicable in state court.

1923 Hearings.

A Subcommittee of the Senate Judiciary Committee held the first hearings on the proposed FAA on January 31, 1923.²³⁷ Although Macneil describes the hearings at length,²³⁸ he does not rely on any of the testimony in support of his interpretation of the statute.²³⁹

The testimony most relevant to the applicability of the FAA in state court was that of Charles N. Bernheimer, the chair of the arbitration committee of the New York Chamber of Commerce. After outlining his experience with commercial arbitration, Bernheimer described the proposed Act:

[t]his bill follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction. These fields are in admiralty and in foreign and interstate commerce. The Federal courts, even in the district of New York, have refused to apply the New York State law in admiralty cases. The fundamental conception underlying the law is to make arbitration agreements valid, irrevocable, and enforceable. The commercial bodies of the country have been urging the adoption of this principle of legislation throughout the country, and their point of view has now been accepted by the American Bar Association²⁴⁰

236 See *supra* Part III.C.1.

237 *1923 Hearings*, *supra* note 73.

238 MACNEIL, *supra* note 15, at 88–91.

239 *Id.* at 111–13.

240 *1923 Hearings*, *supra* note 73, at 2.

In response to questions, Bernheimer explained further the need for the Act:

[f]rom the merchant's standpoint, I can say this, that arbitration clauses in contracts are used, but they are used with undue caution and a great degree of uncertainty because of the revocability of the arbitration agreements after trouble has arisen and after arbitration has commenced. That is so in every State excepting the State of New York, and, I believe, the State of Illinois The arbitration clause, Federally speaking, and in other States, is not enforceable. A merchant can not depend on it

. . . .

Where they are involved as to New York State jurisdiction pure and simple, we press for arbitration, and we can get it because there is no difficulty about it; but the moment the Hudson River separates us, over in New Jersey, and when it is a Jersey case against a New York case, we can not do so.²⁴¹

Certainly this discussion illustrates the need for the FAA as applied to interstate transactions, but it does not address whether the Act applies in state court or only in federal court.

1924 Hearings.

I already have described the Cohen Brief,²⁴² the most important part of the January 9, 1924 Joint Hearings on the proposed FAA.²⁴³

241 *Id.* at 3–4.

242 *See supra* Part III.C.1.

243 1924 Hearings, *supra* note 198. David Schwartz relies on a Senate Judiciary Committee amendment to section 2 of the FAA as support for limiting the Act to federal court. Schwartz, *supra* note 144 (manuscript at 11, on file with author). As originally drafted, the FAA applied to “any contract or maritime transaction or transaction involving commerce.” H.R. 646, 68th Cong. (1924), *reprinted in* 65 CONG. REC. 11,081 (1924). As amended, the Act applied to “any maritime transaction or a contract evidencing a transaction involving commerce.” S. REP. NO. 68-536, at 2 (1924). Schwartz argues that the original language indicates the FAA was intended to apply only in federal court (Congress clearly had no authority to regulate all contracts in state court), and that the amendment was intended to “shrink” the coverage of the Act, not extend its application to state court. Schwartz, *supra* note 144 (manuscript at 11, on file with author). While original (Macneil does not discuss the amendment, *see* MACNEIL, *supra* note 15, at 100), Schwartz’s argument is unpersuasive. All indications from the legislative history are that the amendment was intended to make no substantive change in the statute—in other words, that the original language was not intended to have a broader reach than the language that ultimately became law. Thus, the Cohen Brief—based on the original rather than the amended language—describes the Act as applicable to “a provision for arbitration contained in any contract which involved maritime transactions (matters which would be embraced within admiralty jurisdiction) and interstate commerce as generally defined.” Cohen Brief,

The following summarizes that testimony at the *1924 Hearings* that Macneil finds to be on point.

In his description of the hearing, Macneil quotes from the testimony of Charles Bernheimer as to the need for an arbitration statute addressing interstate transactions. Bernheimer testified in support of

formal arbitration, which is the basis on which this bill is framed, namely, arbitration which has legal sanction, whereby arbitration once agreed upon must be seen through, so that the parties can not, as they can in the most of our States and certainly in connection with interstate business, back out at the last moment when they see the case is going against them²⁴⁴

The Chair of the Committee asked Bernheimer, "What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce," to which Bernheimer answered, "Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance."²⁴⁵ As with his testimony at the *1923 Hearings*, while Bernheimer clearly identified the need for a statute applicable to interstate transactions, including those in federal court, his testimony sheds no light on whether the Act applied to such transactions in state court.

Macneil puts more emphasis on the testimony of Alexander Rose of the Arbitration Society of America. Rose testified,

There is one excellent result to be achieved in the enactment of this bill, apart from the enactment itself; it will set a standard throughout the United States. There are many States which have no arbitration law [T]he enactment of this law, extending its effect all over the United States, will have an effect upon the cause of that much-desired thing—uniform legislation on a subject of this character. I have no doubt all of the States would pattern after it²⁴⁶

Macneil's response is that "Rose saw two effects of the [FAA], legal and moral."²⁴⁷ The legal effect was the enactment of the FAA itself. The moral effect was the encouragement that enactment would give states to enact their own arbitration laws. Macneil concludes, "It may be noted that the moral effect on state law he describes would have been moot if the [FAA] superseded state law in state courts under the

supra note 198, at 34. Moreover, in commenting on the amendment later on the Senate Floor, Senator Sterling explained that "[i]t is a little different phraseology, but the purport is just the same as the language in the original bill." 66 CONG. REC. 2761 (1925).

²⁴⁴ *1924 Hearings*, *supra* note 198, at 7 (testimony of Charles L. Bernheimer).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 28 (testimony of Alexander Rose).

²⁴⁷ MACNEIL, *supra* note 15, at 112.

Supremacy Clause.”²⁴⁸ Macneil here ignores the limited scope of the FAA in state court, resulting from the narrow interpretation at the time of the Commerce Clause. The “moral effect” of the FAA—of encouraging states to enact their own arbitration laws—most certainly would not have been moot if the FAA applied in state courts. Many if not most transactions in state court would not, under the prevailing view, have been subject to the FAA. State arbitration laws were still needed.

Finally, Macneil quotes at length from the testimony of Julius Henry Cohen.²⁴⁹ Cohen’s brief to the Committee is discussed at length above.²⁵⁰ Macneil cites one passage from Cohen’s testimony that “particularly stands out”:²⁵¹

[b]ut it can not be done under our constitutional form of government and cover the great fields of commerce until you gentlemen do it, in the exercise of your power to confer jurisdiction on the Federal courts. The theory on which you do this is that you have the right to tell the Federal courts how to proceed²⁵²

As discussed above, because of uncertainty about the constitutionality of the FAA even in federal court, its drafters relied both on the commerce power and on Congress’s power to regulate the federal courts.²⁵³ The latter power plainly is what Cohen is addressing here. But when, in his brief, Cohen discussed Congress’s power to make arbitration agreements enforceable in state court, he relied solely on the commerce power. Nothing in this excerpt suggests that Cohen in any way is repudiating that position. Instead, he simply is trying to bolster what he sees as the primary (albeit not exclusive) purpose of the legislation to make arbitration agreements enforceable in federal court.

In other passages, Cohen also addresses the need for federal legislation:

[w]hat does this bill do? It destroys the anachronism in the law. The very first sentence says if a man signs a contract for arbitration, it shall be irrevocable Why do we do that in the Federal courts? We have it in New York State; the chamber of commerce and the other commercial bodies got together and got it through in New York. You have got it in New Jersey. The New Jersey Bar Association and the business men there got together and had it passed

248 *Id.*

249 *Id.* at 94–95.

250 *See supra* Part III.C.1.

251 MACNEIL, *supra* note 15, at 112.

252 *1924 Hearings*, *supra* note 198, at 17 (testimony of Julius Henry Cohen).

253 *See supra* text accompanying notes 224–27.

last year. Why do you have to have it in Federal law? There are several reasons.

First of all, it was held that a State statute was not binding in admiralty, even in the Federal courts And the Federal court will not be bound by any State statute. This is in three segments: The first is to get a State statute, and then to get a Federal law to cover interstate and foreign commerce and admiralty, and, third, to get a treaty with foreign countries

But the great field of business—why are these merchants and these fruit shippers and those who are represented here, why are they for this? Because of interstate business. And you know that commerce is mostly interstate now. So that this is a great tonic that is needed to strengthen this patient in the field of commercial activity, because when business men know that they do not have to get a lawyer in California to enforce a case that does not involve more than four or five hundred dollars they will do more business. That is why the business men are behind this thing.²⁵⁴

Again, while these passages emphasize the importance of the proposed Act for interstate business and highlight the need for the FAA in federal court, nothing excludes the application of the Act in state court as well. Cohen's testimony (unlike the Cohen Brief) simply does not address that issue.

3. Reports

Following the hearings, both the House and Senate issued reports on the proposed FAA. Neither report is decisive as to whether the Act applies in state court, although both are consistent with the reading suggested here.

House Report.

The first report on the proposed Federal Arbitration Act was House Report 96, issued on January 24, 1924. This report was the principal source for Chief Justice Burger's legislative history analysis in *Southland*.²⁵⁵

The first sentence of the House Report, on which Chief Justice Burger relied in his majority opinion in *Southland*, states,

The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate

254 1924 Hearings, *supra* note 198, at 16 (testimony of Julius Henry Cohen).

255 See *supra* Part I.B.

commerce or within the jurisdiction or [sic] admiralty, or which may be the subject of litigation in the Federal courts.²⁵⁶

As discussed above, the *Southland* majority found in the final “or” in this sentence evidence that the FAA applied in state court: the FAA makes arbitration agreements enforceable in contracts in interstate commerce or in cases in federal court.

Macneil contends that the final “or” was “quite plainly and simply a clerical or typographical mistake. The intention of the writers of the Report was one of addition, not of alternative.”²⁵⁷ Second, Macneil (correctly) points out that Chief Justice Burger’s reading proves too much: Burger does not assert that the FAA applies to all federal court cases, although that literally is what his interpretation suggests. Third, Macneil falls back on the argument that the majority’s reading “is at odds with all the rest of the legislative history”²⁵⁸

Macneil too readily dismisses the sentence as containing a typographical error. Obviously, the previous “or” in the sentence is a typo and should be “of.” But that does not mean that there is second typo in the excerpt.²⁵⁹ Indeed, in a 1926 publication the American Arbitration Association used almost identical language in describing the scope of the FAA, without the typo but containing the same key phrase: “The United States Arbitration Act, effective January 1, 1926, established a national policy and procedure for the settlement by arbitration of controversies arising out of inter-state commerce or maritime transactions, or within the jurisdiction of the federal courts.”²⁶⁰ But I agree that Chief Justice Burger placed too much weight on this language in *Southland*. In my view, the most likely interpretation of this language is that it was an attempt by the drafter of the House

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

257 MACNEIL, *supra* note 15, at 118.

258 *Id.* at 119.

259 “Enforcible” is not a typographical error. Although the modern spelling is “enforceable,” the spelling in the House Report was an acceptable one at the time. *E.g.*, 5 OXFORD ENGLISH DICTIONARY 245 (2d ed. 1989).

260 MODEL ARBITRATION ACT (Am. Arbitration Ass’n 1926), in *Model Arbitration Statute Offered*, 10 J. AM. JUDICATURE SOC’Y 122, 124, 126 (1927). A later publication by the American Arbitration Association describes the FAA as applicable only to diversity cases involving interstate commerce and maritime transactions: “[i]n 1925, Congress enacted the United States Arbitration Act which became effective January 1, 1926. Under this Act the foregoing principles are applicable to disputes arising out of interstate commerce and foreign transactions which involve \$3,000 or more, and to maritime transactions.” AM. ARBITRATION ASS’N, SUGGESTIONS FOR THE PRACTICE OF COMMERCIAL ARBITRATION IN THE UNITED STATES iii, 9 (1928) (acknowledging Wesley A. Sturges, Kenneth Dayton, and Moses H. Grossman “for critical and constructive suggestions upon the legal phases of the suggestions”).

Report to reflect that the Act's application in federal court was based on two sources of constitutional authority, the Commerce Clause and Congress's power to regulate the federal courts. So viewed, it does not demonstrate that Congress intended the Act to apply in state court. At the same time, however, it does not support Macneil's argument that the intent of the language was "addition, not alternative." The language certainly is at least consistent with the argument that the FAA applies in state court.

The rest of the House Report is consistent with that argument as well. After describing the origins of the Act, the Report continues,

The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States. The remedy is founded also upon the Federal control over interstate commerce and over admiralty. The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.²⁶¹

Plainly, the FAA makes arbitration agreements enforceable in federal court, as the excerpt states. Because that is the "primary purpose" of the Act (to use the words of the Cohen Brief), one would expect that to be the House Report's focus. The excerpt also makes clear the dual sources of constitutional authority on which Congress was relying. But nothing in the excerpt indicates that the Act applies only in federal court.²⁶²

The House Report then goes on to explain that "[t]he bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement."²⁶³ This language is consistent with the FAA making all arbitration agreements in interstate commerce enforceable (in both state and federal court), while also establishing a procedure for enforcement in federal court alone. The Report concludes: "[i]n view of the strong support of commercial and legal bodies, the entire lack of opposition before the committee, the obvious justice of the result sought

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

262 Macneil himself states only that "[t]his statement is entirely consistent with everything that had gone before limiting the proposed law to the federal courts." MACNEIL, *supra* note 15, at 117.

263 H.R. REP. NO. 68-96, at 2.

to be attained, and the evident propriety and necessity of Federal action, we submit that the bill should become law."²⁶⁴

Senate Report.

Senate Report 536 was published on May 14, 1924.²⁶⁵ Macneil concludes that the Report does not "throw any light on whether Congress intended state courts to be bound by the statute."²⁶⁶ In fact, a few snippets in the Report, while generally following the language of section 2, at the very least are consistent with the argument here.

First, the Report describes the bill as one "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"²⁶⁷ Second, the Report states,

It is not contended that agreements to arbitrate have no validity whatever. A party may be liable in an action for damages for the breach of an executory agreement to arbitrate; or, if the agreement has been executed according to its terms and an award made, the appropriate action may be brought at law or in equity to enforce the award. Both maritime contracts or transactions and contracts involving interstate commerce are at least valid to this extent.²⁶⁸

Finally, the Report describes the proposed Act as follows: "[t]he bill, while relating to maritime transactions and to contracts in interstate and foreign commerce, follows the lines of the New York arbitration law"²⁶⁹ In each case, the reach of the Act is described generally, as applicable to contracts in interstate commerce, and not as limited to proceedings in federal court. I do not claim that such statements are by any means decisive. But they are consistent with the FAA being applicable in state court.

4. Floor Debates

The floor debates on the FAA are "exceptionally meagre," as acknowledged even by contemporary commentators.²⁷⁰ As such, it is not surprising that there is little of interest. Macneil states, "In the discussions, such as they were, on the House and Senate floors, what

264 *Id.*

265 S. REP. NO. 68-536 (1924).

266 MACNEIL, *supra* note 15, at 100.

267 S. REP. NO. 68-536, at 1.

268 *Id.* at 2.

269 *Id.* at 3.

270 Baum & Pressman, *supra* note 192, at 429.

was said casts virtually no additional light on the question of applicability in state courts."²⁷¹

The only reference even possibly relevant to the FAA's applicability in state court is the following, which also is the only reference quoted by Macneil.²⁷² On February 5, 1924, the House briefly considered the proposed FAA.²⁷³ Representative Graham of Pennsylvania described the Act:

[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to. It does not affect any contract that has not the agreement in it to arbitrate, and only gives the opportunity after personal service of asking the parties to come in and carry through, in good faith, what they have agreed to do. It does nothing more than that. It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.²⁷⁴

Macneil argues that the lack of debate and the dismissive statement by Representative Graham "strongly impl[y] that the bill was well understood to do nothing of a revolutionary nature, such as regulating remedies and detailed procedures in state courts."²⁷⁵ I addressed these arguments above, explaining that the FAA did not set out "detailed procedures in state courts" (only section 2 of the FAA applies in state court), and that the lack of opposition to the FAA in Congress likely was due to the narrow reach of the commerce power at the time.²⁷⁶

Overall, the congressional materials—with the Cohen Brief as the centerpiece—provide strong indications that Congress intended the FAA to apply in state court. Although there are ambiguities, the ambiguities are fewer than those under Professor Macneil's interpretation of the FAA as applicable only in federal court.

D. *Post-Enactment Commentary by Supporters of the FAA*

Following enactment of the FAA, several of its prominent supporters wrote commentaries describing the Act. After reviewing these

271 MACNEIL, *supra* note 15, at 120.

272 *Id.* at 98–99.

273 *Id.*

274 65 CONG. REC. 1931 (1924) (statement of Rep. Graham).

275 MACNEIL, *supra* note 15, at 120.

276 *See supra* text accompanying notes 149–62, 174–90.

commentaries (and others) in detail, Macneil concludes that “the early commentators, including those who had been intimately involved in promoting its enactment, never questioned that the basic provisions of the act governed only in the federal courts.”²⁷⁷ I disagree. The commentaries by the FAA’s supporters either assert that the FAA applies in state court (by including parts of the Cohen Brief)²⁷⁸ or are fully consistent with that view.

1. ABA Committee on Commerce, Trade and Commercial Law

The “most important and the earliest”²⁷⁹ of the commentaries on the FAA was published in the *ABA Journal* by the ABA’s Committee on Commerce, Trade and Commercial Law, which had prepared and promoted the original bill.²⁸⁰ Macneil calls the commentary “about as official a commentary as one could find.”²⁸¹

The article closely follows the Cohen Brief in the *1924 Hearings on the Act*,²⁸² including the key passages of the brief discussing the constitutionality of federal legislation making arbitration agreements enforceable in state court. In Macneil’s words, that section was “lifted almost verbatim from Julius Henry Cohen’s brief submitted to the joint subcommittee.”²⁸³ For the reasons explained earlier, that section is best understood as indicating that while the “primary purpose” of the FAA was for the Act to govern in federal court, a secondary purpose was that it should govern in state courts as well.²⁸⁴ Repeating that section here, Cohen reiterates his view that the FAA applies in state court.

Nothing in the rest of the article is to the contrary. For example, in describing the central provisions of the Act, the article uses language similar, albeit not identical, to that in the Cohen Brief. If anything, the Committee’s language is even more suggestive that the FAA applies in state court:

[s]peaking in general terms, the act provides that written clauses providing for arbitration of future disputes contained in any

277 MACNEIL, *supra* note 15, at 127.

278 See *supra* Part III.C.1.

279 MACNEIL, *supra* note 15, at 122.

280 Comm. on Commerce, Trade and Commercial Law, *supra* note 199. The members of the committee, indicated as authors of the article, were W.H.H. Piatt, Julius Henry Cohen, Province M. Pogue, Hollis R. Bailey, and Harvey F. Smith. *Id.* at 156.

281 MACNEIL, *supra* note 15, at 122.

282 See *supra* Part III.C.1.

283 MACNEIL, *supra* note 15, at 122.

284 See *supra* text accompanying notes 196–230.

contract relating to maritime transactions (i.e., matters which would normally be embraced in admiralty jurisdiction) or involving interstate commerce shall be valid, irrevocable and enforceable except on the grounds for which any contract may be revoked. The same rules apply to a submission to arbitration of a controversy already existing.²⁸⁵

The next paragraph then begins addressing sections 3 and 4 of the Act:

[i]n addition to the declaration of the validity and enforceability of arbitration agreements within these two fields, the Federal courts are given jurisdiction to enforce agreements for arbitration or submissions and a procedure is established by which such enforcement can be had summarily. The jurisdiction exists in those cases in which, under the Judicial Code, the Federal courts would normally have jurisdiction of the controversy between the parties.²⁸⁶

The text of the brief thus distinguishes between the two fields in which the Act declares arbitration agreements valid and enforceable—admiralty and interstate commerce—and the procedure for enforcement established in sections 3 and 4, which is applicable only in federal court.

In the one section of the article that is not a reworking of the Cohen Brief, the article concludes with a discussion of the proposed Uniform Arbitration Act ("UAA"). The Committee was critical of the proposed UAA because, unlike the FAA, it did not make pre-dispute arbitration agreements valid, irrevocable, and enforceable. The article argued that given the unanimous approval of the FAA in Congress, the drafters of the UAA should "try to harmonize the state laws to meet" the federal law.²⁸⁷

The last paragraph of this section makes the argument in favor of uniformity between federal law and state law as follows: "[f]or how can the legislative situation be uniform in the States, if there is a different policy in the case of contracts involving intrastate commerce from that now made national in the case of contracts involving *interstate* commerce?"²⁸⁸ As Macneil acknowledges, "So far the quotation appears to suggest that the new [FAA] is indeed a regulatory statute governing state courts."²⁸⁹ The quote does not distinguish between the policy

285 Comm. on Commerce, Trade and Commercial Law, *supra* note 199, at 153-54.

286 *Id.* at 154.

287 *Id.* at 156.

288 *Id.*

289 MACNEIL, *supra* note 15, at 123.

applicable in federal court and that in state court, which presumably it would if the drafters believed the FAA applied only in federal court.

The article continues,

And why should merchants whose claims being under \$3,000 must apply to state courts for relief, meet a situation where, if the claim is against a non-resident and involves interstate commerce, the contract for arbitration is *valid*; but, though it be \$10,000, if it be against a fellow resident or involve only intrastate commerce, it is invalid and revocable? It is precisely such situations which require uniformity.²⁹⁰

From this sentence, Macneil concludes, "There could be no clearer indication than this that the very committee which instigated the bill and was entirely responsible for Congress's understanding of it, knew that the USAA governed only in federal courts."²⁹¹

Macneil does not explain his understanding of this paragraph, but presumably it goes as follows: if a "claim is against a non-resident and involves interstate commerce, the contract for arbitration is *valid*" because the case is in federal court and thus subject to the FAA. But "if it be against a fellow resident"—a case with no diversity jurisdiction and thus in state court—"or involve only intrastate commerce"—so that even though the case is in federal court the FAA does not apply—the arbitration agreement is "invalid and revocable."²⁹²

There are, however, at least two other plausible interpretations of this language, and all of the interpretations—including Macneil's—are unsatisfactory in some respect. Macneil's interpretation results in at least two ambiguities (in addition to its acknowledged inconsistency with the introductory sentence of the paragraph). First, Macneil ignores the initial clause, which refers to "merchants whose claims being under \$3,000 must apply to state courts for relief."²⁹³ Macneil's interpretation disregards this language altogether, and instead construes "the claim . . . against a non-resident" as meaning a case in federal court, even though the claim seems to be one for less than \$3000.²⁹⁴ Second, Macneil apparently considers the final case, which involves "only intrastate commerce" likewise as referring to a case in federal court. But enactment of a state arbitration act would not create "uni-

290 Comm. on Commerce, Trade and Commercial Law, *supra* note 199, at 156.

291 MACNEIL, *supra* note 15, at 123.

292 *Id.*

293 The amount in controversy at the time was \$3000, so that even if the dispute was between a resident and a non-resident, the case would be in state court. *Id.* at 105.

294 *Id.* at 123.

formity” in such a case because at that time federal courts would not apply state arbitration laws.²⁹⁵

A second interpretation is that each of the claims referred to in the paragraph is in state court, as suggested by the limitation to merchants “whose claims being under \$3,000 must apply to state courts for relief.” Under this interpretation, the first sentence of the paragraph—citing the need for uniformity between contracts in interstate commerce and contracts in intrastate commerce—makes sense. The FAA would apply to contracts in interstate commerce, even in state court, and so the arbitration agreement involved with the first claim would be valid. But intrastate claims would not be subject to the FAA—in state court as well as federal court—and so the arbitration clause would be invalid with respect to the latter two claims. This interpretation, however, does not make sense of the assumed \$10,000 amount in controversy for those claims, which would have been enough to permit a claim against a non-resident to be filed in federal court. It also renders superfluous the phrases that refer to the residence of the party, since residence is relevant to determining whether there is diversity jurisdiction.

A third possible interpretation likewise is consistent with the FAA making arbitration agreements enforceable in state court. Under this interpretation, the first claim is, as the initial clause suggests, in state court because it fails to meet the jurisdictional amount even though it is against a non-resident. The arbitration clause is valid because the claim involves interstate commerce and thus is subject to the FAA. Of the latter two claims, the first is in state court (because it involves a fellow resident) and the second is in federal court (because by implication it is against a non-resident and the jurisdictional amount is met). However, in neither case does the FAA apply, because the claim in state court is against a fellow resident (and thus does not involve interstate commerce) and the claim in federal court, even though against a non-resident, also does not involve interstate commerce. This interpretation suffers from one of the same weaknesses as Macneil’s view—a state uniform arbitration act would not have created uniformity in federal court. It also requires an assumption that the Committee intended all cases involving claims against fellow residents not to involve interstate commerce, which may be too much of a stretch.

As I acknowledged earlier, the legislative history does contain ambiguities, and under each of these interpretations the above paragraph is ambiguous. Under at least two plausible interpretations,

295 See *supra* text accompanying notes 165–68.

however, the paragraph can be understood as consistent with the view that the FAA applies in state court.

2. Bernheimer

Macneil next considers an article by Charles L. Bernheimer, chair of the Committee on Arbitration of the New York State Chamber of Commerce,²⁹⁶ “extolling the new act.”²⁹⁷ Much of the article comes from Bernheimer’s testimony at the *1923 Hearings* on the proposed Act.²⁹⁸ Two passages from the article are of interest. First, Bernheimer describes the scope of the FAA as follows:

[t]he bill, conceived in the hope of simplifying business procedure in the matters of dispute or difference which daily arise, and will continue to arise just so long as there is trade among men, follows the lines of the New York State Arbitration Law, applying it to the fields wherein there is federal jurisdiction. These fields are in admiralty and in foreign and interstate commerce.²⁹⁹

Macneil comments that “Bernheimer, a non-lawyer, had trouble, as in fact did some of the lawyers, with that difficult word ‘jurisdiction.’”³⁰⁰ Recognizing that Bernheimer’s description of the FAA’s scope is broad enough to include disputes in state court that involve interstate commerce, Macneil then quotes a later excerpt from the article:

[u]nder this new law, . . . the federal courts are given jurisdiction to enforce agreements for arbitration or submissions, and a procedure is established by which enforcement can speedily be secured. Jurisdiction exists in those cases in which the federal courts would normally, under the Judicial Code, have jurisdiction of a controversy between the parties.³⁰¹

Macneil argues that because of Bernheimer’s later use of the word “jurisdiction” to refer to the jurisdiction of the federal courts, “any possible implication that these jurisdictional fields extend beyond the federal courts disappears.”³⁰²

While I do not place too much weight on Bernheimer’s general description of the FAA’s scope, it is nonetheless consistent with the view that the Act applies in state court as well as federal court. The supporters of the Act consistently described the scope of the FAA, as

296 Charles L. Bernheimer, *The United States Arbitration Act*, 3 DOCKET 2928 (1925).

297 MACNEIL, *supra* note 15, at 123.

298 See *supra* text accompanying notes 240–41.

299 Bernheimer, *supra* note 296, at 2928.

300 MACNEIL, *supra* note 15, at 123.

301 Bernheimer, *supra* note 296, at 2929.

302 MACNEIL, *supra* note 15, at 123.

does Bernheimer, as applicable to disputes involving admiralty and interstate commerce, without limiting that scope to the federal courts. Only when describing the procedures implemented by sections 3 and 4 do the supporters mention federal courts.

Moreover, Bernheimer's use of the word "jurisdiction" in two different contexts does not evidence any sort of "trouble." One meaning of "jurisdiction" refers to the court's power to adjudicate. That is the meaning Bernheimer used in the second excerpt quoted above.³⁰³ But another meaning of "jurisdiction" refers to the legislature's authority to enact legislation, as in "prescriptive" or "legislative" jurisdiction.³⁰⁴ It plainly is in that sense, which is distinct from the jurisdiction of the federal courts, that Bernheimer uses the word "jurisdiction" in the first excerpt quoted above.³⁰⁵

In short, if anything the Bernheimer article supports the argument that the drafters of the FAA intended that it apply in state court. It certainly is not inconsistent with that view.

3. Bailey Comments

Macneil next cites a statement by Hollis R. Bailey, one of the members of the ABA Committee on Commerce, Trade and Commercial Law³⁰⁶ and whom Macneil describes as a "staunch reform supporter,"³⁰⁷ at the National Conference of Commissioners on Uniform State Laws in 1925. Arguing for the Commissioners to harmonize the Uniform Arbitration Act with the FAA, Bailey asserted,

You are going to ask the American Bar Association, having committed itself to [the New Jersey] form of an arbitration act, which has been, furthermore, adopted by the United States Congress since the 12th of February, 1925, and has been the law of the United States governing the federal courts, you are going to ask the American Bar

303 See *supra* text accompanying note 301.

304 See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(a) (1987) (discussing "jurisdiction to prescribe"); Michael Akehurst, *Jurisdiction in International Law*, in 46 BRIT. Y.B. INT'L L. 1972-1973, at 145, 179-212 (Humphrey Waldock et al. eds., 1975) (discussing "legislative jurisdiction"); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978). As the Restatement makes clear, "The domestic law of the United States addresses the propriety of exercises of jurisdiction by legislative, executive, administrative, or judicial bodies, both federal and State, under the United States Constitution, the State constitutions, and State and federal law." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 cmt. b.

305 See *supra* text accompanying note 299.

306 See *supra* note 280.

307 MACNEIL, *supra* note 15, at 123.

Association to approve a state law entirely different, radically different, from what it has approved for the federal law of the land.³⁰⁸

Macneil contends that here Bailey “revealed his unquestioned understanding that the [FAA] governed only in federal court.”³⁰⁹ Rather, what Bailey revealed was his understanding that the FAA governed in federal court, not that it governed only in federal court.³¹⁰

4. Cohen and Dayton

Finally, Professor Macneil points to an additional article by Julius Henry Cohen (co-authored with Kenneth Dayton) in the *Virginia Law Review*.³¹¹ Macneil describes the article as “reflecting [Cohen’s] clear understanding that the [FAA] did not govern state courts.”³¹² Much of the article, as Macneil points out,³¹³ is virtually identical to the Cohen Brief in the *1924 Hearings*.³¹⁴ Indeed, the article repeats yet again Cohen’s conclusion that Congress had the power to make the FAA applicable in state court and asserts that the “primary purpose” of the Act was to make arbitration agreements enforceable in federal court,³¹⁵ implying that a constitutionally permissible, albeit secondary, purpose was to make arbitration agreements enforceable in state court.

The article also reiterates the summary of the statute in the Cohen Brief, revised to reflect changes in the Act as enacted by Congress. The following is the key paragraph:

[t]he Federal courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would have had jurisdiction of an action or proceeding arising out of the contro-

308 NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS, HANDBOOK AND PROC. OF THE THIRTY-FIFTH ANNUAL MEETING 65 (1925) [hereinafter HANDBOOK].

309 MACNEIL, *supra* note 15, at 123.

310 Macneil points out that one of the other delegates, Jesse A. Miller of Iowa, construed the FAA as applicable only in federal court. *See id.* at 124. Miller explained that the ABA “didn’t pass on this act or any act that is applicable to the states. All it had before it was an act which applied to a few limited subjects where the federal courts would have control . . .” HANDBOOK, *supra* note 308, at 71–72. The contrast between Miller’s statement and Bailey’s statement highlights the lack of exclusivity in Bailey’s assertion. Even though, as Macneil concludes, no other delegate “disputed” Miller’s assertion about the FAA, MACNEIL, *supra* note 15, at 124, that hardly indicates agreement. Moreover, emphasizing that the FAA applied in state court would not likely help the cause of those who supported revisions to the Uniform Arbitration Act.

311 Cohen & Dayton, *supra* note 200.

312 MACNEIL, *supra* note 15, at 124.

313 *Id.*

314 *See supra* Part III.C.1.

315 Cohen & Dayton, *supra* note 200, at 277–78.

versy between the parties. Where the basis of jurisdiction is diversity of citizenship, the dispute must involve \$3000 as in suits at law.* In admiralty the party still may libel a vessel or other property at the commencement of his proceeding.³¹⁶

The asterisk indicates the following footnote:

* [t]he statute as drafted and as it passed the House omitted this requirement. It should not have been re-inserted. The reason for the requirement is to relieve the Federal courts of a mass of petty litigation. But since these arbitration proceedings involve only motion practice, and occasionally summary trials on limited issues, there was no threat of overburdening the courts. On the other hand, most arbitration disputes involve small amounts, and lacking state statutes, the Federal law ought to cover them.³¹⁷

The change reflects Congress's deletion of proposed section 8 of the FAA, which would have done away with the amount in controversy requirement in cases involving diversity of citizenship jurisdiction.³¹⁸

According to Macneil, the last sentence of the footnote shows Cohen's view that the FAA did not apply in state court. Macneil states, "If, as the Supreme Court later held in *Southland Corp. v. Keating* (U.S. 1984), the [FAA] governed in state courts, then, of course, the federal law *did* cover these small claims."³¹⁹ I disagree. The footnote refers to the discussion of the procedure provided in section 4 of the Act for actions to compel arbitration in federal court. Cohen and Dayton were lamenting the fact that the federal procedures available in sections 3 and 4 did not cover diversity cases that did not satisfy the amount in controversy requirement. The issue was not the irrevocability and enforceability of the arbitration agreements, but the procedure. "[T]he Federal law [that] ought to cover them" was sections 3 and 4 of the FAA, not section 2.³²⁰

In sum, contrary to Macneil's argument, the contemporaneous writings by the supporters of the FAA³²¹ all are consistent with the

316 *Id.* at 267.

317 *Id.* at 267 n.*.

318 See MACNEIL, *supra* note 15, at 124. Thus, the original Cohen Brief stated: "[a]lthough, if the basis of jurisdiction is diversity of citizenship, the usual limitation of \$3,000 is removed." Cohen Brief, *supra* note 198, at 34.

319 MACNEIL, *supra* note 15, at 124. Macneil makes a similar argument about Congress's deletion of section 8 itself. *Id.* at 105.

320 See *supra* text accompanying note 317. Macneil's argument makes sense given his view that the FAA was an integrated statute which either applies in its entirety or not at all. This excerpt is further indication that the drafters of the FAA did not see it that way.

321 Macneil also notes an amicus brief prepared by Cohen and Dayton on behalf of the Chamber of Commerce of the State of New York and the American Arbitration

interpretation offered here—that those supporters believed that the Act applied in state court as well as in federal court.

E. *Other Contemporaneous Commentary*

Other contemporaneous legal commentary also provides an indication of how the FAA was understood at the time. For obvious reasons, this commentary is less helpful than commentary written by those directly involved in the legislative process. Nonetheless, it still may be useful, at least if it was unanimous. It was not.

As Macneil points out,³²² most contemporaneous commentary—other than that written by supporters of the FAA—either concluded that the FAA did not apply in state court or simply did not consider the issue.³²³ Indeed, Macneil states that “[i]n the years following enactment of the [FAA], I have come across only one work, a 1929 student note, which even considered the possibility that it might govern in state courts. The note promptly rejected the idea”³²⁴ As a result, Macneil concludes, “just as one would have predicted from any careful analysis of the legislative history of the [FAA], the early commentators . . . never questioned that the basic provisions of the act governed only in the federal courts.”³²⁵

Contrary to Professor Macneil’s contention, however, at least one contemporaneous commentator (in addition to the supporters of the Act discussed above³²⁶) not only considered the possibility that the FAA applied in state courts, but in fact concluded that the FAA did apply in state court. Alfred N. Heuston, a Special Assistant to the United States Attorney General from 1924–1926 who later became a partner in the law firm of White & Case in New York,³²⁷ wrote an article for the *Washington Law Review* arguing that the state of Wash-

Association in *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932). MACNEIL, *supra* note 15, at 127. I discuss this brief, as does Macneil, *id.* at 132–33, in connection with the early court cases considering the FAA. See *infra* text accompanying notes 342–51.

322 MACNEIL, *supra* note 15, at 122–27.

323 See WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS § 480, at 937 (1930); 6 SAMUEL WILLISTON & GEORGE J. THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 1920, at 5368 (rev. ed. 1938); Baum & Pressman, *supra* note 192, at 459. Macneil describes the relevant portions of these sources in detail in his book; I do not repeat the description here. MACNEIL, *supra* note 15, at 125–27.

324 MACNEIL, *supra* note 15, at 124; see *id.* at 226 n.23 (citing Note, *Problems in Statutory Construction Arising Out of Arbitration Laws*, 29 COLUM. L. REV. 195, 196–97 (1929)).

325 See *id.* at 127.

326 See *supra* Part III.D.

327 1 WHO’S WHO IN LAW 429 (J.C. Schwartz ed., 1937); N.Y. TIMES, Apr. 26, 1955, at 29 (obituary). Although Heuston was in Washington when the FAA was enacted, I

ington should adopt a revised arbitration act.³²⁸ Most of Heuston's article, which was published in 1926, addressed Washington state arbitration law. In one section, however, the article addresses the newly enacted Federal Arbitration Act. That section draws heavily from the ABA commentary and confirms in straightforward terms what I argue in this article: the FAA's supporters believed and informed Congress that the Act applies in state court.

Heuston first considered the provisions of the Act. As with the various legislative reports and other commentaries, he described sections 1 and 2 in general terms and with no limitation to federal courts.³²⁹ He then described the subsequent sections of the FAA, noting their applicability in federal court. He commented that "[o]f course, the act has not yet been the subject of judicial interpretation. It was carefully drawn, however, and as it is very similar to the New York act which has been approved by the United States Supreme Court, it will probably stand the test of constitutionality."³³⁰ Finally, Heuston analyzed the applicability of the Act in state court:

[t]he act is broad enough to apply to actions commenced in state courts as well as to those instituted in federal courts, and it was so intended by those who drafted it. It was recognized, however, that it might be held that Congress could not so regulate procedure in the state courts even though maritime and interstate commerce matters were involved. Consequently, the act was so drafted that such a decision would not affect its application to the federal courts.³³¹

Again, Heuston's article was published in 1926, making it one of the earliest commentaries on the Act. It demonstrates that at least one contemporary commentator understood the FAA exactly as interpreted by the Court in *Southland*.

can find no indication whether he had any involvement with the Act, in an official or unofficial capacity.

³²⁸ Heuston, *supra* note 29. Heuston was born in the state of Washington, and had practiced in that state before moving to Washington, D.C. 1 WHO'S WHO IN LAW, *supra* note 327, at 429.

³²⁹ Heuston, *supra* note 29, at 257. Heuston wrote,

The United States Arbitration Act, approved by the President February 12, 1925, went into effect on January 1st of this year. It applies only to maritime contracts and to contracts involving interstate or foreign commerce. Agreements to arbitrate disputes, existing and future, arising out of such contracts are declared to be "valid, irrevocable and enforceable."

Id. (footnote omitted).

³³⁰ *Id.* at 257-58 (footnote omitted).

³³¹ *Id.* at 258 (footnotes omitted).

I certainly do not suggest that the fact that one 1926 law review article interpreted the FAA as applicable in state court definitively resolves the question at hand.³³² Indeed, as far as the authoritativeness of sources goes, the commentators cited by Macneil are among the most prominent arbitration scholars of the time. Instead, the claim in this Part is more modest: that interpreting the FAA as applicable in state court was not beyond the realm of contemplation at the time of its enactment, even among those not involved in the legislative process.

F. Cases

Macneil's final argument is that the contemporary understanding of the FAA—as not applicable in state court—is shown by the lack of state court cases even considering the FAA for several decades after its enactment.³³³ He further cites the lack of any federal court discussion of the issue during the same period.³³⁴ Justice Thomas made a similar point in his dissenting opinion in *Allied-Bruce*: “to judge from the reported cases, it appears that no state court was even *asked* to enforce the statute for many years after the passage of the FAA.”³³⁵ I know of no earlier court cases than those cited by Macneil.³³⁶ But I disagree with the conclusion he draws from the lack of cases.

332 For what it is worth, I discovered the Heuston article only after formulating the thesis of this article: that the drafters of the FAA intended that it apply in state court. The Heuston article was merely further support for that conclusion.

333 MACNEIL, *supra* note 15, at 127–28. Macneil states,

The most striking thing of all is the absence of state cases concerning the [FAA] from its enactment until 1959. Twenty years elapsed after the enactment before any reported state case can be found in which a state court seems even to have thought of applying the [FAA]. . . . [T]hirty-four years after its enactment, the [FAA] had yielded a grand total of only five reported cases in which efforts had been made to have it applied in state courts.

Id. (footnote omitted).

334 *Id.* at 131 (based on examination of forty cases listed in annotations to Title 9 of the 1942 U.S.C.A.).

335 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 288 (1995) (Thomas, J., dissenting).

336 I do have a small quibble as to the date of the earliest reported state court case discussing the FAA: the trial court's opinion in *French v. Petrinovic*, 46 N.Y.S.2d 846 (City Ct. 1944), was issued in 1944, a year earlier than the appellate court opinion in the same case cited by Macneil. See MACNEIL, *supra* note 15, at 128 & n.40 (citing *French v. Petrinovic*, 54 N.Y.S.2d 179 (App. Term 1945)).

1. State Court Cases

Although Macneil's argument is intuitively appealing—surely if Congress intended the FAA to apply in state court, some state court would have considered that issue much earlier—in fact it is not unheard of for issues to lie dormant for decades before they make it to court. One example is hotly litigated today: the effect of the Magnuson-Moss Warranty Act on binding pre-dispute arbitration clauses in consumer warranties. Although the Magnuson-Moss Warranty Act took effect in 1975,³³⁷ the first published opinion considering the effect of the Act on pre-dispute arbitration agreements in consumer warranties was not decided until 1997, over twenty years later.³³⁸

There is particular reason for such a time lag with respect to the FAA: the Supreme Court's narrow interpretation of the commerce power in 1925 meant that relatively few cases in state court were likely even to present the issue. That the first reported state court case addressing the FAA was decided in 1944 does not seem so unusual given that the key cases in the expansion of the commerce power were not decided until the late 1930s and early 1940s.³³⁹ Moreover, one would expect parties in states without arbitration laws to seek enforcement in federal court if at all possible, given that the FAA clearly applied in federal court. Conversely, in states with arbitration laws making arbitration agreements enforceable, such as New York, there would be little need for parties and courts to rely on the FAA at all.

Indeed, even today—with *Southland* decided and dozens of state statutes being invalidated—there are still cases failing to consider the applicability of the FAA. As Macneil and his co-authors state in their treatise, "State courts often, and federal courts sometimes, seem hap-

337 15 U.S.C. § 2312 (2000).

338 See *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala.), *aff'd*, 127 F.3d 40 (11th Cir. 1997). Since then, the cases have become quite common, with the state and federal courts split on the issue. Compare *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002) (Magnuson-Moss claims subject to arbitration); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002) (same); *S. Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000) (*per curiam*) (same); *Howell v. Cappaert Manufactured Hous.*, 819 So. 2d 461 (La. Ct. App. 2002) (same); and *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2001) (same), with *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958 (W.D. Va. 2000) (holding that Magnuson-Moss precludes arbitration of claims arising under written warranty); *Borowiec v. Gateway 2000, Inc.*, 772 N.E.2d 256 (Ill. App. Ct. 2002) (refusing to enforce arbitration clause in written warranty due to Magnuson-Moss), and *Parkerson v. Smith*, 817 So. 2d 529, 532–35 (Miss. 2002) (Magnuson-Moss overrides the FAA and invalidates arbitration clause in written warranty).

339 See *supra* text accompanying notes 174–92.

pily unaware that the FAA governs the case before them and apply state law.”³⁴⁰ Thus, the absence of state cases in the early years following enactment of the FAA does not (necessarily, at least) demonstrate that the Act was intended to apply only in state court.

2. Federal Court Cases

As for federal courts, it is not surprising that no federal courts discussed the applicability of the FAA in state court. The FAA plainly applied in federal court, and there would be little reason for a federal court to consider whether the Act applied in state court. What I find more interesting is that even in federal court, few reported cases dealt with the FAA. Macneil states that “[t]he 1942 U.S.C.A. annotation summarizes about forty Title 9 cases, all those the publishers deemed important enough to mention in the first sixteen years of the active life of the [FAA].”³⁴¹ With fewer than three reported cases per year in federal court, where the FAA clearly is applicable, the lack of state court cases involving the FAA seems far less unusual.

As Macneil notes, the “most important”³⁴² federal court case during that period was *Marine Transit Corp. v. Dreyfus*,³⁴³ in which the Supreme Court upheld the constitutionality of the FAA. Because the case came to the Supreme Court from a lower federal court, again it is not surprising that the Court did not discuss whether the Act applied in state court.

340 1 MACNEIL ET AL., *supra* note 2, § 9.5.4, at 9:48–49.

341 MACNEIL, *supra* note 15, at 131 (footnote omitted).

342 *Id.*

343 284 U.S. 263 (1932). By comparison, David Schwartz relies on *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924), decided *before* enactment of the FAA. He argues that had Congress intended the FAA to apply in state court, the Act “would have effectively overruled *Red Cross Line*,” which had only a year earlier applied state arbitration law in state court to enforce an arbitration clause in a maritime contract. Schwartz, *supra* note 144 (manuscript at 15, on file with author). But applying section 2 of the FAA in state court is fully consistent with the outcome in *Red Cross Line*, which held the arbitration clause enforceable—the same result as under the FAA. Moreover, the key aspect of *Red Cross Line* for the FAA’s supporters was that it upheld the constitutionality of the New York arbitration law, a fact that was highlighted in the Senate Report on the bill. S. REP. NO. 68-536, at 3 (1924) (“The bill, while relating to maritime transactions and to contracts in interstate and foreign commerce, follows the lines of the New York arbitration law enacted in 1920, amended in 1921, and sustained by decision of the Supreme Court of the United States in the matter of *Red Cross Line v. Atlantic Fruit Co.*, rendered February 18, 1924.”). The lack of any other discussion of *Red Cross Line* in the FAA’s legislative history is not surprising given that the case was decided after both hearings on the bill were completed.

The case is of “special interest,” according to Macneil,³⁴⁴ because Julius Henry Cohen (and Kenneth Dayton, Cohen’s co-author of the *Virginia Law Review* article)³⁴⁵ filed an amicus brief on behalf of the New York Chamber of Commerce and the American Arbitration Association.³⁴⁶ In the brief, Cohen and Dayton argued that the FAA applies to all cases in federal court, even those not involving interstate commerce or admiralty. They relied on the fact that the language addressing interstate commerce and admiralty appears only in section 2 of the Act and not elsewhere.³⁴⁷ The brief further argued that sections 1 and 2 create federal subject matter jurisdiction over all arbitration matters in interstate commerce,³⁴⁸ an argument that was rejected (in dicta) by the Court in *Southland*³⁴⁹ and seems inconsistent with Cohen and Dayton’s position in their *Virginia Law Review* article.³⁵⁰ Nothing in the amicus brief addresses the applicability of the FAA in state court, but as Macneil recognizes, “Such an argument was unnecessary to win the case, and it would have been most unwise to advance it.”³⁵¹

In short, nothing in the federal court cases after enactment of the FAA suggests that the Act did not apply in state court.

G. Summary

Thus, Chief Justice Burger reached the right conclusion about the FAA’s legislative history in *Southland*, although his inadequate opinion provided an all-too-easy target. This section briefly summarizes my analysis.

(1) The Cohen Brief—drafted by Julius Henry Cohen and submitted to Congress at the 1924 *Hearings*—argues that Congress had the power under the Commerce Clause to make the FAA applicable in state court. The context of the discussion makes clear that, contrary to Professor Macneil’s assertion, this is not merely a discussion of hypothetical congressional powers but an argument that the FAA is constitutional as applied in state court. Indeed, the discussion identifies the “primary purpose” of the FAA as making agreements to arbitrate

344 MACNEIL, *supra* note 15, at 132.

345 See *supra* text accompanying notes 311–21.

346 Brief for the Chamber of Commerce of the State of New York and the American Arbitration Association, Inc., *Amici Curiae*, *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932) (No. 172).

347 *Id.* at 21–23.

348 *Id.* at 24.

349 *Southland Corp. v. Keating*, 465 U.S. 1, 15 & n.9 (1984).

350 See *supra* text accompanying notes 311–21.

351 MACNEIL, *supra* note 15, at 228 n.63.

enforceable in federal court, implying that a secondary purpose was to make such agreements enforceable in state court. Thus, the Cohen Brief provides strong evidence that the supporters of the FAA not only believed that the FAA applied in state court, but also communicated that belief to Congress.

(2) Cohen also asserted that the FAA applied in state court (using words essentially identical to those in his brief to Congress) in two law journal articles he co-authored after the enactment of the FAA. In addition, despite Macneil's claim to the contrary, at least one other contemporaneous commentator flatly stated that the FAA applied in state court. Such statements belie the commonly asserted view that no one in 1925 believed that the FAA applied in state court, either because arbitration matters were procedural or because it would have been too great an infringement on state sovereignty.

(3) The vast majority of statements in the legislative history, relied on by Professor Macneil as well as Justices O'Connor and Thomas to argue that FAA applies only in federal court, state merely that the FAA applies in federal court, not that it applies only in federal court.³⁵² Given that the "primary purpose" of the FAA was to make arbitration agreements enforceable in federal court, that is to be expected. But such statements are not inconsistent with the applicability of the Act in state court. Likewise, contemporaneous statements that the FAA was based on Congress's power to establish rules of procedure in federal court do not demonstrate that the Act applied only in federal court. Because of doubts about the constitutionality of the FAA, its supporters relied on both Congress's power to regulate the federal courts and its power to regulate interstate commerce. The applicability of the Act in state court obviously could be grounded (and was in fact grounded) solely on the commerce power. Finally, statements in the legislative history to the effect that the FAA does not infringe on the authority of the states to regulate arbitration agreements, again read in context, refer not to section 2 of the FAA but to provisions of the Act establishing procedures for enforcing arbitration agreements in federal court, i.e., sections 3 and 4 of the Act, which by their terms apply only in federal court.

(4) In my view, the central historical reason for such "transformation" of the FAA as has occurred is not, as usually asserted, the decision in *Erie Railroad v. Tompkins*.³⁵³ Instead, the key change affecting the FAA has been the post-New Deal expansion of Congress's commerce power, which has resulted in the FAA applying to a vastly wider

352 See *supra* Part III.C.

353 304 U.S. 64 (1938).

array of cases today than it originally did, both in federal court and in state court. The narrow reach of the FAA when enacted makes both the lack of opposition to the Act in Congress and the limited number of state cases considering the Act much less significant than Professor Macneil argues.

At bottom, I do not claim that the legislative history of the FAA unambiguously demonstrates that Congress intended the Act to apply in state court. Instead, I agree with Chief Justice Burger (albeit for different reasons) that, although the legislative history is “not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts.” As such, my conclusions are twofold: first, that the legislative history does not unambiguously demonstrate that the FAA applies only in federal court, as Professor Macneil and Justices O’Connor and Thomas have argued, and, second, that the interpretation offered here leaves fewer ambiguities unexplained—that is, is more consistent with the legislative history—than the conventional wisdom.³⁵⁴

IV. THE LEGITIMACY OF *SOUTHLAND* AND AMERICAN ARBITRATION LAW

So why does any of this matter? The Supreme Court held in *Southland* that the FAA applies in state court, and reaffirmed that holding in *Allied-Bruce*. The Court declined once again to revisit the issue in *Circuit City*.³⁵⁵ Thus, as Professor Macneil has put it: “The Chief Justice’s official history, however inaccurate, nonetheless remains the law of the land.”³⁵⁶ What value is there in reaffirming the reasoning underlying a settled interpretation of a statute, even in the face of Professor Macneil’s strong critique of that reasoning?

There are at least four reasons why a proper understanding of the history of the FAA is important for American arbitration law, even aside from the value of getting the history right.

First, two current members of the U.S. Supreme Court have indicated that they believe *Southland* should be overruled. Both Justice Scalia and Justice Thomas have voted to overrule *Southland*, and remain ready to do so if enough other members of the Court are willing to join them, even if Justice Scalia no longer dissents on that

354 Of course this entire discussion assumes, as Professor Macneil assumes, that the intent of the supporters of the FAA can be imputed to Congress. See *supra* note 195.

355 See *supra* text accompanying notes 119–21.

356 1 MACNEIL ET AL., *supra* note 2, § 10.2, at 10:5.

ground.³⁵⁷ Given their reluctance to consider legislative history when interpreting statutes, it is unlikely that this Article will persuade those Justices to vote otherwise.³⁵⁸ But at least it offers an alternative view of that history in the unlikely event the Supreme Court decides to revisit *Southland* once again.³⁵⁹

Second, state courts may misapply or misconstrue the FAA, influenced at least in part by their belief that *Southland* was wrongly decided. Certainly most state courts properly follow the Supreme Court's holding in *Southland*. But the view that *Southland* infringed on state sovereignty contrary to Congress's intent continues to influence at least some state court judges in their decisions construing the FAA.

One example is Justice Trieweiler's special concurrence in *Casarotto v. Lombardi*,³⁶⁰ a Montana Supreme Court opinion that was vacated by the U.S. Supreme Court.³⁶¹ In voting to uphold the Montana notice requirement later invalidated by the U.S. Supreme Court in *Doctor's Associates v. Casarotto*, Justice Trieweiler wrote,

What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of [Montana's] procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.³⁶²

A more recent example is the dissenting opinion of Chief Justice Moore of the Alabama Supreme Court in *Selma Medical Center, Inc. v. Fontenot*.³⁶³ In dissenting from the majority's holding that contracts between a hospital and physicians were within the scope of the FAA,

357 See *supra* text accompanying notes 109–16.

358 However, Justice Thomas's critical view of *Southland* is based at least in part on his interpretation of the FAA's legislative history. See *supra* text accompanying notes 109–16.

359 Two very recent commentaries renew the call for *Southland* to be overruled. See Pittman, *supra* note 144, at 889–90; Schwartz, *supra* note 144 (manuscript at 72–73, on file with author). But given that the Supreme Court rejected precisely such a contention by a 7-2 vote in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995), the call seems unlikely to be heeded.

360 886 P.2d 931 (Mont. 1994), *vacated sub nom.* Doctor's Assocs., Inc. v. Casarotto, 515 U.S. 1129 (1995), *reaff'd*, Casarotto v. Lombardi, 901 P.2d 596 (Mont. 1995), *rev'd sub nom.* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996).

361 517 U.S. 681 (1996).

362 Casarotto, 886 P.2d at 940 (Trieweiler, J., specially concurring).

363 824 So. 2d 668 (Ala. 2001).

Chief Justice Moore quoted at length from Justice O'Connor's dissent in *Southland* and Justice Thomas's dissent in *Allied-Bruce*,³⁶⁴ and concluded,

Because Congress wrote and enacted the FAA as a procedural device and intended that it apply exclusively in federal courts, it has no application to the case before us—a case between Alabama residents and Alabama corporations, based on state-law claims, for which exclusive jurisdiction lies in a court of the State of Alabama.³⁶⁵

Only then did the opinion go on to analyze the scope of the FAA, concluding (not surprisingly) that the contract at issue was not subject to the FAA.³⁶⁶

Certainly not all (or even most) state court judges are so critical of the Supreme Court's decision in *Southland*. Likewise, even were I to demonstrate beyond any doubt that the FAA was intended to apply in state court (which I by no means claim to do), hostility to the FAA in the state judiciary would remain. But perhaps a proper understanding of the FAA's legislative history might reduce that hostility by some small degree.

Third, Congress may be more likely to amend the FAA to limit the enforceability of pre-dispute arbitration agreements if it views *Southland's* application of the FAA to the states as illegitimate. A wide variety of bills restricting the enforceability of pre-dispute arbitration clauses have been introduced into Congress in recent years.³⁶⁷ In the 106th Congress, the House of Representatives unanimously passed the Motor Vehicle Franchise Contract Arbitration Act of 2000, which would have made revocable pre-dispute arbitration clauses in contracts between car dealers and car manufacturers.³⁶⁸ During the hearings on one such bill, numerous supporters testified that the legislation was necessary because states could not, under *Southland*,

364 *Id.* at 679–80.

365 *Id.* at 681.

366 *Id.* at 687–92.

367 See Consumer Credit Fair Dispute Resolution Act of 2001, S. 192, 107th Cong. § 2 (2001); Civil Rights Procedures Protection Act of 2001, S. 163, 107th Cong. §§ 2–9 (2001); Securing a Future for Independent Agriculture Act of 2001, S. 20, 107th Cong. § 128(b) (2001); Consumer Fairness Act of 1999, H.R. 2258, 106th Cong. § 2 (1999); Civil Rights Procedures Protection Act of 1999, H.R. 872, 106th Cong. §§ 2–9 (1999); Civil Rights Procedures Protection Act of 1999, S. 121, 106th Cong. §§ 2–9 (1999); H.R. 613, 106th Cong. § 1 (1999).

368 Motor Vehicle Franchise Contract Arbitration Act of 2000, H.R. 534, 106th Cong. § 2 (1999).

enact their own legislation.³⁶⁹ One supporter went further and argued that *Southland* incorrectly construed the FAA as applicable in state court.³⁷⁰ Such arguments should not be surprising, given that Justice O'Connor in *Allied-Bruce* called on Congress to amend the FAA to overrule *Southland*.³⁷¹ Certainly Congress may be more likely to enact statutes to overrule a Supreme Court decision it sees as wrongly decided than otherwise. Statutes restricting consumer and employment arbitration should be considered on their own merits, and not through the lens of correcting the Supreme Court's "mistake" in *Southland*.

Fourth, ironically, the criticisms of *Southland* have the potential to lead to a broader scope of federal preemption of state arbitration law than otherwise would be appropriate under the Act. Thus, Professor Macneil's view of the FAA as an integrated arbitration statute leads him to argue that the entire Act is applicable in state court and wholly preempts state arbitration law: "[i]n spite of marginal difficulties, the better course would be for the Supreme Court to hold that where the FAA governs a case, state arbitration law is entirely preempted—regardless of whether the case arose in federal or state court."³⁷² Even though he acknowledges that this position has not been followed by the Supreme Court,³⁷³ his analysis of the scope of current FAA preemption doctrine also is broader than that of others.³⁷⁴ If instead of an integrated statute fully applicable in state court, the FAA is viewed more narrowly (i.e., only section 2 is seen as applicable in state court), the scope of FAA preemption becomes narrower and state regulatory authority over arbitration remains greater. Such an interpretation of

369 *Fairness and Voluntary Arbitration Act: Hearing on H.R. 534 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 106th Cong. 6–7 (2000) ("[U]nfortunately . . . in the 1984 *Southland* case, arbitrators are not required to apply the particular . . . state law that would be applied by a court."); *id.* at 16 (arguing that *Southland* makes arbitration enforceable in the face of state law); *id.* at 35 ("In a landmark case, *Southland* . . . , the U.S. Supreme Court held that state laws that prohibit mandatory binding arbitration . . . are preempted."); *id.* at 37 ("[T]he Supreme Court has clearly interpreted the FAA to preempt state law.")

370 *Id.* (prepared statement of Richard Holcomb, Comm'r, Va. Dep't of Motor Vehicles) ("When Congress enacted the FAA in 1925, the narrow intent of Congress was to make arbitration awards enforceable in federal courts.")

371 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284 (1995) (O'Connor, J., concurring) ("It remains now for Congress to correct this interpretation if it wishes to preserve state autonomy in state courts.")

372 1 MACNEIL, *supra* note 2, § 10.8.2.2, at 10:84.

373 1 *id.* § 10.8.2.4, at 10:88.

374 Compare 1 *id.* § 10.8.3, with Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 71–73, and Hayford & Palmiter, *supra* note 144, at 208–26.

the FAA is consistent with its text and legislative history, and also respects the essential role of the states in our federal system.³⁷⁵

In sum, whether *Southland* was correctly decided is of more than merely academic interest. It has important implications for modern American arbitration law, in the courts and in Congress.

CONCLUSION

This Article challenges the conventional wisdom that the Supreme Court's decision in *Southland Corp. v. Keating*, holding that the Federal Arbitration Act applies in state court and preempts state law, was an illegitimate exercise of judicial lawmaking. Justices O'Connor and Thomas and commentators, most prominently including Professor Ian Macneil, have strongly criticized Chief Justice Burger's majority opinion in *Southland* as disregarding Congress's unambiguous intent that the FAA apply only in federal court.

I agree that the Chief Justice's opinion failed persuasively to make the case that the FAA applies in state court. But the Chief Justice nonetheless reached the correct conclusion: "[a]lthough the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts."³⁷⁶ A reexamination of the FAA's legislative history reveals that while the "primary purpose" of the FAA was to make arbitration agreements enforceable in federal court, a secondary purpose was to make arbitration agreements enforceable in state court.³⁷⁷ A contemporaneous commentator, overlooked by the critics, sums it up well: "[t]he act is broad enough to apply to actions commenced in state courts as well as to those instituted in federal courts, and it was so intended by those who

³⁷⁵ David Schwartz argues for the Supreme Court to correct its "federalism mistake" by overruling *Southland* and permitting the states to regulate the enforceability of pre-dispute arbitration agreements. Schwartz, *supra* note 144 (manuscript at 73, on file with author). That action is unlikely, as noted previously. See *supra* note 359. More likely is that federalism principles will be important in defining the proper scope of FAA preemption, as they support a narrower scope of preemption than that favored by Macneil. Further, although not discussed by Schwartz, such federalism values also counsel against enactment of many of the bills pending in Congress that would make unenforceable pre-dispute arbitration agreements in employment and other contracts. See *supra* text accompanying notes 366–67. Those bills, no less than the FAA, override state rules on the enforceability of pre-dispute arbitration agreements.

³⁷⁶ *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

³⁷⁷ Cohen Brief, *supra* note 198, at 38.

drafted it.”³⁷⁸ While ambiguities in the legislative history remain, this interpretation of the legislative history results in fewer ambiguities than the prevailing interpretation.

378 Heuston, *supra* note 29, at 258.