THE FUTURE OF ARBITRATION IN THE UNITED STATES: TEXTUALISM, A TECTONIC SHIFT, AND A RESHAPING OF THE CIVIL JUSTICE SYSTEM

*Imre S. Szalai**

I. Introduction

Everyone reading this sentence is likely bound by an arbitration agreement. There are hundreds of millions of arbitration agreements in the United States used in connection with all types of employment relationships and consumer transactions.[1] An explosion in the broad use of arbitration agreements has been occurring since the 1980s, when the United States Supreme Court began issuing broad, expansive interpretations of arbitration law.[2] As a result of this expansion, the role of courts diminished in society. Due to arbitration agreements, parties are generally blocked from having their disputes heard through public proceedings in courts with broader procedural protections. Instead, parties bound by such agreements must submit claims to a private arbitrator where due process does not exist.[3]

---

* Imre S. Szalai is the Judge John D. Wessel Distinguished Professor of Social Justice at Loyola University New Orleans College of Law. He actively serves as an arbitrator and writes extensively about arbitration and the development of arbitration law over time.

1 Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration,* Econ. Pol'y Inst. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/BN68-T3F2] (noting that more than 60 million American workers are bound by arbitration agreements); Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. 233, 234 (2019) (noting that more than 826 million consumer arbitration agreements were in force in the United States in 2018).

2 *See infra* Section II.

3 Davis v. Prudential Sec., 59 F.3d 1186, 1191 (11th Cir. 1995) (holding that "the state action element of a due process claim is absent in private arbitration cases."); *see also* Fed. Deposit Ins. Corp. v. Air Florida Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987) ("The FDIC argues also that it had a due process right to an oral hearing. The arbitration involved here was private, not state, action; it was conducted pursuant to contract by a private arbitrator. Although Congress, in the exercise of its commerce power, has provided for some governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim."); Elmore v. Chi. & I.M.R. Co., 782 F.2d 94, 96 (7th Cir. 1986) ("Private arbitration, however, really is private; and since constitutional rights are in general rights

The inability to access courts and the corresponding shrinking role of courts in society, due to the growth of arbitration, can be problematic on many fronts.

As one example of the potential harm of arbitration, some parties have abused arbitration in a manner to help cover up wrongdoing. The widespread use of arbitration agreements in the employment context likely played a role in concealing widespread sexual assault and harassment cases in the workplace.[4] Claims involving anticompetitive or unfair business practices by Amazon, as well as claims that Amazon sold counterfeit, dangerous infant car seats and other harmful products, have been sent to arbitration instead of public courts.[5] As a result, their wrongdoing can be more easily concealed from the public. As another example, an arbitration agreement is at the center of one of Donald J. Trump's many legal battles. Trump used an arbitration agreement in connection with the hush payment made to adult film actress Stormy Daniels.[6] Although arbitration can be appropriately used for many legitimate reasons and with many potential benefits, such as efficiency, speed, lower costs, and the use of an expert decisionmaker to resolve a dispute,[7] parties can sometimes abuse arbitration with the hope of concealing questionable or illegal conduct, which could otherwise be more easily revealed during the course of public court proceedings.

---

against government officials and agencies rather than against private individuals and organizations, the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term 'due process of law' cannot give rise to a constitutional complaint.").

[4] Employees at Sterling Jewelers endured severe sexual harassment and discrimination at their workplace. However, the confidential nature of arbitration hindered the workers from fully discovering the scope of the wrongdoing. An attorney representing these workers noted that "[m]ost of [these workers] had no way of knowing that the others had similar disputes, because that was all kept confidential." *See* Rachel Martin, *No Class Action: Supreme Court Weighs Whether Workers Must Face Arbitrations Alone*, NPR (Oct. 6, 2017, 4:22 AM), https://www.npr.org/transcripts/555862822 [https://perma.cc/R8Q6-H95G].

[5] Greenberg v. Amazon.com, Inc., No. 20-cv-02782-JSW, 2021 WL 7448530 at *20 (N.D. Cal. 2021) (ordering consumer to arbitrate his unfair competition claims against Amazon.com); Blake Ellis & Melanie Hicken, *Dozens of Amazon's Own Products Have Been Reported as Dangerous—Melting, Exploding or Even Bursting into Flames. Many are Still on the Market*, CNN (Sept. 10, 2020), https://www.cnn.com/2020/09/10/business/amazonbasics-electronics-fire-safety-invs/index.html [https://perma.cc/3ED7-G8VH]; Anderson v. Amazon.com, Inc., 478 F. Supp. 3d 683, 699 (M.D. Tenn. 2020) (compelling arbitration of claims involving sale of allegedly defective seatbelt extenders for children).

[6] Clifford v. Trump, No. CV1802217SJOFFMX, 2019 WL 3249597, at *2 (C.D. Cal. 2019); Michael R. Sisak et al., *Trump Charged with 34 Felony Counts in Hush Money Scheme*, Associated Press (Apr. 4, 2023), https://apnews.com/article/donald-trump-arraignment-hush-money-81225510ef7638494852816878f612f0 [https://perma.cc/N2HD-S975].

[7] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.") (citation omitted).

Today, after decades of expansion, arbitration and arbitration law are undergoing a tectonic shift, and a new phase of contraction in arbitration law is currently unfolding.[8] Since 2019, the United States Supreme Court has started to use a more textual approach when interpreting the Federal Arbitration Act ("FAA"), the main federal law governing the enforceability of arbitration agreements.[9] This profound shift and more literal approach in interpreting the law can have a far-reaching impact and limit the broad enforceability of arbitration agreements. In addition to this judicial shift, there have been similar legislative and private initiatives reflecting a more cautious, restrained use of arbitration in recent years.[10] Before this shift, and still to this day, the United States has stood apart from the rest of the world in its expansive embrace and broad uses of arbitration agreements for virtually all types of disputes.[11] However, it appears that the United States may have now reached a maximum saturation point with arbitration agreements. A recalibration is currently underway in which there will be a contraction and rethinking of the broad uses of arbitration in the United States.

This Article explores the transformation in arbitration and arbitration law that is currently in progress. To help contextualize how arbitration law is evolving, the first part of the Article examines the initial enactment of the FAA in 1925. It also discusses a forty-year period of the FAA's expansion, when the Supreme Court generally used an atextual, policy-driven approach when interpreting the FAA from the 1980s to about 2019.[12] The second part of the Article then analyzes this new, ongoing phase with the FAA whereby the Court, since 2019, has been using a more restrained, textual approach in interpreting and applying the FAA.[13] Finally, the third part of the Article discusses the current and potential future impact of this new textual approach by the judiciary, which is coinciding with similar legislative and private initiatives to cut back on the uses of arbitration, and how the new textual approach can help reconceptualize arbitration.[14] Furthermore, future cases decided under the new approach will be in tension with the older, expansionist FAA

---

[8] *See infra* Section III.

[9] *See* 9 U.S.C. § 1–16.

[10] *See infra* Section IV.B.

[11] Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 Nev. L. J. 381, 391 n.51 (2018) ("Mandatory pre-dispute arbitration in consumer and employment contexts is a uniquely American phenomenon, distinguishing U.S. arbitration from domestic arbitration in other countries.") (citation omitted).

[12] *See infra* Section II.A.

[13] *See infra* Section III.

[14] *See infra* Section IV.

precedent, and this tension can cause arbitration law to unravel in certain situations.[15]

The explosive growth of arbitration for several decades and the recent beginning of a period of contraction have shaped and will continue to shape our civil justice system. Arbitration should not be viewed in isolation as a stand-alone legal institution, but instead, should be understood as part of a broader legal system and as having a close relationship with the courts. Whenever there is a binding arbitration agreement in place, a weaker party has likely lost an opportunity and broader procedural protections available in publicly petitioning the government, through the courts, for assistance in resolving disputes. Some of these disputes sent to private arbitration may involve critical disputes of public interest, such as civil rights disputes or wage disputes or claims of consumer harm. One can view the period of expansion of arbitration law as reflecting successful attempts by conservative interests and corporate interests to weaken or limit access to the public courts by vulnerable consumers and workers.[16] At a time when other pillars of democracy are under attack, this current period of contraction is a significant, needed shift to help reestablish or recalibrate the courts to a more proper, stronger role in maintaining democracy in the United States.

II. The Supreme Court's Transformation and Expansion of the FAA

Today, arbitration agreements, including agreements to arbitrate future disputes, are generally binding and fully enforceable,[17] but this broad enforceability has not always been the case in United States history. Prior to the 1920s, although an arbitration award could generally be entered in court as a binding judgment, pre-dispute arbitration agreements were not enforceable.[18] To put this another way, a promise or agreement to arbitrate a future dispute was not

---

15 *Id.*

16 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting) ("The inevitable result of today's [majority, pro-arbitration] decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."); *See generally* Stephen B. Burbank & Sean Farhang, Rights and Retrenchment: The Counterrevolution against Federal Litigation (2017) (exploring how conservative interests have transformed federal law to make private enforcement of substantive rights more difficult).

17 9 U.S.C. § 2.

18 Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization 19–20 (1992) (although pre-1920 laws were supportive of arbitration once an arbitrator issued an award, there was a "relative lack of enforceability of such agreements before an award was made . . .").

legally binding before the 1920s; a person could back out of such a promise, if desired, prior to an award being issued.[19] However, a mix of different events, beliefs, and transformations in society during the early 1900s—including innovations in transportation and communications, a growing, interconnected national and international economy, the First World War, progressive beliefs, and a broader movement of procedural reform in the courts—prompted Congress and several states to enact modern arbitration laws during the 1920s, such as the FAA, which declared that agreements to arbitrate future disputes are "valid, irrevocable, and enforceable."[20]

With the passage of the FAA in 1925, arbitration agreements between two business interests across the country became valid, irrevocable, and enforceable, and the statute helped facilitate an efficient, convenient mechanism for resolving disputes.[21] As explained below, the FAA, as originally enacted, was limited in scope. However, for a period of about forty years beginning in the 1980s and lasting until 2019, the Supreme Court ignored the FAA's text and expanded the meaning of the statute far beyond its original scope.

A. *The Supreme Court Expanded the FAA From Contractual Disputes to Virtually All Types of Disputes*

The FAA was originally designed to resolve contractual, commercial disputes that arose out of interstate shipping. During Congressional hearings about the bills that would become the FAA, a Senator described the FAA by observing "[w]hat you have in mind is that this proposed legislation relates to contracts arising in interstate commerce."[22] The main proponent and supporter of the FAA confirmed the Senator's observation and gave an example of what the FAA was designed for by responding, "Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in

---

[19] *Id.*; *see also* Arb. Agreements at Common L., 21 Williston on Contracts § 57:2 (4th ed.) (2023) (discussing the revocability of arbitration agreements under common law prior to the issuance of an award).

[20] 9 U.S.C. § 2. For deeper exploration of the many factors that brought about modern arbitration laws during the 1920s, *see* Imre S. Szalai, Outsourcing Justice: The Rise of Modern Arbitration Laws in America (2013).

[21] 9 U.S.C. § 2.

[22] *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7 (1924) [hereinafter *1924 Hearings*].

the State of New Jersey, for instance."[23] During these hearings, the FAA was described as designed to cover "ordinary[,] everyday trade disputes," and drafters stated, "it is for them that this legislation is proposed."[24]

The FAA's text confirms this understanding of the FAA as limited in scope to contractual disputes. Section 2 of the FAA, which is the heart of the statute, contains a substantial limit that has been largely ignored for the last several decades:

> 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* . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[25]

To paraphrase this key provision of the statute, the FAA governs written arbitration provisions either in a maritime transaction or in a contract involving interstate commerce, and the statute further defines "maritime transaction" as certain types of maritime contracts. Additionally, under section 2, such arbitration provisions are binding with respect to certain designated controversies. More specifically, there are two types of controversies covered by this language of the FAA: (i) controversies arising out of a contract involving interstate commerce; and (ii) controversies arising out of a maritime transaction, which is defined to be maritime contracts.[26] Thus, the FAA's text establishes a critical limit to the FAA's coverage. The FAA only applies to contractual disputes or disputes that arise out of a contract. The FAA's coverage is expressly limited to written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract . . ."[27]

It must be emphasized that claims that can be asserted without reference to a contract are not covered by the FAA's text. For example, if one party commits an assault or battery on another party, the right to sue in this instance generally does not arise out of a contract. One's right to be free from unconsented, harmful or offensive contact does not depend on a contract.[28] Likewise, certain statutory claims are beyond the scope of the FAA's coverage. For example, if an employer engages in gender or racial discrimination against an

---

[23] *Id.*

[24] *Id.*

[25] 9 U.S.C. § 2 (emphasis added).

[26] *Id.*

[27] *Id.*

[28] *See, e.g.*, Brown v. Brotman Med. Ctr., Inc., 571 F. App'x 572, 574 (9th Cir. 2014) ("prohibitions against assault and battery exist independent of any contract.") (citation and internal quotations omitted).

employee, the employee's right to sue may arise out of a federal civil rights statute, not out of a contract.[29]

Unfortunately, since the 1980s, the U.S. Supreme Court has expanded the FAA to cover virtually every type of claim of substantive law, including statutory and tort claims. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court ignored the text of the FAA and expanded the FAA to cover statutory claims.[30] In *Mitsubishi*, the Court selectively quotes section 2 as follows and, through selective omissions, the Court opens the door for the arbitration of statutory antitrust claims:

> We do not agree, for we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[31]

Notice that the Court's quotation of section 2 in *Mitsubishi* leaves out the critical contractual limitation found in section 2 that disputes must "aris[e] out of such contract" in order to be covered by the FAA.[32] The Court in *Mitsubishi* uses a cleverly placed, disingenuous ellipsis to ignore the clear contractual limitation and in effect rewrite and expand the statute beyond contractual claims.

Immediately after engaging in this atextual analysis and claiming the FAA is not limited to contractual disputes, the Court in *Mitsubishi* then cites and relies on a purported federal policy favoring arbitration to justify its holding:

> The "liberal federal policy favoring arbitration agreements," manifested by this [section 2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." As this Court recently observed, "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," a concern which requires that we rigorously enforce agreements to arbitrate. Accordingly,

---

[29] *See, e.*g, Jamison v. Dow Chem. Co, No. 03-10226-BC, 2005 WL 1252204, at *5 (E.D. Mich. May 23, 2005) ("The right to be free of discrimination under both state and federal law is independent of contract rights.") (citation omitted); Leahman v. Shell Oil Co., No. CIV.A. 88-1469, 1989 WL 30280, at *1 (E.D. La. Mar. 23, 1989) ("the right to be free from racial discrimination in employment is independent of any contractual right an employee may have.").

[30] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 615 (1985).

[31] *Id.* at 625.

[32] 9 U.S.C. § 2 (written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract" are fully binding).

> the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.[33]

In *Mitsubishi*, the Court ignores the FAA's text and relies instead on a "liberal federal policy favoring arbitration" to hold that virtually any substantive dispute the parties agreed to arbitrate could be covered by the FAA.[34] The *Mitsubishi* Court, instead of applying the limitation from the FAA's text, shifts the inquiry to whether the substantive law of the underlying dispute prohibits arbitration of such a dispute.[35] In other words, if parties agree to arbitrate a statutory civil rights claim pursuant to the FAA, such a dispute is arbitrable as long the civil rights law does not forbid arbitration.[36] Most substantive laws do not address, or much less forbid, arbitration, and so based on *Mitsubishi*, virtually every substantive claim is by default subject to the FAA unless the substantive law forbids arbitration.[37]

Mitsubishi approved of the arbitration of statutory claims, beyond the text of the FAA, and more specifically upheld the arbitration of complex antitrust claims.[38] In the wake of *Mitsubishi*, the Court addressed and approved of the arbitration of other statutory disputes under the FAA, such as securities, RICO, and ADEA claims.[39] And in more recent years, the Court has applied the FAA to wrongful death or battery claims in the nursing home context.[40] As a result of the Court's permissive attitude towards arbitrability under the FAA, virtually every type of claim can now be arbitrated.[41]

---

[33] 473 U.S. at 625–26 (citations and internal quotations omitted).

[34] *Id.* at 627.

[35] *Id.* ("[I]t is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.") (citations omitted).

[36] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (to determine whether an Age Discrimination in Employment Act ("ADEA") claim can be arbitrated under the FAA, court must examine the text, legislative history, and purpose of the ADEA).

[37] *Id.*

[38] *Mitsubishi*, 473 U.S. at 636–37.

[39] Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477 (1989) (securities claims); Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (securities and RICO claims); *Gilmer*, 500 U.S. 20 (ADEA claim).

[40] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246 (2017) (applying the FAA to wrongful death tort claims).

[41] *See, e.g.*, Woodell v. Vivint, Inc., No. 22-CV-00733-JCH-GBW, 2023 WL 3956631 (D.N.M. June 12, 2023) (compelling arbitration of personal injury claims); Duval v. Costco Wholesale Corp., No. 22-CV-02338-TSH, 2023 WL 3852694 (N.D. Cal. June 5, 2023) (Costco successfully asked court to compel arbitration of a slip-and-fall claim); Karim v. Best Buy Co., No. 22-CV-04909-JST, 2023 WL 3801909 (N.D. Cal. June 2, 2023) (Best Buy successfully asked the court to compel arbitration of customer's unfair business practices claim); Southwest Convenience Stores, LLC v. Iglesias, 656 S.W.3d 784 (Tex. App. 2022) (enforcing arbitration clause in connection with wrongful death action filed by family of a murdered convenience store worker); Winninger v. Scott, No.

However, disputes that do not arise out of a contract should not be covered under the text and original purpose of the FAA.

Through a democratic process with elected representatives, it would be appropriate for legislators to decide that certain disputes involving a public interest should or should not be entitled to greater protections in court. However, the shift that occurred through *Mitsubishi* involved judicial activism and judicial rewriting of the law. With the Court's atextual and policy-driven approach from *Mitsubishi*, the contractual limitation in the FAA no longer exists as a matter of law and stare decisis. During the 1980s, the Court transformed and expanded the statute by ignoring its text in cases like *Mitsubishi* and others.

B. *The Supreme Court Expanded the FAA From Federal Court to State Court*

The FAA was not originally designed to apply in state court. This federal nature of the FAA was emphasized during Congressional hearings when the bills that would become the FAA were being debated:

> Nor can it be said that the Congress of the United States, directing its own courts . . . would infringe upon the provinces or prerogatives of the States . . . [T]he question of the enforcement [of arbitration agreements] 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 . . . *There 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.*[42]

If a party involved in an interstate shipping dispute is bound by an arbitration clause but nevertheless files a lawsuit in federal court, the text of the FAA would allow the federal court to stay the litigation until the arbitration occurred.[43] Section 3 of the FAA states that "[i]f any suit or proceeding be brought in any of the *courts of the United States* upon any issue referable to arbitration under an agreement in writing for such arbitration," then that court may issue a stay.[44] Notice that the statute here discusses "courts of the

---

21-CV-04689-HSG, 2022 WL 3205035 (N.D. Cal. 2022) (compelling arbitration of patient's claims that doctor sexually assaulted her during a medical exam).

[42] 1924 Hearings, at 39–40 (emphasis added).

[43] 9 U.S.C. § 3 (1947).

[44] *Id.* (emphasis added).

United States," or federal courts, not state courts. Likewise, if one party involved in an interstate shipping dispute refused to honor an arbitration agreement, the other party could ask a federal court to compel arbitration.[45] Section 4 of the FAA allows such a petition to be filed in the "United States district court" which would have subject matter jurisdiction over the dispute between the parties.[46] As demonstrated by the FAA's text, the FAA, as a procedural statute, was not intended to govern in state courts.[47]

However, in 1984 in the landmark case of *Southland Corp. v. Keating*, the Supreme Court interpreted the FAA as applicable in state courts.[48] Before analyzing the text of the FAA, the Court in *Southland* described the core section of the FAA as embodying a strong national policy: "[i]n enacting section 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[49] After highlighting this federal policy favoring arbitration, the Court then selectively analyzed the text of one provision of the FAA.[50] The Court quoted section 2 of the FAA, which broadly declares arbitration agreements to be binding, and the Court found two limitations in this provision.[51] First, the arbitration provision must be part of a written maritime contract or a contract involving interstate commerce.[52] Second, the arbitration agreement may be revoked upon any grounds that exist at law or in equity for the revocation of any contract.[53] After recognizing these two limitations found in section 2 of the FAA, the Court explained that the FAA's broad principle of enforceability contains no other limitation under state law.[54] Looking at this provision in isolation and finding no

---

45 9 U.S.C. § 4 (1947).

46 *Id.*

47 *See also* H.R. Rep. No. 68–96, at 1 (1924) ("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."); *id.* ("Before [arbitration] contracts could be enforced in the Federal courts . . . this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States."); *See* Ian R. Macneil, American Arbitration Law: Reformation, Nationalization, Internationalization (1st ed. 1992), for a thorough exploration of why the FAA is applicable solely in the federal courts.

48 Southland Corp. v. Keating, 465 U.S. 1 (1984).

49 *Id.* at 10.

50 *Id.* at 10–11.

51 *Id.*

52 *Id.* at 11.

53 *Id.*

54 *Southland*, 465 U.S. 1, 11.

other limitations, the Court was now free to declare that the FAA is not limited to federal courts and could be applied in state courts.[55] The Court also characterized the FAA as a substantive rule enacted pursuant to Congress's Commerce Clause powers.[56]

In *Southland*, the Court relied on a federal policy favoring arbitration to reach its conclusion and expand the FAA beyond its original intent as applicable solely in federal court.[57] As pointed out by Justice O'Connor in her dissenting opinion in *Southland*, the majority focused its textual analysis on section 2 of the FAA, which contains no mention of which judicial forums are bound by section 2.[58] Justice O'Connor explained that the other provisions of the FAA implementing section 2 are limited to federal courts, and Justice O'Connor also relied on legislative history to show the original understanding of the FAA as applicable solely in federal courts.[59] Justice O'Connor pointed out that her colleagues' decision to change and expand the FAA "is impelled by an understandable desire to encourage the use of arbitration."[60]

C. *The Supreme Court Expanded the FAA to Cover Employment Disputes*

The FAA was originally understood as covering contractual, commercial disputes, not employment disputes. During legislative hearings regarding the FAA, one of the main drafters explained that "[i]t was not the intention of this bill to make an industrial arbitration in any sense . . . It is not intended that this shall be an act referring to labor disputes, at all."[61] The FAA is limited in its coverage to contracts involving interstate commerce.[62] Before the New Deal and at the time of the FAA's enactment, the Court treated the Commerce Clause in a narrow manner so that most

---

55 *Id.* at 16 (in passing the FAA, Congress created "a substantive rule applicable in state as well as federal courts.").

56 *Id.* at 11–16.

57 *Id.* at 10.

58 *Id.* at 22.

59 *Id.* at 22–23, 25–29.

60 *Southland*, 465 U.S. 1, 22.

61 *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce; and a Bill 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: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923).

62 9 U.S.C. §§ 1, 2 (1947).

employment relationships would be analyzed as local and not involving interstate commerce.[63] However, transportation workers who crossed state lines, such as railroad workers, were viewed as involved with interstate commerce and could be subject to federal regulation.[64] To confirm that the FAA was limited to commercial disputes and not employment disputes, the FAA's drafters added language to the original draft to clarify that the FAA does not apply to "contracts of employment" of any "class of workers engaged in interstate commerce."[65] Furthermore, the drafters stressed that "all industrial questions have been eliminated" from the FAA's coverage through the addition of this language excluding workers involved in interstate commerce.[66]

For several decades, the FAA was understood to be inapplicable to employment disputes, but in 1991, the Supreme Court upheld the enforcement of an arbitration clause in connection with an employment relationship in *Gilmer v. Interstate/Johnson Lane Corp*.[67] The *Gilmer* Court focused on a narrow issue: whether a statutory claim under the Age Discrimination in Employment Act ("ADEA") can be covered by the FAA.[68] Based on precedent such as the *Mitsubishi* case described above, the Court recognized that statutory claims can be arbitrated pursuant to the FAA, and nothing in the ADEA prohibits private resolution through arbitration.[69] In reaching its conclusion, the Court recognized there must be a "healthy regard" for the "liberal federal policy favoring arbitration."[70] However, in *Gilmer*, the Court ignored a controlling, threshold legal issue: whether the FAA applies to employment relationships. The majority opinion in *Gilmer* did not address the section 1 exclusion regarding workers or the legislative history demonstrating the FAA was not intended for employment disputes.[71] Instead, by focusing on the narrow issue of whether statutory claims can be arbitrated and by upholding the enforcement of the arbitration agreement at issue, the Court in

---

63 *Employers' Liability Cases*, 207 U.S. 463 (1908).

64 *Id.* at 496, 498 (regulation of the employment of railroad employees engaged in the operation of interstate commerce is permissible under the Commerce Clause, but regulation of a railroad company's clerical workers is not).

65 9 U.S.C. § 1 (1947); SZALAI, *supra* note 20, at 135, 153.

66 SZALAI, *supra* note 20, at 135, 153.

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

68 *Id.* at 23.

69 *Id.* at 35.

70 *Id.* at 26, 35.

71 *Id.* at 25 n.2 (noting that this threshold issue was not raised in the courts below or presented as a question in the petition for certiorari, and instead this issue is "left for another day").

Gilmer indirectly opened the door for the arbitration of employment disputes under the FAA.

Ten years after *Gilmer*, the Court finally addressed the worker exclusion in section 1 in *Circuit City Stores, Inc. v. Adams*.[72] Instead of viewing the exclusion as originally intended as a provision to ensure that the FAA would not cover any employment relationships, the Court explained that section 2's broad enforceability provision implements Congress' intent to exercise commerce power to the full.[73] Under this view of the commerce power, employment contracts would generally be covered by the FAA.[74]

In a strong dissent in *Circuit City*, Justice Stevens explained the FAA was originally designed for commercial disputes, not employment disputes.[75] He explained that section 1's exclusion was added to the FAA to confirm that section 2 would not apply to any employment relationships.[76] Justice Souter also wrote a separate dissent where he emphasized that at the time of the FAA's enactment, when there was a narrow view of the commerce power, most employment relationships would not be covered by the FAA.[77] The majority in *Circuit City* improperly transformed and expanded the statute to cover employment relationships.[78]

Justice Stevens criticized his colleagues for this transformation. He explained the FAA was originally designed to reverse an old judicial hostility against arbitration so that arbitration agreements would be treated neutrally and enforceable like other contracts.[79] However, Justice Stevens explained that the Court was now expanding the FAA and treating arbitration agreements more favorably than other contracts.[80] Citing cases like *Gilmer*, *Mitsubishi*, *Southland*, and others, Justice Stevens explained "a number of this Court's cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration."[81] As a result of the Court's decision to

---

72 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

73 *Id.* at 112.

74 *Id.* at 113–14 (section 2 of the FAA broadly covers all employment contracts, subject to the narrow exception in Section 1 for transportation workers).

75 *Id.* at 125–27.

76 *Id.* at 128.

77 *Id.* at 136.

78 *Circuit City*, 532 U.S. at 119 ("only contracts of employment of transportation workers" are exempt from the FAA's scope).

79 *Id.* at 131–32.

80 *Id.*

81 *Id.*

change and expand the FAA to employment disputes, millions of workers are now covered by binding arbitration agreements.[82]

To summarize this section about the judicial transformation of the FAA, the FAA was originally enacted and designed to play a more limited role in society. The statute was originally understood to be a procedural statute, applicable only in federal courts,[83] for commercial, contractual claims.[84] However, beginning around the 1980s, the Court used an atextual, policy-driven approach to change and expand the FAA. Cases like *Mitsubishi*,[85] *Southland*,[86] *Gilmer*,[87] and *Circuit City*[88] are contrary to the text, history, and purpose of the FAA. As recognized by dissenting Justices, the Court's expansion of the FAA was likely motivated by a desire to promote the use of arbitration.[89] This judicial activism probably arose, at least in part, in response to a perception of a litigation crisis during the 1980s,[90] with the hope that increased use of arbitration agreements would help clear judicial dockets.

III. The Court's New Textual Approach When Analyzing the FAA

After four decades of judicial expansion of the FAA, which was addressed in the prior section of the Article, arbitration law is currently undergoing a tectonic shift. This section of the Article explores a new phase in the historical evolution of arbitration law. In this new phase, which is a significant change from the past several decades, the Supreme Court has been using a more textual approach when interpreting the FAA as opposed to a more policy-driven approach. This textual approach tends to limit the broad enforceability of arbitration agreements.

This section of the Article first explores the landmark 2019 case of *New Prime, Inc. v. Oliveira*,[91] which ushered in this new phase of arbitration law. Then, this section explores the Supreme Court's

---

82 Colvin, *supra* note 1; Szalai, *supra* note 1.

83 *See supra* section II.B.

84 *See supra* section II.A.

85 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

86 *Southland*, 465 U.S. 1.

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

88 *Circuit City*, 532 U.S. 105.

89 *Southland*, 465 U.S. 1, at 22 (O'Connor, J., dissenting).

90 Frank J. Vandall, *A Critique of the Restatement (Third), Apportionment as it Affects Joint and Several Liability*, 49 Emory L. J. 565, 620 (2000) (explaining that during the 1980s, "the myth of a litigation crisis was created and widely disseminated.").

91 New Prime, Inc, v. Oliveira, 139 S. Ct. 532 (2019).

2021 term, during which the Court's new textual approach is on full display.

A. *New Prime, Inc. v. Oliveira*

The *New Prime* case involved a minimum wage employment dispute and class action filed by a truck driver, and the truck driver was purportedly bound by an arbitration agreement with the defendant trucking company.[92] The truck driver and trucking company disagreed whether the driver was an employee or an independent contractor.[93] Under *Circuit City*'s interpretation of the FAA, section 1 of the FAA contains the transportation worker exception, which is supposed to be narrowly construed.[94] However, there was some confusion whether the phrase "contracts of employment" narrowly referred to employee-employer relationships or more broadly covered all types of workers, including independent contractors.[95] Under a narrow interpretation of the exemption, if the truck driver at issue was an independent contractor, the exemption would not apply, and the FAA would require enforcement of the arbitration agreement. However, under a broad reading of the exemption, the truck driver would not be covered by the FAA, regardless of whether the truck driver was an employee or independent contractor.

In resolving this issue, the Supreme Court in *New Prime* focused on the text of the FAA and what the terms would have meant at the time of the FAA's enactment. Citing several dictionaries as well as cases and statutes from the relevant time period,[96] the Court in *New Prime* held that the term "contract of employment" meant a contract to perform work, without distinguishing between kinds of workers.[97] As a result, the truck driver would be exempt from the FAA's coverage pursuant to the transportation worker exemption in section 1.[98]

---

92 *Id.* at 536.

93 *Id.*

94 *Adams*, 532 U.S. 105, 118–19.

95 *New Prime*, 139 S. Ct. at 536 ("[D]oes the term 'contracts of employment' refer only to contracts between employers and employees, or does it also reach contracts with independent contractors? Because courts across the country have disagreed on the answers to these questions, we took this case to resolve them.").

96 *Id.* at 539–43.

97 *Id.* at 543–44.

98 *Id.*

Since the 1980s, the Court's decisions were often driven or influenced by the Court's perception of a strong federal policy favoring arbitration.[99] For decades since the 1980s, it was a safe bet that the Court would likely rule in favor of ordering arbitration in connection with FAA cases. There was a long line of Supreme Court cases where a consumer or worker would be pitted against a corporate defendant who was trying to enforce an arbitration agreement, and for the last few decades, the Court has generally ruled in favor of the company and of enforcing the arbitration agreement.[100] If the *New Prime* case had been decided several years ago during the expansionist phase of the FAA's evolution, a different Court following a policy-driven approach could have interpreted the transportation worker exemption more narrowly such that only employees who served as transportation workers would be exempt. Under a policy-driven interpretation of the FAA from the past, the Court may have held that the truck driver in *New Prime* was covered by the FAA and forced to arbitrate.

The Court's *New Prime* case is a landmark decision because the Court broke from its prior, atextual, policy-driven approach. The Court in *New Prime* was more textual and analyzed what the statute's language would have meant at the time of the FAA's enactment. If this approach had been followed consistently since the FAA's enactment, arbitration law would be more limited in scope today, and as explained below, the Court has continued with this more textual approach, especially during the Court's 2021 term.

B. *The Supreme Court's 2021 Term*

This subsection examines the textualist approach used by the Supreme Court in four arbitration cases from the 2021 term. As explained below, it is likely that these cases would have been decided differently under the prior era's atextual, policy-driven, expansionist approach.

---

99 *See supra* Section II.

100 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246 (2017); DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); Cir. City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); Allied-Bruce Terminix Cos. V. Dobson, 513 U.S. 265 (1995).

i. Badgerow v. Walters

The *Badgerow* case addressed a federal court's power or subject matter jurisdiction in connection with FAA proceedings.[101] More specifically, the case addressed how a federal court analyzes subject matter jurisdiction in connection with a petition to vacate or confirm an arbitrator's award.[102] In the Court's *Badgerow* decision, one sees the Court's textual approach on display.

To better understand the jurisdictional issues with the FAA and in the *Badgerow* case, it helps to understand that the FAA regulates or governs different types of court proceedings used to facilitate arbitration. For example, from the front end of a dispute, before an arbitration takes place, a court can rely on section 4 of the FAA to enforce an arbitration agreement or compel a party to arbitrate.[103] When one party refuses to honor an arbitration agreement, the other party to the agreement can commence an action in court pursuant to section 4, which provides for a court order directing the parties to arbitrate according to the terms of the agreement.[104] At the back end of a dispute, or after an arbitration proceeding has run its course and produced an award resolving the dispute, a party may seek confirmation of the award in court pursuant to section 9 of the FAA.[105] Additionally, at the back end, a party may seek vacatur of the award in court pursuant to section 10 of the FAA, which sets forth narrow grounds for vacatur such as evident partiality of the arbitrator or procurement of the award by fraud.[106]

When does a federal court have power or subject matter jurisdiction to compel arbitration or enforce an arbitration agreement from the front end? The text of section 4 provides a clear answer. Section 4 directs the federal court to analyze jurisdiction by examining whether the federal court has subject matter jurisdiction over the dispute to be arbitrated.[107] In other words, if the federal court has the power to hear the merits of the underlying dispute, the federal court has the power to order the parties to honor an agreement to arbitrate this underlying dispute.[108] This approach of examining the underlying dispute to be arbitrated is sometimes referred to as the "look-through" approach, whereby a federal court looks through

---

101 Badgerow v. Walters, 142 S. Ct. 1310, 1314 (2022).

102 *Id.*

103 9 U.S.C. § 4.

104 *Id.*

105 *Id.* § 9.

106 *See id.* § 10.

107 *Id.* § 4.

108 *See generally* Vaden v. Discover Bank, 556 U.S. 49 (2009).

the arbitration agreement to examine subject matter jurisdiction over the main merits dispute to be arbitrated.[109] Pursuant to the text of section 4, the underlying merits dispute, the core substantive dispute at the heart of any attempts to arbitrate under the FAA, serves as the jurisdictional anchor in federal court for FAA proceedings to compel arbitration.[110]

Badgerow addressed subject matter jurisdiction of federal courts from the back end, after an arbitration proceeding has produced an arbitrator's award.[111] *Badgerow* involved an employment dispute where a worker alleged unlawful termination under both state and federal laws, and an arbitrator dismissed the worker's claims.[112] Does a federal court have power or subject matter jurisdiction to confirm or vacate this award? The look-through approach used to analyze subject matter jurisdiction for "front-end" petitions to compel arbitration[113] would support a finding of jurisdiction here in the *Badgerow* "back-end" situation. Under this look-through approach, if applied to the back-end, a federal court would have subject matter jurisdiction over the employment dispute at issue in *Badgerow* because the employment dispute involved a federal civil rights claim, and thus, a federal court would have jurisdiction to confirm or vacate the arbitral award resolving this dispute. However, the Supreme Court in *Badgerow* rejected this look-through approach,[114] and as explained below, the Court reached this result through a textual analysis.

In a majority opinion authored by Justice Elena Kagan, the Court recognized that the FAA does not, by itself, provide for federal jurisdiction, and instead, there must be an "independent jurisdictional basis."[115] The Court also recognized that the text of Section 4 instructs courts to examine jurisdiction over the parties' underlying dispute.[116] However, in contrast to section 4, "[s]ections 9 and 10 do not mention the court's subject-matter jurisdiction at all. So under ordinary principles of statutory construction, the look-through method for assessing jurisdiction should not apply."[117] The Court reasoned that if certain text only appears in one section of a statute but not others, Congress intended such an omission to be

---

109 *Id.* at 52, 66.

110 9 U.S.C. § 4; *Discover Bank*, 556 U.S. at 66.

111 *Badgerow*, 142 S. Ct. at 1314.

112 *Id.* Badgerow's claims included a Title VII federal civil rights claim. *Badgerow v. Walters*, 975 F.3d 469, 473 n.3 (5th Cir. 2020).

113 *Discover Bank*, 556 U.S. at 66.

114 *Badgerow*, 142 S. Ct. at 1314.

115 *Id.* at 1316 (citations omitted).

116 *See id.* at 1317 (citation omitted).

117 *Id.* at 1317–18.

deliberate.[118] Emphasizing a textual approach, the Court also cautioned it could not "redline" the FAA or import "[s]ection 4's consequential language into provisions containing nothing like it."[119]

The textual approach used by the Court in *Badgerow* is less supportive of arbitration than the past policy-driven cases interpreting the FAA. As a practical matter, if the underlying dispute involves a federal question claim, such as a civil rights claim for racial discrimination in an employment dispute, a federal court would not have power to confirm or vacate an arbitral award resolving this federal claim.[120] The federal nature of the underlying dispute is no longer a proper basis for a federal court's subject matter jurisdiction under *Badgerow*.[121] Although a federal court would have jurisdiction to compel arbitration of this same dispute from the front end,[122] a federal court would not have automatic jurisdiction to vacate or confirm an award arising from this same federal question dispute.[123] Post-*Badgerow*, federal judicial power is now lopsided with respect to the FAA; *Badgerow* undermined, to a certain degree, the powers of federal courts to facilitate arbitration from the back end. In order for a federal court to have power to confirm or vacate an arbitral award, the petition to vacate or confirm would generally need to involve diverse parties and more than $75,000 in controversy.[124] Without satisfying diversity jurisdiction, parties would have to seek confirmation or vacatur of an arbitral award in state courts. As recognized by the Court, state judiciaries will play a significant role with respect to the FAA: "The result [of the holding in *Badgerow*] is to give state courts a significant role in implementing the FAA. But we have long recognized that feature of the statute. Enforcement of the Act, we have understood, 'is left in large part to the state courts.'"[125]

To emphasize the shift that is currently underway in arbitration law, it is helpful to understand the impact of *Badgerow* and realize that the Court could have easily reached the opposite result in *Badgerow* by using the policy-driven, atextual approach of the past.

---

118 *Id.* at 1318 (quoting Collins v. Yellen, 141 S.Ct. 1761, 1782 (2021)).

119 *Id.*

120 *Id.* at 1317–18.

121 *See id.* at 1321 ("As Walters notes, those claims may have originated in the arbitration of a federal-law dispute. But the underlying dispute is not now at issue. Rather, the application concerns the contractual rights provided in the arbitration agreement, generally governed by state law.").

122 *Discover Bank*, 556 U.S. at 66.

123 *See Badgerow*, 142 S. Ct. at 1317–18.

124 *Id.* at 1316 ("If [a petition to confirm or vacate an arbitral award] shows that the contending parties are citizens of different States (with over $75,000 in dispute), then § 1332(a) gives the court diversity jurisdiction.").

125 *Id.* at 1322 (citations and internal quotations omitted).

The textual approach used in *Badgerow* resulted in a more restrained reading of the FAA and less judicial support of arbitration proceedings. Under *Badgerow*, the federal courts are not as supportive of the system of arbitration from the back end, after an arbitration award has been issued. Also, if the Court had decided *Badgerow* twenty years ago during the policy-driven, expansive era of the Court's FAA interpretations, the Court could have reached the opposite result it reached in *Badgerow*. For example, the Court could have reached the opposite result by extending the look-through jurisdictional analysis to all FAA proceedings, whether front-end or back-end, and such a jurisdictional approach would have been more supportive of arbitration. An expansionist, atextualist Court from the past may have reasoned that based on the strong federal policy favoring arbitration, the entire statute should be viewed as embodying a comprehensive legal framework regarding arbitration, and the jurisdictional look-through approach found in section 4 of the FAA applies to every FAA proceeding under this unitary, comprehensive statute, including back-end proceedings for vacatur or confirmation. With a uniform jurisdictional approach, federal courts would be best positioned to support and facilitate the federal policy favoring arbitration. In other words, relying on a broad federal policy supporting arbitration, the Court in the past may have been tempted to be less textual and may have said that the approach recognized under Section 4 was intended to apply comprehensively to every type of FAA proceeding. Thus, under this expansive approach, as long as a federal court has power to hear the merits of the underlying dispute, such as a federal civil rights claim in the employment context, a federal court would have power to hear any type of FAA proceeding related to that dispute, such as a proceeding to compel arbitration, to appoint an arbitrator, to enforce an arbitral subpoena, or to confirm or vacate an arbitral award.

As an alternative way to reach the opposite result in *Badgerow*, the Court could have addressed this *Badgerow* fact pattern by relying on its earlier policy-driven, expansionist holding from *Southland*, that the FAA embodies a substantive right to arbitrate.[126] Treating the FAA as involving a substantive right should mean that the FAA automatically gives rise to federal question jurisdiction.[127] Therefore, had the Court decided *Badgerow* during its expansive, atextualist stage, the Court could have justified and reached a different result.

---

[126] Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (through the FAA, Congress "creat[ed] a substantive rule applicable in state as well as federal courts.").

[127] A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454, 1459 (D.C. Cir. 1995) ("In a federal question case within the scope of § 1331, there is by definition some substantive federal law to govern the case from the outset.") (citation and internal quotations omitted).

In sum, *Badgerow* helps illustrate the evolution that is occurring in arbitration law with the more textual approach.

ii. Morgan v. Sundance, Inc.

On a narrow plane, the *Sundance* case addressed the issue of waiver; more specifically, when or under what circumstances has a party waived its contractual right to arbitrate?[128] To help understand the impact of *Sundance* and the particular fact pattern involved, consider the following hypothetical. A consumer or worker files a lawsuit against a company in court, and the plaintiff is either unaware of the arbitration agreement or believes that any purported arbitration agreement related to the transaction is likely invalid. In many situations like this, the defendant will immediately raise the issue of the arbitration agreement and ask the court to stay the action and issue an order compelling the plaintiff to submit the plaintiff's claims to arbitration pursuant to the arbitration agreement.[129]

However, there may be situations where the defendant does not immediately raise the issue of the arbitration agreement and the defendant does not immediately ask the court to compel arbitration. For example, the defendant may engage in some motion practice before raising the issue of arbitration. Or perhaps the defendant may file an answer and start engaging in discovery, as if there is no arbitration agreement. Why does a defendant not immediately ask the court to enforce an arbitration agreement? It could be that the defense counsel is neglectfully unaware of the existence of the arbitration agreement, or perhaps the defense counsel is hoping to game the system and see if a litigation route may be more beneficial to the defendant's interests.

In these situations where a defendant delays in asking the court to compel arbitration, courts examine whether a defendant has waived the right to arbitrate.[130] Although the federal appellate courts articulated a waiver standard in slightly different ways, the majority of federal appellate courts before *Sundance* required a showing of prejudice in order to demonstrate that a waiver of the right to arbitrate had occurred.[131] In other words, this standard of waiver

---

128 Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1710–11 (2022).

129 *See, e.g.*, Racioppi v. Airbnb, Inc., No. A-0455-22, 2023 WL 4552596 (N.J. Super. Ct. App. Div. July 17, 2023); Hopkins v. Dell Techs., Inc., No. 22-CV-2464-DWD, 2023 WL 3791722 (S.D. Ill. June 2, 2023).

130 *See, e.g.*, Bridgeporte Wealth Plan. Partners Co. v. Vallabhaneni, No. 1-20-CV-390-RP, 2020 WL 13180462, at *3 (W.D. Tex. Dec. 30, 2020) ("The right to arbitrate a dispute, like all contract rights, is subject to waiver.") (citation omitted).

131 *See, e.g.*, McCoy v. Walmart, Inc., 13 F.4th 702, 704 (8th Cir. 2021) ("[W]hen a party (1) kn[ows] of an existing right to arbitration; (2) act[s] inconsistently with that right; and (3) prejudice[s] the

helped preserve the right to arbitrate, and this pre-*Sundance* standard was forgiving and generous in allowing defendants to compel arbitration belatedly.[132] Put another way, demonstrating a defendant's waiver before *Sundance* required the plaintiff to demonstrate prejudice arising from the defendant's delay.[133] This pre-*Sundance* requirement of prejudice helped support, or was justified, in light of the strong federal policy favoring arbitration.[134]

For example, the Second Circuit in *Rush v. Oppenheimer & Co.* explained that "[g]iven this dominant federal policy favoring arbitration, waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated."[135] In *Rush*, the Second Circuit found there was no waiver, even where the defendant had delayed about eight months in asking the court to compel arbitration and instead engaged in pretrial proceedings, including filing a motion to dismiss, participation in some discovery, and filing an answer containing several affirmative defenses but with no mention of arbitration.[136] The Second Circuit found that the plaintiff had not demonstrated any prejudice.[137]

Prior to *Sundance*, courts recognized that a waiver of the right to arbitrate should not be inferred lightly, and the prejudice requirement helped maintain this standard.[138] For example, one district court in connection with a Title VII civil rights employment dispute found that the defendant employer had not waived the right to arbitrate, despite the defendant's year long delay in moving to compel arbitration.[139] The employer had filed an answer containing several affirmative defenses, none of which involved arbitration, and the

---

other party [with its] inconsistent acts, waiver occurs.") (citation and internal quotations omitted); O.J. Distrib., Inc. v. Hornell Brewing Co., 340 F.3d 345, 356 (6th Cir. 2003) ("Although a waiver of the right to arbitration is not to be lightly inferred, a party may waive the right by delaying its assertion to such an extent that the opposing party incurs actual prejudice.") (citations and internal quotations omitted).

132 Borror Prop. Mgmt., LLC v. Oro Karric N., LLC, 979 F.3d 491, 494 (6th Cir. 2020) ("Federal law looks favorably upon arbitration. In view of that federal prerogative, the waiver of the right to arbitration is not to be lightly inferred.") (citations and internal quotations omitted).

133 Gala v. Tesla Motors TN, Inc., No. 2:20-CV-2265-SHM-TMP, 2020 WL 7061764, at *17 (W.D. Tenn. 2020) ("The party asserting waiver must demonstrate both that there was inconsistency and that there was actual prejudice.") (citation omitted).

134 Sabatelli v. Baylor Scott & White Health, 832 Fed. Appx. 843, 848 (5th Cir. 2020) (recognizing presumption against waiver because of the liberal federal policy in favor of arbitration).

135 Rush v. Oppenheimer & Co., 779 F.2d 885, 887 (2d Cir. 1985).

136 *Id.* at 889.

137 *Id.* at 885–86.

138 Trout v. Organizacion Mundial de Boxeo, Inc., 965 F.3d 71, 76–77 (1st Cir. 2020) (in light of federal policy favoring arbitration, waiver should not be lightly inferred and doubts about waiver should be resolved in favor of arbitration).

139 Pierre v. Rochdale Vill. Inc., No. 18-CV-6383, 2020 WL 6799635, at *9 (E.D.N.Y. Nov. 19, 2020).

employer also engaged in some discovery, including a minimal exchange of documents and responding to interrogatories.[140] The court found this delay and litigation conduct did not amount to waiver because the plaintiff did not demonstrate any prejudice from this delay or conduct.[141] In another case, a defendant delayed twenty-two months in asking the court to compel arbitration, and the defendant also removed the case from state court and engaged in some discovery, such as requesting the production of documents and propounding interrogatories.[142] Because the plaintiff did not demonstrate any prejudice, the court found that the defendant had not waived the right to arbitrate.[143]

In *Morgan v. Sundance, Inc.*, the Supreme Court addressed this particular problem of waiver of the right to arbitrate.[144] The plaintiff in *Sundance* was a Taco Bell worker who filed a collective action lawsuit in federal court for overtime violations of the Fair Labor Standards Act.[145] Sundance, the owner of the franchise, engaged in eight months of litigation without asking the court to compel arbitration.[146] Sundance first moved to dismiss the lawsuit since there were similar lawsuits previously filed, and the district court denied Sundance's motion.[147] Sundance then answered the plaintiff's complaint.[148] The answer contained numerous affirmative defenses, but none mentioned arbitration.[149] The parties also engaged in a mediation before Sundance moved to compel arbitration.[150] The district court found that the worker had been prejudiced,[151] but the Eighth Circuit found no prejudice and compelled arbitration, reasoning that no formal discovery had occurred and that the parties had not contested matters on the merits.[152]

The Supreme Court granted certiorari in *Sundance* to resolve a split among the federal circuits. Most circuits had adopted an arbitration-specific waiver rule whereby the party seeking to demonstrate

---

140 *Id.* at *7.

141 *Id.* at *8 ("[T]he key to a waiver analysis is prejudice; without prejudice, there can be no waiver of the right to arbitrate a dispute.") (citations and internal quotations omitted); *id.* at *9.

142 Gateguard, Inc. v. Goldenberg, 585 F. Supp. 3d 391, 397 (S.D.N.Y. 2022).

143 *Id.* at 401.

144 *Sundance, Inc.*, 142 S. Ct. 1708, 1710–11 (2022).

145 *Id.* at 1711.

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Sundance*, *Inc.*, 142 S. Ct. at 1711.

151 *Id.* at 1712.

152 *Id.*

waiver had to show prejudice, but two circuits had rejected this rule.[153]

When discussing the special waiver rule for arbitration requiring prejudice, the Supreme Court explained the origins of this rule: the "special rule . . . derives from the FAA's 'policy favoring arbitration.'"[154] The Court recognized that outside of the arbitration context, federal courts generally do not require a showing of prejudice in connection with a waiver analysis,[155] and federal courts developed the prejudice requirement to foster this policy favoring arbitration.[156] However, the Court strongly cautioned that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."[157] Instead, this policy should be understood as overruling the pre-1920s judicial hostility and refusal to enforce arbitration agreements, and under this narrower view of policy, arbitration agreements are to be enforceable like any other contract.[158] Put another way, waiver concepts applicable to all other contracts would also govern arbitration contracts; "a court may not devise novel rules to favor arbitration over litigation."[159]

A prejudice requirement does not exist in the FAA's text,[160] and the idea of treating arbitration agreements the same as other contracts can be found in section 2 of the FAA, whereby agreements to arbitrate are fully binding "save upon such grounds as exist at law or in equity for the revocation of any contract."[161] The Court in *Sundance* did not mention the text of section 2 or the fact that the FAA does not explicitly discuss a prejudice requirement. However, the Court did attempt a textual analysis. Citing section 6 of the FAA, the Court mentions "the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one we address here."[162] According to section 6, any

---

153 *Id.*

154 *Id.* at 1711.

155 *Id.* at 1713.

156 *Sundance*, *Inc.*, 142 S. Ct. at 1712–13.

157 *Id.* at 1713.

158 *See id.* at 1713–14.

159 *Id.* at 1713. After *Sundance*, it is possible that a court may still require a showing of prejudice in order to find waiver if the applicable contract law would have a prejudice requirement for waiver analysis for contracts generally. VIPshop Int'l Holdings, Ltd. v. Transpacific Trade Ctr. LLC, No. 20 C 2557, 2022 WL 4119787, at *2 (N.D. Ill. 2022) ("Although the Supreme Court recently held [in *Sundance*] federal courts could not fashion an arbitration-specific rule requiring prejudice as a condition of waiver, it did not cast doubt on the proposition that prejudice can be a factor in deciding whether a party impliedly waived arbitration.").

160 9 U.S.C. § 1–16.

161 9 U.S.C. § 2.

162 *Sundance*, *Inc.*, 142 S. Ct. at 1714.

application under the FAA must be "made and heard in the manner provided by law for the making and hearing of motions,"[163] and the Court construed this provision as requiring usual procedural rules, not "custom-made rules, to tilt the playing field in favor of (or against) arbitration."[164]

To help illustrate the shift that is currently underway in arbitration law, recall that prior to *Sundance*, courts would bend over backwards to enforce an arbitration agreement, even where one party had engaged in litigation conduct incompatible with arbitration.[165] Prior to *Sundance*, courts would not easily find a waiver of the right to arbitrate.[166] However, in the aftermath of *Sundance*, courts have been finding waiver more easily. Courts which used to require a showing of prejudice have been rejecting that requirement after *Sundance*.[167] As a result, waiver of the right to arbitrate can be more easily established after *Sundance*.

If the Court had decided *Sundance* decades ago during the policy-driven, expansive phase of the FAA instead of during the more textual phase, the Court could have reached the opposite conclusion and required a showing of prejudice. Relying on the federal policy favoring arbitration cited by the Court in the past,[168] the Court in *Sundance* could have simply concluded that waiver is not to be easily established unless there is a strong showing of prejudice in light of such policy.

iii. Southwest Airlines Co. v. Saxon

The *Southwest* case involves section 1 of the FAA, which exempts from the coverage of the statute "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[169] This exemption in Section 1 has been construed since *Circuit City* as referring to "transportation workers."[170] The plaintiff in *Southwest* was employed by the airline

---

163 9 U.S.C. § 6.

164 *Sundance*, *Inc.*, 142 S. Ct. at 1714.

165 *See supra* notes 137–42 and accompanying text.

166 *Id.*

167 Armstrong v. Michaels Stores, Inc., 59 F.4th 1011, 1014 (9th Cir. 2023) (recognizing that after *Sundance*, "it is error to require parties arguing waiver of the right to arbitration to demonstrate prejudice"); Alvarez v. Experian Info. Sols., Inc., No. 19-CV-03343, 2023 WL 2519249, at *8 (E.D.N.Y. Mar. 15, 2023) (same).

168 *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (claiming that Congress had declared a national policy favoring arbitration when enacting the FAA).

169 9 U.S.C. § 1 (2023).

170 Southwest Airlines Co. v. Saxon, 142 S. Ct. 1783, 1789 (2022) "§ 1 exempted only contracts with transportation workers, rather than all employees, from the FAA." (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)).

company as a ramp supervisor who trained and supervised ramp agents who physically handled cargo, and the supervisors frequently handled cargo as well.[171] The plaintiff, who had agreed to arbitrate pursuant to her employment contract, filed suit against Southwest for overtime wages, and a threshold issue was whether the FAA governed the plaintiff's arbitration agreement.[172] The Court had to decide whether the plaintiff would fall within the transportation worker exemption found in section 1 of the FAA.[173]

The Court's textual approach in *Southwest* was evident throughout the opinion. The Court began its analysis by emphasizing it had to interpret the transportation worker exemption's "language according to its ordinary, contemporary, common meaning," and "[t]o discern that ordinary meaning, those words must be read and interpreted in their context, not in isolation."[174] Then, to engage in this textual analysis, the Court broke down the transportation worker exemption into different phrases: "class of workers" and "engaged in foreign or interstate commerce."[175] First, the Court relied on three different dictionaries from the early 1900s to describe how one defines the relevant "class of workers."[176] The Court explained that this phrase "class of workers" focuses on the "actual work that the members of the class, as a whole, typically carry out," as opposed to the broader industry an employer may be involved in.[177] The Court then applied this definition or principle and found that the plaintiff belonged to a class of workers who frequently handled or loaded cargo on airplanes.[178] Next, having defined the relevant class of workers, the Court examined the rest of the transportation worker exemption by analyzing whether this particular class of airplane cargo loaders is "engaged in foreign or interstate commerce."[179] To analyze this phrase, the Court again emphasized its textual approach: "As always, we begin with the text."[180] Relying again on dictionaries from the time period of the FAA's enactment, the Court found that to be "engaged" means to be "occupied, employed, or involved," and the

---

171 *Id.* at 1787.

172 *Id.* If the FAA did not govern, then perhaps state arbitration law would govern. Saxon v. Southwest Airlines Co., 993 F.3d 492, 502 (7th Cir. 2021) ("But [if the FAA does not govern,] Saxon could still face arbitration under state law . . .").

173 *Southwest*, 142 S. Ct. at 1788.

174 *Id.* (citations and internal quotation marks omitted).

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

179 *Southwest*, 142 S. Ct. at 1789–90.

180 *Id.* at 1789.

word "commerce" includes the transportation of goods.[181] The Court concluded that "any class of workers directly involved in transporting goods across state or international borders" is not covered by the FAA, and airplane cargo loaders such as the plaintiff were within such a class.[182]

During the expansionist, atextual phase of the Court's FAA jurisprudence, the Court may have reached a different conclusion in *Southwest*. For example, relying on the liberal federal policy favoring arbitration, the Court may have interpreted the transportation worker exemption very narrowly. Under a narrow view of the exemption, only workers who transport goods and people across state lines, like seamen and railroad employees, would fall under the exemption. But other workers in the same industries would fall outside the scope of the exemption and thus be covered by the FAA.[183]

iv. ZF Automotive US, Inc. v. Luxshare, Ltd.

Luxshare did not directly involve the domestic FAA, and instead, at issue in this case was a different statute that could potentially impact international arbitration.[184] Even though the domestic FAA was not at issue, one also sees the Court's strong textual approach in this arbitration-related case. A federal statute from the 1960s, 28 U.S.C. § 1782(a), permits litigants to ask United States federal courts to provide assistance in gathering evidence for use in "a foreign or international tribunal,"[185] and there was uncertainty whether a foreign or international tribunal included a private arbitration proceeding.[186] In *Luxshare*, the Court granted certiorari to clarify whether the statute could be used in connection with international arbitration proceedings.[187]

Engaging in a textual analysis and citing dictionaries from the 1960s, the Court held that the terms "foreign tribunal" and "international tribunal" mean tribunals with governmental authority, not private arbitration proceedings.[188] After engaging in a textual analysis, the

---

181 *Id.* (internal quotations marks and citations omitted).

182 *Id.*

183 *Cf.* Eastus v. ISS Facility Servs., Inc., 960 F.3d 207, 212 (5th Cir. 2020) (narrowly construing the transportation worker exemption before the *Southwest* case and finding that a ticketing agent supervisor, who sometimes handled baggage at the gate and supervised others who did so, did not fall under the exemption because the worker was not "engaged in an aircraft's actual movement in interstate commerce.").

184 ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2083 (2022).

185 28 U.S.C. § 1782 (2022).

186 *ZF Auto. US, Inc.*, 142 S. Ct. at 2083.

187 *Id.*

188 *Id.* at 2086–87.

Court found support for such an analysis in the history of the statute.[189] The Court explained the statute was designed for United States courts to provide assistance to governmental bodies abroad, in the hope of encouraging reciprocal assistance from other foreign courts, and this purpose would be in tension with providing assistance to purely private arbitration proceedings.[190] The Court also supported its textual analysis by explaining that a contrary ruling would be in tension with the FAA, which generally does not allow for broad discovery.[191]

As demonstrated by the Court's decision in *New Prime*, which ushered in the textual era of the Court's FAA jurisprudence, and the Court's decisions from its 2021 term, the Court is now using a more literal, textual, restrained approach when interpreting arbitration law, as opposed to the more policy-driven, expansionist approach used for several decades since the 1980s.

IV. The Future of Arbitration and Arbitration Law in the United States

This final section of the Article makes some observations and predictions about the future.[192] The Court will likely continue using a more textual approach in future FAA cases, and this approach will tend to limit the scope of arbitration and conceptualize arbitration differently from the past. Also, this new textual approach is subject to a few caveats, which will be explored below. Furthermore, recent legislative and private initiatives are consistent with this more restrained, textual approach being displayed in the judiciary. Finally, cases decided under the textual approach will not always coexist in harmony with the policy-driven cases from the past. Tension is likely to grow within arbitration law, and in some instances, the legal framework supporting arbitration may breakdown as a result.

A. *The Court Will Likely Use a More Textual Approach in Future FAA Cases, and This Approach Can Help Reconceptualize Arbitration*

At least with the current makeup of the Court, the Court as a general trend will likely continue to use some form of a textualist

---

189 *Id.* at 2088.

190 *Id.*

191 *Id.* at 2088–89.

192 However, as the wise Yoda once recognized, "Difficult to see. Always in motion is the future." Star Wars: Episode V – The Empire Strikes Back (20th Century Fox 1980).

approach for the foreseeable future. The text of the statute will be the primary focus for the Court when analyzing the FAA in future cases, subject to few caveats or qualifications. This new trend is significant and will likely lead to more restrained or limited interpretations of the FAA, and this new approach may be less supportive of arbitration. Such a textual approach is a tectonic shift compared to the past, when a more policy-driven analysis was used,[193] and as explained below, this textual approach may lead to a different conceptualization of arbitration.

To illustrate this tectonic shift, consider how some past FAA decisions would have turned out differently under a textualist approach. In *Sundance*, the Court warned that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."[194] Instead, under the FAA, arbitration agreements are to be enforceable like any other contract, and "a court may not devise novel rules to favor arbitration over litigation."[195] These principles from *Sundance* are in direct conflict with a landmark ruling from the Court's expansionist, earlier period regarding the FAA, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*.[196]

If the Court in *Moses H. Cone* had applied these principles from *Sundance*, arbitration law would be different today. Normally, the general rule in contract law is that ambiguous terms in a contract are construed against the drafter.[197] But in the landmark *Moses H. Cone* case, the Court created a policy-driven rule favoring arbitration, whereby ambiguities about the scope of an arbitration clause are to be interpreted in favor of arbitration.[198] Thus, imagine a customer and merchant enter into an arbitration clause, drafted by the merchant, whereby all disputes regarding "deliveries" are to be arbitrated. Suppose a shipment is delivered late, and the parties dispute who is responsible for the delay of the delivery. This dispute concerning a late delivery is likely covered by the clause. What if the dispute involves a purchased product that is defectively designed? The dispute has nothing to do with a late delivery or an allegation that a delivery damaged the product. Is this dispute regarding a design

193 *See supra* Section II.

194 *Sundance*, 142 S. Ct. at 1713.

195 *Id.*

196 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). Westlaw demonstrates that *Moses H. Cone* has been cited in thousands of cases and briefs over the years; it is a foundational case in FAA jurisprudence.

197 Restatement (Second) of Contracts § 206 (1981).

198 *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25 (1983) ("The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ").

defect a dispute about a "delivery"? Under normal contract law, ambiguities about the arbitration contract would be construed against the drafter,[199] and the dispute about a design defect would therefore not be arbitrable. However, under the special pro-arbitration rule crafted by the Court in *Moses H. Cone*, ambiguities in the scope of an arbitration clause are resolved in favor of arbitration.[200] Why? Because the Supreme Court (not the text of the FAA) said so in *Moses H. Cone* based on the purported federal policy in favor of arbitration.[201]

If the Court were to revisit the *Moses H. Cone* ruling using the principle from *Sundance,* that courts are not supposed to invent arbitration-preferring procedural rules,[202] then the Court would have reached a different result in *Moses H. Cone*. Treating arbitration agreements like any other contract, instead of developing a special rule favoring arbitration, would result in application of the traditional contract rule that ambiguities are construed against the drafter.[203] In today's modern economy, where millions of arbitration clauses are presented on a take-it-or-leave-it, non-negotiable basis, by a corporate entity to a consumer or worker,[204] the general contract rule would typically result in holding that arbitration is not required if the arbitration clause is ambiguous, because the drafter would tend to be the corporate party. The pro-arbitration, expansionist *Moses H. Cone* presumption, whereby ambiguities are resolved in favor of arbitration—which has no basis in the text of the FAA—would likely not exist if the Court had applied today's more textual approach.

This example involving *Moses H. Cone* and *Sundance* also helps demonstrate how the new textual approach can lead to a different conceptualization of arbitration. Although *Sundance* involves the doctrine of waiver,[205] the Court's reasoning in *Sundance* goes beyond the narrow context of waiver. The Court's core statement in *Sundance*, that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules,"[206] is a strong, clear rejection of the atextual, policy-driven approach from the past. In rejecting the policy-driven approach, the

---

199 Restatement (Second) of Contracts § 206 (1981).

200 *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

201 *Id.* at 24 ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

202 *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

203 Restatement (Second) of Contracts § 206 (1981).

204 Colvin, *supra* note 1.

205 *Sundance*, 142 S. Ct. at 1713.

206 *Id.*

Court in *Sundance* attempts to restore arbitration agreements as being on an equal footing like any other contract. In other words, *Sundance* reconceptualizes or repositions arbitration agreements by relegating arbitration agreements to be equal with other contracts.[207] Arbitration contracts are no longer at the top of a hierarchy of contracts to be supported by the Court's preference for arbitration, as illustrated by the preferential rule from *Moses H. Cone*. Instead, in this post-*New Prime* world of the FAA, arbitration agreements should be treated like any other contract.

This more textualist approach on display since *New Prime* has the potential to recalibrate and change arbitration law, subject to some caveats and qualifications. It is important to recognize that a textualist approach to the FAA does not necessarily mean that there will be clear answers to every FAA issue. There are different degrees or types of textualist approaches, with some versions being more flexible and others more formal.[208] Also, some view the text of the FAA as ambiguous, indeterminate, and sparse.[209] Additionally, the FAA may be silent on certain issues, especially because it was originally designed for a more limited use of arbitration compared to today.[210] Thus, even if the text of the FAA is the main focus of analysis, there may still be uncertainty or disagreement on how a particular issue may be resolved because of uncertainties or gaps in the text, or different textualist approaches. To put this another way, a textualist approach will be the dominant approach going forward but may not eliminate all confusion or uncertainty regarding the FAA.

Furthermore, the policy preferences of the Justices may also creep in and influence a textualist approach. Hanging in the balance of FAA cases may be whether class proceedings can occur, and certain Justices appear to strongly dislike class proceedings.[211] For

---

[207] *Id.* ("The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.") (citations omitted).

[208] Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 Nw. U. L. Rev. 1033, 1084–85 (2023) (discussing different versions of textualism); Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265, 279 (2020); Kevin Tobia et al., *Progressive Textualism*, 110 Geo. L. J. 1437, 1448–55 (2022) (describing different principles of textualism and how these principles sometimes conflict).

[209] Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. Rev. 1189, 1194 n.29 (2011) (noting the text of the FAA is indeterminate); Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 Yale L. J. 2940, 2946 (2015) (recognizing the text of the FAA is "too terse" and "indeterminate") (citations omitted).

[210] *See supra* Part II.

[211] In an FAA case, Justice Kagan made the following observation in dissent: "To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled." Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 252 (2013) (Kagan, J., joined by Ginsburg and Breyer, JJ., dissenting).

certain Justices, their policy preferences and desire to limit the use of class proceedings may shape how they utilize a textualist approach in connection with FAA cases.[212]

Also, the Court has built up several decades of atextual and flawed holdings. For example, as explained above, the Court has held that section 2 of the FAA governs in state courts,[213] and statutory claims are covered by the FAA.[214] Justice O'Connor once wrote of the Court's judicial law-making with respect to the FAA that the "Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."[215] This judicially created edifice, or prior Court holdings, is subject to the principle of stare decisis. Although some Justices have expressed a willingness to overrule past FAA cases, such as *Southland*,[216] overruling of prior FAA cases has not occurred. The Court seems likely to adhere to stare decisis and its past FAA precedents.[217] Thus, the Court's textual approach is more likely to be used when confronting new FAA issues for which there is no prior precedent.

In sum, the Court has ushered in a new era of FAA jurisprudence where the primary focus will be on the FAA's text, and this approach, although subject to a few caveats, is a significant shift from

---

212 Justice Alito, joined by Justice Thomas, wrote in dissent the following comments about the textualist approach: "[t]he Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated; the theory that courts should "update" old statutes so that they better reflect the current values of society." Bostock v. Clayton City, 140 S. Ct. 1731, 1755–56 (2020) (Alito, J., joined by Thomas, J., dissenting); *cf.* W. Va. v. Env't Prot. Agency, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., joined by Breyer and Sotomayor, JJ., dissenting) ("[s]ome years ago, I remarked that '[w]e're all textualists now.' It seems I was wrong. The current Court is textualist only when being so suits it.") (citation omitted).

213 Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

214 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636–37 (1985).

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

216 *Id.* at 287 (Thomas, J., dissenting, joined by Scalia, J.) (*Southland* is fundamentally flawed because the FAA was intended to apply solely in federal court); *Id.* at 285 (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling [*Southland*].").

217 In another landmark FAA case from the expansionist period, the Court developed a "clear and unmistakable" standard for delegating arbitrability issues to an arbitrator. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). Textually, however, the FAA does not allow for delegation of arbitrability matters to an arbitrator; instead, section 4 requires a court to make arbitrability determinations. 9 U.S.C. § 4. However, when the Court was confronted with this textual argument recently, that the FAA's text does not allow for delegation, the Court succinctly observed "that ship has sailed." Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019). Thus, with respect to past FAA precedent, the Court is also likely to dismiss new, textual arguments against such precedent as involving a "ship [that] has sailed" instead of overruling the past precedent).

the past. This new approach can lead to more constrained or limiting interpretations of the FAA, along with a reconceptualization of arbitration as involving a contract that does not deserve special treatment.

B. *The Court's New Approach is Consistent with Recent Legislative and Private Initiatives*

Arbitration law can be described through the metaphor of a slow-moving pendulum, with shifts or changes that have occurred over long periods of time.[218] When one looks at the treatment of arbitration across United States history, there have been periods where government and judicial systems gave little support for arbitration and other periods where government and judicial systems more strongly supported arbitration. For example, prior to the 1920s in the United States, there was a judicial mistrust of arbitration,[219] and courts would generally not enforce predispute arbitration agreements.[220] Arbitration was sometimes viewed as an inferior form of dispute resolution.[221] Then, the pendulum shifted during the 1920s with the enactment of the FAA and similar state arbitration statutes whereby predispute arbitration agreements became valid, irrevocable, and enforceable.[222] During the 1980s, the pendulum started shifting increasingly in favor of arbitration, with the Supreme Court's expansionist interpretations transforming the FAA.[223] With such pro-arbitration law, arbitration clauses exploded in the United States so that now, arbitration clauses appear in connection with virtually all types of transactions.[224]

---

218 Stephen C. Yeazell & Joanna C. Schwartz, Civil Procedure 555 (9th ed. 2016).

219 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011) (recognizing a pre-FAA "judicial hostility" towards arbitration).

220 Macneil, *supra* note 18, at 19–20.

221 Tobey v. Cty. of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) ("[Arbitrators] are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicium. Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?"); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 (1991) (recognizing that judicial attitudes have shifted and no longer treat arbitration as inferior to litigation).

222 *See generally* Szalai, *supra* note 20.

223 *See supra* Part I.

224 *See, e.g.*, Woodell v. Vivint, Inc., No. 22-CV-00733-JCH-GBW, 2023 WL 3956631 (D.N.M. June 12, 2023) (enforcing arbitration clause in connection with personal injury claims); Duval v. Costco Wholesale Corp., No. 22-CV-02338-TSH, 2023 WL 3852694 (N.D. Cal. June 5, 2023) (enforcing

Now, during this new, more textualist phase of the Court's jurisprudence regarding the FAA, it appears that arbitration may have reached a saturation point in society. The pendulum may have reached its highest point or limit already, and more parties seem to be questioning whether the broad uses of arbitration in society are appropriate. With this more textualist phase, the pendulum appears to be swinging back in the opposite direction, with less judicial support of arbitration. If the pendulum is pushed too far in one direction, the pendulum seems to correct itself and move in the opposite direction.

The judicial shift captured in this Article also corresponds well with recent legislative and private initiatives to cut back on the expansive uses of arbitration. For several years, there have been attempts in Congress to amend the FAA, such as by banning predispute arbitration agreements in the consumer or employment contexts.[225] Such bills have usually died in committee.[226] However, in March 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("EFAA") went into effect.[227] The EFAA is the most significant change in the last several decades to the FAA and a landmark statute arising from the #MeToo movement.[228] The EFAA generally invalidates predispute arbitration agreements in cases involving sexual harassment or sexual assault.[229] In effect, the people of the United States, through their representatives, made a recent decision that these types of disputes should not be subject to predispute arbitration agreements under the FAA. Instead, survivors of these horrible acts can choose to proceed with their claims in public court with more robust procedural protections.

There have also been some private initiatives in recent years cutting back on the broad use of arbitration. For example, Google voluntarily dropped the use of arbitration agreements for all

---

arbitration clause in connection with a slip-and-fall claim); Karim v. Best Buy Co., No. 22-CV-04909-JST, 2023 WL 3801909 (N.D. Cal. June 2, 2023) (enforcing arbitration clause in connection with an unfair business practices claim); Southwest Convenience Stores, LLC v. Iglesias, 656 S.W.3d 784 (Tex. App. 2022) (enforcing arbitration clause in connection with a wrongful death claim); Winninger v. Scott, No. 21-CV-04689-HSG, 2022 WL 3205035 (N.D. Cal. 2022) (enforcing arbitration clause in connection with a sexual assault claim).

225 *See, e.g.*, Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017) (declaring as invalid predispute arbitration agreements with respect to employment, consumer, antitrust, or civil rights disputes).

226 *Id.*

227 Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117–90, 136 Stat. 26 (codified at 9 U.S.C. §§ 401, 402).

228 Imre S. Szalai, *#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 18 NW. J. L. SOC. POL'Y 1 (2023).

229 9 U.S.C. § 402.

employment disputes in 2019,[230] shortly after the *New Prime* ruling. In 2021, Amazon also voluntarily dropped arbitration for its customers.[231] These legislative and private initiatives suggest that the shift in attitude regarding arbitration is not just limited to the judiciary, and this shift is happening across broader segments of society.

C. *The Court's New Approach Will Create Tension with Older Precedent from the Expansionist Phase of the Court's FAA Jurisprudence*

As explained above, the Court's future interpretations of the FAA are likely to be more rooted in the text of the FAA. However, such new decisions will be in tension with the older expansionist FAA precedent from the last several decades.[232] Arbitration law will lack coherence, and in some situations, the uneasy tension between the expansionist phase and textual phase could lead to a breakdown in the legal system's treatment of arbitration.

As an example of this uneasy tension, consider the Court's *Southland* ruling[233] in light of the more recent watershed *New Prime* case.[234] The Court in *New Prime* recognized the unitary nature of the FAA, [235] an analysis in tension with *Southland*. The Court in *New Prime* observed that sections one, two, three and four of the FAA involve a significant "sequencing" and are "integral parts of a whole."[236] Sections three and four refer exclusively to federal courts,[237] and by recognizing that sections one, two, three and four must be read together,[238] it becomes clear under the rationale from *New Prime* that the FAA's broad principle of enforceability is a procedural rule applicable solely in federal courts. In other words, the broad enforceability principle from section two is inextricably intertwined with the provisions of sections three and four, which are

---

230 Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. Times (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html [http://perma.cc/PG7L-R6EB].

231 Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. Times (July 22, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html [http://perma.cc/E9MF-29C9].

232 *See, e.g.*, *supra* Part II.

233 Southland Corp. v. Keating, 465 U.S. 1 (1984).

234 New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019).

235 *Id.* at 538.

236 *Id.*

237 9 U.S.C. §§ 3 ("[C]ourts of the United States . . ."), 4 ("United States district court . . .").

238 *New Prime Inc.*, 139 S. Ct. at 534, 538.

limited to federal courts. However, the *Southland* Court from the 1980s ignored the integrated, unitary nature of the FAA and the FAA's clear references to federal courts, and instead the *Southland* court reached its expansionist holding by looking narrowly at section two in isolation.[239] If the Court would have always used this more textual approach found in *New Prime* when analyzing the FAA in the past, the Court's expansionist, atextual cases like *Southland*,[240] *Mitsubishi*,[241] and *Circuit City*[242] may have turned out differently. As the Court warned in the landmark *New Prime* case, courts should not "pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal,"[243] an ironic statement in light of the forty years of the Court's expansionist, policy-driven FAA interpretations immediately prior to *New Prime*. Had the Court adhered to this more restrained principle during the 1980s, the FAA would be more limited in scope today, and the United States may not have experienced an explosion of arbitration agreements.

Like pouring new wine into old wineskins, the new textualist decisions may lead to problems trying to coexist with the older, atextual FAA precedent, and in some situations, the legal system's support of arbitration may break down. For example, consider the Court's textual approach in *Badgerow* in light of the expansive, atextual interpretations of the FAA in *Southland*. If the underlying dispute involves a federal statutory claim, like a federal civil rights claim, the federal nature of this claim would no longer give rise to a federal court's jurisdictional power to vacate or confirm an arbitral award.[244] The solution according to the *Badgerow* Court is for such petitions to vacate or confirm to be heard in state courts.[245] The *Badgerow* Court believed that "Congress chose to respect the capacity of state courts to properly enforce arbitral awards," and the Court concluded it "must respect that congressional choice."[246] However, this conclusion is problematic because if one examines the FAA's text, it is not clear that the FAA applies in state court. For example, consider the vacatur provisions of section ten, which state that the "United States court in and for the district wherein the award was made" may vacate an award upon four stated grounds.[247] If one applies a textual analysis, one will conclude that the FAA's vacatur

239 *Southland*, 465 U.S. at 10–11.

240 *Id.* at 1.

241 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

242 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

243 *New Prime Inc.*, 139 S. Ct. at 543.

244 Badgerow v. Walters, 142 S. Ct. 1310, 1317–18 (2022).

245 *Id.* at 1322.

246 *Id.*

247 9 U.S.C. § 10.

provisions do not apply in state court. The text of the FAA has always been in tension with the Court's expansive readings of the past, such as the Court's *Southland* decision where the Court found the FAA embodies a substantive right applicable in both state and federal courts.[248]

The Court has painted itself into a corner with the textual approach of *Badgerow* and the expansive FAA precedent. According to *Badgerow*, an arbitral award resolving a federal claim could be subject to a petition to vacate or confirm in state court.[249] However, looking at the text of the FAA's vacatur provision, the four grounds for vacatur found in the FAA do not apply in state courts.[250] If one turns to state arbitration laws, many states' arbitration laws are patterned after the FAA and have the same grounds for vacatur as the FAA.[251] However, what if a state arbitration law provides more expansive grounds for vacatur, such as a *de novo* judicial review of statutory claims, which would seem to unravel the finality of arbitration embodied in the FAA's limited vacatur provision? *Badgerow*'s decision to send more vacatur petitions to state court could create a situation where the legal framework supporting arbitration collapses. Arbitration is supposed to be binding under the FAA, with very limited grounds for vacatur, but arbitration could lose its benefit of finality if a state opens up the grounds for vacatur to *de novo* review.[252] The textual approach of the Court on display in *Badgerow* is on a collision course with the Court's prior expansionist interpretations and could lead to a breakdown in the legal system's treatment and support of arbitration.

Badgerow's holding also gives rise to another conceptual tension regarding the FAA. When compelling arbitration from the front-end where courts are permitted to base jurisdiction on the underlying dispute to be arbitrated,[253] the court is treating the FAA as procedural in nature and as a tool to resolve the underlying dispute. Arbitration is treated as a process to resolve the underlying dispute when the Court treats the underlying substantive dispute as the jurisdictional anchor.[254] But in *Southland*, the right to arbitrate

---

248 Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (in passing the FAA, Congress "creat[ed] a substantive rule applicable in state as well as federal courts.").

249 *Badgerow*, 142 S. Ct. at 1322.

250 9 U.S.C. § 10 (providing for vacatur under four grounds in the "United States court in and for the district wherein the award was made.").

251 *See, e.g.*, Conn. Gen. Stat. Ann. § 52-418 (2012); Miss. Code. Ann. § 11-15-23 (2019); N.J. Stat. Ann. § 2A:24-8 (2013); Ohio Rev. Code Ann. § 2711.10 (2006).

252 9 U.S.C. §§ 2, 10.

253 Vaden v. Discover Bank, 556 U.S. 49, 62 (2009).

254 *Id.* at 63–64.

is viewed as substantive in nature.[255] Also, at the back-end after *Badgerow*, when vacating an award, the Court appears to treat arbitration as involving a bundle of contractual rights. For example, if one seeks to vacate an arbitral award involving a federal statutory claim because perjury was used to obtain the result, the Court seems to view this vacatur process as involving contractual rights, not a federal right.[256] But isn't an issue of perjury an ancillary dispute to the main substantive underlying dispute involving the federal right? The goal of the vacatur proceeding is not simply to resolve the issue of perjury, but instead, to reopen the merits process to resolve the underlying dispute. Thus, in *Vaden*, with respect to front-end proceedings, arbitration is viewed as procedural in nature, but in *Southland* and in *Badgerow*, the Court appears to treat arbitration as involving a substantive right. Interpreting the FAA as originally intended, as a procedural statute designed to facilitate the arbitral resolution of contractual disputes,[257] would avoid this conceptual tension.

With the Court likely continuing its more textual approach in the future, there is greater potential for more examples of tension and inconsistencies to arise between the expansionist FAA decisions and more recent textual decisions. Tension in arbitration law is problematic because arbitration can lose its potential value of speed and efficiency if the legal framework supporting arbitration is uncertain and filled with conflicting principles.

V. Conclusion

The explosive growth of arbitration for several decades and the recent beginning of a period of contraction have shaped and will continue to shape our civil justice system. Arbitration should not be

---

255 Southland Corp. v. Keating, 465 U.S. 1, 26 (1984).

256 Badgerow v. Walters, 142 S. Ct. 1310, 1321 (2022) ("As Walters notes, those claims may have originated in the arbitration of a federal-law dispute. But the underlying dispute is not now at issue. Rather, the application concerns the contractual rights provided in the arbitration agreement, generally governed by state law.").

257 The issues in *Badgerow* never would have arisen if the FAA had been interpreted as originally intended. The Court's expansionist *Mitsubishi* decision, where the Court conveniently uses an ellipsis to avoid the text of the FAA and hold that the FAA applies beyond contractual disputes to cover statutory claims, is deeply flawed. *See supra* Part II.A. If the FAA were limited to contractual disputes as originally intended, then the jurisdictional issue in *Badgerow* (whether a federal court has jurisdiction to vacate an arbitral award on the basis of the federal nature of the underlying claim) never would have arisen. The FAA was never supposed to cover federal claims such as the federal claim at issue in *Badgerow*. Also, *Badgerow* involves the employment setting, and if the Court had properly limited the FAA to non-employment cases, the *Badgerow* case would have never arisen. The problems arising from the clash between the atextual holdings, and the more textual approach are all of the Court's making.

viewed in isolation as a stand-alone legal institution, and instead, arbitration should be understood as part of a broader legal system and as having a close relationship to the courts. Courts help facilitate this arbitration process. Also, whenever there is a binding arbitration agreement in place, a weaker party likely loses an opportunity and broader procedural protections available in publicly petitioning the government, through the courts, for assistance in resolving disputes, some of which may involve critical disputes of public interest, such as civil rights disputes, wage disputes, or claims of consumer harm. One can view the period of expansion of arbitration law as reflecting successful attempts by corporate, conservative interests to weaken or limit access to the courts by vulnerable consumers and workers. This current period of contraction is a significant, welcome, and needed shift, which can help reestablish or recalibrate the courts to a more proper, stronger role in maintaining democracy.

This shift in arbitration law is also coinciding with a milestone in the FAA's history. The FAA is approaching its centennial anniversary in 2025, and with the upcoming centennial, it will be an opportune time to examine the FAA and uses of arbitration in the United States and consider possible reforms. With the decades of the Supreme Court's policy-driven, expansionist decisions beginning in the 1980s, there is a disconnect between the FAA's text and how the FAA is applied today. As explained above, the principles from atextualist decisions from the past tend to be in tension with more textualist interpretations of the FAA, and the FAA's text does not support the broad uses of arbitration that currently exist. Recent judicial, legislative, and private initiatives reflect a greater awareness, debate, caution, and questioning about the appropriate role of arbitration in the United States. These questions about arbitration more broadly help define the scope of the civil justice system. With the tectonic shift described in this Article and with the upcoming centennial anniversary of the FAA's enactment, it is hoped that more reforms can occur.