THE ARBITRATION CLAUSE AS SUPER CONTRACT

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ABSTRACT

It is widely acknowledged that the purpose of the Federal Arbitration Act (FAA) was to place arbitration clauses on equal footing with other contracts. Nonetheless, federal and state courts have turned arbitration clauses into "super contracts" by creating special interpretive rules for arbitration clauses that do not apply to other contracts. In doing so, they have relied extensively, and incorrectly, on the Supreme Court's determination that the FAA embodies a federal policy favoring arbitration.

While many scholars have focused attention on the public policy rationales for and against arbitration, few have explored how arbitration clauses should be interpreted. This Article fills that gap and asserts that the judiciary's inappropriate reliance on the federal policy favoring arbitration distorts state contract law to push cases into arbitration that do not belong there, thereby unfairly depriving litigants of access to the courts. By creating special rules that favor arbitration and that deviate from state contract law, courts are enforcing arbitration agreements in situations where they would not enforce other agreements. This Article challenges the judiciary's favored treatment of arbitration clauses and identifies several areas in which arbitration clauses are being over-enforced as a result. The fact that courts send too many disputes into arbitration also is significant because it undermines the perception, common among both academics and judges, that courts remain hostile to arbitration rather than supportive of it.

Because the original purpose of the Federal Arbitration Act was to make arbitration clauses just like other contracts, this Article proposes that courts should construe the federal policy favoring arbitration in a way that is consistent with state contract law rather than in a way that

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uproots it. Doing so best ensures that litigants are not unfairly forced into arbitration where they never agreed to it.

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INTRODUCTION

Although the issue of the enforceability of mandatory arbitration clauses is a controversial one, it should not be. The Federal Arbitration Act (FAA) was enacted in 1925 with a simple goal: to overcome existing judicial unwillingness to enforce arbitration clauses by placing arbitration clauses on "equal footing" with other contracts.[1] The Act made such clauses as enforceable as any other contract provision and subject to the same defenses as applied to other contracts.[2]

Current interpretation of the FAA, however, places arbitration clauses not on equal footing, but on a pedestal. Courts have strayed from the

1. EEOC v. Waffle House, Inc., 534 U.S. 279, 293 (2002) ("The FAA directs courts to place arbitration agreements on equal footing with other contracts . . . ."); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.").

2. *See* 9 U.S.C § 2 (2012) (making arbitration clauses enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"). Typical contract defenses may include fraud, duress, unconscionability, lack of consideration, and waiver. *See generally* E. ALLAN FARNSWORTH, CONTRACTS (4th ed. 2004).

FAA's original purpose and have turned arbitration clauses into a type of "super contract."[3] Although courts purport to apply general contract law when interpreting arbitration clauses, they have in fact distorted contract law by creating special rules for arbitration clauses that make them enforceable in situations where other contracts are not. The consequence is that many litigants are improperly losing their right of access to the courts and are being forced to submit to arbitration.

Much of this arbitration favoritism is attributable to lower-court misinterpretation of thirty-year-old dicta from the United States Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*.[4] In that case, the Court stated that the FAA embodies "a liberal federal policy favoring arbitration" and establishes that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" notwithstanding any state policies to the contrary.[5]

The Court's creation of a federal policy favoring arbitration has been transformational. The use of arbitration clauses has exploded in the last thirty years,[6] and such clauses are routinely inserted by corporations into employment agreements, consumer contracts, brokerage agreements, and the like.[7] Since the Supreme Court first declared the federal policy

3. This Article is not the first to use the "super contract" phrase to describe arbitration clauses. *See, e.g.*, Brief for Respondents at 34, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (No. 04-1264) (characterizing a lower court as treating an arbitration clause as a "super contract" that was "especially favored under federal law"); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 581 (2007).

4. 460 U.S. 1 (1983). For a fuller discussion of *Moses H. Cone*, see *infra* Part II.A.

5. *Moses H. Cone*, 460 U.S. at 24–25. Though *Moses H. Cone* spoke in terms of the federal policy favoring arbitration overriding contrary state law, it remained unsettled at the time of the decision whether the FAA applied in state courts and preempted state law. That question was put to rest one year later when the Supreme Court decided that the FAA did create substantive law that could preempt state law. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984). The Court relied in significant part on *Moses H. Cone* in reaching that result. *See id.* at 12 (describing how *Moses H. Cone* reaffirmed that the FAA creates substantive law applicable in both federal and state courts).

6. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1636–38 (2005) (noting the "emergence of 'mandatory' arbitration" since the mid-1980s and explaining that a great increase in the use of arbitration clauses occurred "[o]nce the Supreme Court began to issue decisions stating that commercial arbitration was 'favored'").

7. *See, e.g.*, *Arbitration: Is It Fair When Forced?*: *Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 59, 62–64 (2011) [hereinafter *Hearing*] (statement of F. Paul Bland, Senior Attorney, Public Justice) (noting that millions of consumers are subject to mandatory arbitration clauses in consumer contracts and that arbitration clauses are prevalent in credit card agreements, financial services agreements, cell phone contracts, employment contracts, car sales, and securities brokerage services, among others); David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1027 (2012) ("The United States Supreme Court's expansion of the Federal Arbitration Act (the 'FAA') has made arbitration clauses ubiquitous in consumer and employment contracts . . . ."); ZACHARY GIMA ET AL., FORCED ARBITRATION: UNFAIR AND

favoring arbitration, *Moses H. Cone* has been cited more than 30,000 times by courts, advocates, and commentators.[8]

Lower courts have seized upon the federal policy favoring arbitration to enforce arbitration clauses in a wide range of circumstances.[9] This Article explores how courts have misread and wrongly extended *Moses H. Cone* to establish special rules regarding the interpretation of arbitration clauses that often are in conflict with traditional rules of contract interpretation designed to protect contracting parties. In doing so, courts have overlooked various facts indicating that *Moses H. Cone* should be given a narrow reading—one that effectuates the FAA's overarching purpose of maintaining consistency with state contract law rather than a reading that overrides it.[10]

In particular, this Article examines three areas in which courts have given arbitration clauses "super contract" status: (1) interpreting ambiguous contracts in favor of arbitration rather than in accordance with the traditional contract rule of interpreting ambiguities against the drafting party;[11] (2) creating special rules that make it more difficult to find that a party waived the arbitration provision than to find that a party waived other contractual terms;[12] and (3) interpreting arbitration clauses to bind individuals to arbitrate disputes with parties who never signed the arbitration clause.[13] The result is that courts are substantially over-enforcing arbitration clauses and that parties are wrongly losing their right to go to court.

Determining the proper framework for interpreting the scope and breadth of arbitration clauses is an under-theorized issue. Much of the debate over arbitration has focused on whether arbitration is a fairer and better alternative to litigation,[14] or on whether the FAA was intended to

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EVERYWHERE, PUB. CITIZEN 1 (Sept. 14, 2009), http://www.citizen.org/documents/UnfairAndEverywhere.pdf (conducting study indicating that "forced arbitration remains almost ubiquitous in many industries").

8. A Westlaw KeyCite search performed on February 19, 2013 showed that the case had been cited in 33,158 different documents.

9. *See generally* F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS (6th ed. 2011) (collecting cases in which lower courts have enforced and/or rejected challenges to arbitration clauses).

10. *See infra* Part I.

11. *See infra* Part III.A.

12. *See infra* Part III.B.

13. *See infra* Part III.C.

14. *See, e.g.*, Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695 (asserting that the arguments that arbitration is unfair are overstated); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009) (disputing the assertion that

create any substantive law at all.[15] Substantially less attention has been paid to what rules should govern how arbitration clauses are interpreted.[16] This is somewhat surprising, given that questions involving arbitral waiver, scope, and enforcement of arbitration clauses by non-signatories are a frequent and growing source of litigation.

The issue of the proper interpretive rules for arbitration clauses is an important one to address. First, challenging the scope and reach of an arbitration clause is one of the few remaining avenues for parties to keep a dispute in court and out of arbitration.[17] State legislatures have been unable to protect a litigant's right to go to court because the Supreme Court has held that virtually any state law that regulates arbitration is preempted by the FAA.[18] The Supreme Court also has constricted the ability to challenge arbitration clauses on fairness grounds, as it has foreclosed certain unconscionability defenses to arbitration clauses,[19] and required that other challenges to arbitration be resolved by the arbitrator rather than by a court.[20] By contrast, the interpretive issues addressed in

arbitration is a fairer alternative to litigation and suggesting that the opposite is true); Sternlight, *supra* note 6 (challenging the fairness of arbitration provisions).

15. *See infra* note 39 and accompanying text.

16. For a general critique of the Supreme Court's purported adherence to contract law in its arbitration jurisprudence, see Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS., Issue 1, 2012, at 129. Cunningham, however, makes a different argument than the one made here. He asserts that the federal policy favoring arbitration is "constitutionally suspect" absent explicit contractual agreement to establish such a policy. *Id.* at 131. This Article, by contrast, does not question Congress's constitutional authority to establish a federal policy favoring arbitration. Rather, it asserts that any federal policy Congress did create is much more limited in scope than lower courts have given it. Additionally, Cunningham does not address the doctrinal areas covered in this Article.

17. *Cf.* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1422 (2008) (noting that few avenues remain for challenging the enforcement of arbitration clauses).

18. *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (stating that the FAA prohibits states from enacting laws applicable "*only* to arbitration provisions"); *see also* David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y 129 app. A (2004) (identifying forty-nine different state statutes that were found preempted by judicial decisions from January 2002–April 2004 alone).

19. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (finding that the application of state unconscionability principles to arbitration clauses banning class actions was rendered invalid by the Federal Arbitration Act).

20. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (holding that all challenges to "the contract as a whole, and not specifically to the arbitration clause," must be decided by an arbitrator, even if the contract as a whole is ultimately determined to be void and unenforceable); *see also* Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010) (holding that the FAA authorizes arbitrators to decide the threshold question of whether the arbitration clause is unenforceable).

this Article all concern open questions that the Supreme Court has yet to confront.

Second, examining how courts give arbitration clauses favored treatment contributes valuable insight into the debate over whether the judiciary is too solicitous of arbitration or too skeptical of it. Many commentators believe that the judiciary has remained hostile to arbitration and that courts are actually under-enforcing arbitration provisions.[21] The Supreme Court appears to agree with this view, as it indicated in its recent landmark decision holding that arbitration clauses that ban class actions must be enforced even if they are unconscionable under state law.[22] This Article provides a counterpoint to that view.

Finally, the loud and growing public debate over arbitration would benefit from a better understanding of how courts are interpreting arbitration clauses. Not only are arbitration clauses prevalent, they are enormously controversial. Mandatory arbitration has been the subject of widespread academic commentary, as well as repeated congressional, federal agency, and state legislative hearings regarding whether arbitration clauses are fair or whether they unjustly deprive individuals of the ability to seek redress for legal wrongs committed against them.[23] Critics contend

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21. *See, e.g.*, Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1286 (2011) (noting that "academics and practitioners" have asserted a resurgence of the "'judicial hostility' to arbitration"); Bruhl, *supra* note 17, at 1483 (describing the "perception that some state courts are insufficiently attentive to the national policy favoring arbitration"); Cunningham, *supra* note 16, at 130 ("Although some detect continued judicial aversion to arbitration, pervasive hostility died generations ago, yet today's Court often speaks as if such hostility were a daily threat to civil society."); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 61 ("This article traces how, despite the laudable goals of the FAA, 'judicial hostility' to arbitration has reared its unwelcome head once again."); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186 (2004) ("This Article suggests that federal and state judges retain some measure of the long-standing judicial hostility toward arbitration . . . .").

22. *Concepcion*, 131 S. Ct. at 1747 (citing to two law reviews arguing that there is continued judicial hostility toward arbitration clauses when asserting that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts" (citing Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006); Randall, *supra* note 21, at 186–87)).

23. *See, e.g.*, Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1311 (noting that 139 bills designed to limit or regulate arbitration have been introduced in Congress since 1995); Schwartz, *supra* note 14, at 1249–50 (describing the "fifteen-year academic debate" regarding the fairness of arbitration and documenting the rise in congressional hearings and legislative proposals to amend the Federal Arbitration Act); *see also* 12 U.S.C. § 5518(a)–(b) (2012) (requiring the Consumer Financial Protection Bureau to conduct a study and report to Congress concerning arbitration agreements in connection with consumer financial services and authorizing the agency to limit or prohibit a mandatory arbitration agreement if it finds, consistently with its study, that such

that mandatory arbitration gives rise to systemic biases that favor large corporations over individual consumers, that arbitral proceedings are shrouded in secrecy and subject to limited judicial review, and that arbitration represents a form of private law enforcement that stifles the growth and development of legal principles.[24] Supporters counter that arbitration is a faster, cheaper, and more efficient alternative to a flawed and overwhelmed judicial system.[25]

This Article proceeds in three parts. Part I discusses the history of the enactment of the FAA and explains how the Act's purpose was to make arbitration clauses no different from other contracts. Part II traces the development of the federal policy favoring arbitration and explains why it should not be read to give arbitration clauses special status relative to other contracts. Part III examines how courts have over-enforced arbitration clauses in three different areas: (1) interpreting ambiguous contracts to require arbitration, (2) restricting the circumstances in which a party will be found to have waived its right to arbitrate, and (3) expanding the rights of parties who never signed the arbitration agreement to force a dispute into arbitration. In each of these areas, courts have improperly relied on the federal policy favoring arbitration to interpret arbitration clauses in ways that conflict with traditional rules of contract interpretation. The conclusion suggests that state contract law should govern the interpretation of arbitration clauses just as it governs other contracts.

I. PLACING ARBITRATION CLAUSES ON EQUAL FOOTING—THE ENACTMENT AND EARLY HISTORY OF THE FEDERAL ARBITRATION ACT

The legislative history of the FAA shows that the drafters simply intended for arbitration clauses to be treated like other contracts—no better, no worse. The effort to implement a federal arbitration law began in the early twentieth century and was driven primarily by an American Bar Association committee and its three zealous advocates, Julius Henry Cohen, Charles L. Bernheimer, and Kenneth Dayton.[26] At that time, there

limitations are in the public interest and will help protect consumers.); Schwartz, *supra* note 18 at app. A (identifying various state legislative proposals to regulate arbitration).

24. *See infra* notes 91–93 and accompanying text.

25. *See infra* notes 95–97 and accompanying text.

26. *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 83–101 (1992) (describing the role of the ABA, Cohen, Dayton and Bernheimer in drafting versions of the Act and advocating for its passage); Margaret L. Moses,

truly was judicial hostility to arbitration. Arbitration agreements were essentially unenforceable in federal court. Because of the then-prevailing doctrinal view against "ouster" provisions in contracts, courts would refuse to enforce contracts that ousted jurisdiction from them and shifted dispute resolution into the hands of private arbitrators.[27] Additionally, the dual agency doctrine that was recognized at the time "maintained that an arbitrator was merely a dual agent of the parties and, as such, either party could revoke his authority at any time."[28] Because arbitration agreements were essentially "revocable at will" by either party, courts would decline to order specific performance when an arbitration clause was breached.[29] As a result, a party who signed an agreement could refuse to arbitrate altogether, could use the threat of arbitration to gain an advantage in settlement negotiations, or could begin arbitration and then decide to resort to litigation instead if the arbitration did not appear to be proceeding favorably.[30] As explained by Cohen and Dayton, the Act was driven by the fact that "these clauses are not regarded in the same light as other contractual obligations."[31]

Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, 34 FLA. ST. U. L. REV. 99, 101–13 (2006) (discussing Cohen's and Bernheimer's role).

27. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 210–11 & n.5 (1956) (Frankfurter, J. concurring); *see also Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 13–15 (1924) [hereinafter *Joint Hearings*] (statement of Julius Henry Cohen, Member, ABA) (discussing the need for an arbitration statute in order to overcome problems created by the ouster doctrine); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 74. The ouster doctrine has been criticized for being overly formalistic, reflecting an irrational judicial hostility to arbitration, and unduly interfering with the freedom of contract. *See, e.g.*, Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982–84 (2d Cir. 1942); Ezell v. Rocky Mountain Bean & Elevator Co., 232 P. 680, 681 (Colo. 1925) ("[I]t would be absurd to say that any consideration of public policy forbids a common-law arbitration incidentally involving the determination of a question of law, because such an award would oust the established judicial tribunals of their jurisdiction."); Park Constr. Co. v. Indep. Sch. Dist. No. 32, 296 N.W. 475, 477 (Minn. 1941) ("Arbitration simply removes a controversy from the arena of litigation. It is no more an ouster of judicial jurisdiction than is compromise and settlement or that peculiar offspring of legal ingenuity known as the covenant not to sue. Each disposes of issues without litigation. One no more than the other ousts the courts of jurisdiction."); *see also* Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 60–61 (1997) (describing some criticisms of the ouster doctrine).

28. Schwartz, *supra* note 27, at 74; *see also* Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 645 n.32 (1996).

29. *See, e.g.*, Moses, *supra* note 26, at 101 (noting that prior to the enactment of the FAA, "a party to an arbitration agreement could at any time prior to the award simply refuse to arbitrate and courts would not enforce the agreement"); Schwartz, *supra* note 27, at 73–74.

30. *See* Sternlight, *supra* note 28, at 644–45.

31. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270 (1926).

It was this non-enforcement ill that the FAA was designed to remedy. The drafters of the Act did not want arbitration clauses to be unenforceable simply because of their status as arbitration clauses. Instead, they wanted arbitration clauses to be treated just like any other contract. Section 2, the main substantive provision of the Act, embodies this idea of unifying the law of arbitration agreements with the rest of the law of contracts. It states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[32] The House Report accompanying the legislation indicates that the purpose was to place arbitration agreements "upon the same footing as other contracts, where it belongs," and also emphasizes that "[a]rbitration agreements are purely matters of contract, and [that] the effect of the bill is simply to make the contracting party live up to his agreement."[33] Cohen stated in a written brief that was submitted into the record of a Joint Hearing on the bill that "[a]n agreement for arbitration is in its essence a business contract. It differs in no essential from other commercial agreements. It should stand upon the same plane and be regarded by the law in the same light."[34] Cohen and Dayton make the same point in a post-enactment article, explaining that arbitration agreements "should be as inviolable as any other business contract."[35] The Supreme Court has since recognized the FAA's narrow purpose of making "arbitration agreements as enforceable as other contracts, *but not more so*."[36]

The framers of the FAA recognized that arbitration agreements were not to be interpreted by special principles of federal arbitration law, but according to state contract law. Cohen and Dayton emphasized that "[i]t is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure, whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made."[37] Consequently, when it comes to

32. 9 U.S.C. § 2 (2012).

33. H.R. REP. NO. 68–96, at 1 (1924).

34. *Joint Hearings*, *supra* note 27, at 33, 38 (written statement of Julius Henry Cohen, Member, ABA); *accord id.* at 38–39 ("But, if the contract for sale or promissory note is to be recognized and enforced by the courts, why should a contract for arbitration stand upon a different plane?").

35. Cohen & Dayton, *supra* note 31, at 278.

36. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (emphasis added).

37. Cohen & Dayton, *supra* note 31, at 276; *accord* Schwartz, *supra* note 27, at 38 (explaining that the goal of the FAA was to make arbitration agreements the same as other contracts); *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) ("[T]he interpretation of private contracts is ordinarily a question of state law . . . .").

interpreting arbitration clauses, courts "should apply ordinary state-law principles that govern the formation of contracts."[38]

Several scholars have examined this legislative history and have argued, quite persuasively, that the FAA was intended to have a much narrower reach than the Supreme Court has given it. Some have argued that the FAA was intended merely as a procedural statute applicable only in federal court, and that it was never intended to create substantive law or exert any preemptive effect over state laws that regulate or restrain arbitration.[39] Others have argued that the Act was intended to apply only to business-to-business disputes and was not intended to apply, as it now routinely is, to individual-to-business disputes, such as consumer protection and employment discrimination claims.[40] Still others have argued that the Act was designed to address contract disputes only and should not bind individuals to arbitrate statutory claims.[41] Nonetheless, the Supreme Court has remained unconvinced and, since *Moses H. Cone*, has consistently given the FAA vast substantive content and widespread preemptive effect.[42]

This Article's argument, however, differs from those critiques of the Supreme Court's reading of the FAA in that it does not require revisiting those debates or overturning Supreme Court precedent that gives the FAA

38. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); *see also* Hightower v. GMRI, Inc., 272 F.3d 239, 242 (4th Cir. 2001) ("To determine whether the parties agreed to arbitrate, courts apply state law principles governing contract formation. There is no dispute that North Carolina law controls in this case . . . .") (citation omitted).

39. *See, e.g.*, MACNEIL, *supra* note 26, at 117 ("[T]he proposed [FAA] was intended to apply only in federal courts. It was never intended to create substantive federal regulatory law superseding state law under the Supremacy Clause of the federal Constitution."); Moses, *supra* note 26, at 111–12; Schwartz, *supra* note 18, at 130–39 (arguing that the Supreme Court's determination that the FAA applies in state court was incorrect). *But see* Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002) (arguing that the legislative history of the FAA could be read to support the conclusion that the FAA was intended to create substantive law applicable in both state and federal court).

40. *See, e.g.*, Schwartz, *supra* note 27, at 75–81 (arguing that the framers intended for the FAA to be limited to commercial disputes between business entities); Sternlight, *supra* note 28, at 647 ("Most commentators have concluded that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power, and not necessarily to transactions between a large merchant and a much weaker and less knowledgeable consumer.").

41. *See, e.g.*, Moses, *supra* note 26, at 139 ("Moreover, the FAA was never described in the legislative history as applying to any claims other than contract and maritime claims. Nor is there evidence that anyone at the time believed the FAA made statutory claims arbitrable.") (footnote omitted); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803 (2009); *see also* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 712–19 (1999) (arguing that from a normative perspective, parties should not be required to arbitrate statutory claims under the FAA).

42. *See infra* notes 98–101 and accompanying text.

broad preemptive effect.[43] In other words, even if the Supreme Court is correct that the FAA creates substantive law applicable in state court and applies beyond the arena of commercial disputes, courts are still deviating from the Act's basic purposes by giving arbitration clauses protections that do not exist for other contracts.[44] The problem identified here, as seen in the next Part, arises instead from a misreading of a single paragraph of poorly-considered Supreme Court dicta regarding the federal policy favoring arbitration.

II. THE FEDERAL POLICY FAVORING ARBITRATION

From the enactment of the FAA until the early 1980s, most courts, with a few exceptions, followed the FAA's original purposes and applied state contract law when interpreting arbitration agreements.[45] How, then, did the FAA become transformed from a statute seeking to reject outdated ouster doctrines into one that spawned millions of arbitration clauses in industries ranging from banking and finance to employment to medical services? This Part suggests that the Supreme Court's dicta in *Moses H. Cone* regarding a national policy favoring arbitration has played a substantial role in that expansion. It also suggests, however, that both the history of the *Moses H. Cone* case itself and the sloppy language the Court used in articulating the policy favoring arbitration show that the case should be given a narrow reading that maintains consistency with state contract law, rather than a broad reading that elevates arbitration clauses above other contracts.

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43. Lawrence Cunningham, for example, has critiqued a number of Supreme Court arbitration decisions for ignoring the constraints of state contract law. Cunningham, *supra* note 16. Regardless of the force of Cunningham's critique, unless the Court overrules those decisions, they will remain governing law. By contrast, no reversal of Supreme Court precedent is required to rectify the three areas addressed in this Article.

44. Some commentators have questioned the "equal footing" with other contracts rationale on the grounds that contract law necessarily treats different contracts differently, such as by requiring some contracts to be in writing while allowing others to be oral. Rather, as one commentator argues, the intent of the FAA should be seen as prohibiting discrimination against arbitration clauses relative to other contracts. *See, e.g.*, Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189 (2011). Whether phrased as "equal footing" or "nondiscrimination," however, the outcome is the same. Courts are singling out arbitration agreements for special treatment, which is inconsistent with the FAA.

45. *See* MACNEIL, *supra* note 26, at 138–39 (explaining that most arbitrations were conducted on the "assumption that state law governed" and that many courts agreed, although noting that as time passed more and more courts started to apply federal law in place of state law).

A. Moses H. Cone

Despite subsequent judicial interpretation to the contrary, the national policy favoring arbitration that emerged out of *Moses H. Cone* was not intended to give arbitration clauses more favored treatment than other contracts. The first indication of this is that the Court in *Moses H. Cone* had no business speculating about the substantive reach of the FAA because that is not what the case was about. The main issue in the case did not concern the meaning of the FAA, but an esoteric doctrine of federal abstention.[46] In fact, although the case did involve an arbitration provision, neither party disputed that the provision applied to the dispute in the case.[47]

In *Moses H. Cone*, the Mercury Construction Company contracted with Moses H. Cone Memorial Hospital and an architect to build additions to the hospital.[48] All disputes concerning the contract were to go first to the architect, and if that failed to resolve the dispute, either party had the option of initiating a binding arbitration.[49] Following the completion of the work, a dispute arose regarding Mercury's entitlement to reimbursement for certain costs.[50] The hospital filed a declaratory judgment action in state court seeking an order that Mercury was not entitled to any funds and that it had waived its right to initiate any arbitration to try and collect them.[51] Mercury subsequently filed an action in federal district court under Section 4 of the FAA,[52] which permits a party to file a federal court action seeking an order compelling arbitration of the underlying dispute.[53] Applying a doctrine known as *Colorado River* abstention,[54] the federal district court abstained from exercising its jurisdiction in favor of allowing the state action involving the identical question of whether Mercury could

46. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 13 (1983) (describing abstention as "the principal issue to be addressed" in the case).

47. *Id.* at 29 (noting that the appellant "does not contest the substantive correctness of the Court of Appeals's holding" that the dispute is subject to arbitration, but instead asserted that the Court of Appeals should not have reached that question when it was not first addressed by the district court).

48. *Id.* at 4.

49. *Id.* at 4–5.

50. *Id.* at 6.

51. *Id.* at 7.

52. *Id.*

53. 9 U.S.C. § 4 (2012) ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.").

54. *Colorado River* abstention permits a federal court to stay federal litigation in favor of ongoing parallel state litigation involving the same issue. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976).

compel arbitration to proceed.[55] It therefore did not reach the question of whether the dispute should be resolved in arbitration.[56] The Fourth Circuit, sitting en banc, reversed.[57] It rejected the district court's grounds for abstention, but also went further by directing the district court to enter an order compelling arbitration, even though the district court did not consider that question and the parties did not brief it in the court of appeals.[58] In addressing whether the dispute was arbitrable, the Fourth Circuit did not determine whether or not there had been a waiver but simply decided that question was better suited to the arbitrator than to the court.[59] In other words, the court ordered arbitration so that the arbitrator could address Mercury's defenses to arbitration.

Thus, by the time the case reached the Supreme Court, the only issues before the Court were whether the district court should have abstained and whether the court of appeals erred in compelling arbitration rather than remanding that issue to the district court to decide in the first instance, and possibly whether the question of waiver was an appropriate one for the arbitrator to decide. The case presented no dispute about the scope and meaning of the arbitration clause, or about whether the FAA created any rules regarding the construction and interpretation of arbitration clauses.

In affirming the court of appeals, the Court acknowledged that the enforceability of the underlying arbitration clause was ancillary to the dispute and that abstention was "the principal issue to be addressed" in the case.[60] While the Court briefly addressed the propriety of the court of appeals's decision to order arbitration, that portion of the decision consumed only two paragraphs of a twenty-six page opinion and was devoted largely to addressing why the court of appeals had the authority to

55. *Moses H. Cone*, 460 U.S. at 7.

56. *Id.* at 29 (acknowledging that the district court did not reach the issue of arbitrability); *accord id.* at 35 (Rehnquist, J., dissenting) ("The Court of Appeals ordered the District Court to enter an order compelling arbitration, even though that issue was not considered by the District Court.").

57. *In re* Mercury Constr. Corp., 656 F.2d 933 (4th Cir. 1981) (en banc), *aff'd*, 460 U.S. 1 (1983).

58. *See In re Mercury Constr. Corp.*, 656 F.2d at 948 n.1 (Hall, J., dissenting) ("The majority opinion, which in effect directs arbitration, will come as a surprise to all parties. No one argued that this court should decide that issue."). *But see Moses H. Cone*, 460 U.S. at 29 ("The Court of Appeals had in the record full briefs and evidentiary submissions from both parties on the merits of arbitrability . . . .").

59. *In re Mercury Constr. Corp.*, 656 F.2d at 940. The court also rejected the hospital's other challenge to Mercury's federal action to compel arbitration, which was that the dispute did not involve interstate commerce. *Id.* at 942. However, resolving whether the dispute involved interstate commerce was ancillary to the question of whether arbitration was required. The fact that the court found that the dispute involved interstate commerce meant only that the Federal Arbitration Act would apply to the case rather than North Carolina's arbitration statute.

60. *Moses H. Cone*, 460 U.S. at 13.

order arbitration as a matter of procedure, rather than addressing whether the court of appeals should have ordered arbitration as a matter of substantive law.[61]

The Court's statements about the national policy favoring arbitration emerged only in determining that federal law rather than state law governed the underlying dispute over arbitrability, which is a factor that counsels against abstaining in favor of a parallel state-court proceeding.[62] But to resolve that question, the Court merely needed to decide, as it did, that "[f]ederal law in the terms of the [Federal] Arbitration Act governs [the arbitrability] issue in either state or federal court,"[63] an issue that the Court acknowledged was not in dispute.[64]

Nonetheless, the Court went on to include its now-famous language:

> Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.[65]

The Court could have stopped there by simply establishing that the FAA creates substantive law, without speculating as to what that substantive law might be. Instead, the Court went on to state:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[66]

Thus, in a case that presented no disputed question regarding the scope or meaning of arbitration, the Supreme Court articulated a new policy regarding arbitration clauses without examining the FAA's original purpose and without regard for the policy's effect on traditional state contract principles. The result is a vague and poorly-considered policy statement that coexists with the FAA's purposes only when read narrowly

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61. *Id.* at 29.
62. *Id.* at 23–26.
63. *Id.* at 24.
64. *Id.* at 26 n.34 (explaining that section 3 of the Act applies requires both federal and state courts to stay litigation when a valid arbitration agreement exists).
65. *Id.* at 24.
66. *Id.* at 24–25.

to keep arbitration clauses in conformity with general contract law principles.[67] As suggested below, reading the policy broadly, as courts have done, makes the federal policy favoring arbitration difficult to reconcile with the rest of the FAA and also highlights the weaknesses and inconsistencies in the Court's statements.[68]

B. Moses H. Cone*'s Limitations*

There are several reasons to think that the Court's newly-minted federal policy favoring arbitration was not designed to differentiate arbitration clauses from other contract provisions, beyond the simple fact

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67. This is not to say that a federal policy favoring arbitration is necessarily good or bad as a policy matter, or that Congress could not have created such a policy if it so desired. My point here is simply that Congress did not intend for the FAA to embody the type of policy favoring arbitration adopted in *Moses H. Cone* and subsequently expanded by lower courts.

68. To be sure, one could argue that the federal policy favoring arbitration is consistent with state law. Many states have adopted their own arbitration statutes and a pro-arbitration policy of resolving doubts in favor of arbitration. *See, e.g.*, Rath v. Network Mktg., L.C., 790 So. 2d 461, 463 (Fla. Dist. Ct. App. 2001) ("We begin our discussion with the general principle that all doubts regarding the scope of an arbitration agreement, as well as any questions about waivers thereof, should be construed in favor of arbitration rather than against it."). However, the fact that states have similar pro-arbitration policies more likely shows how states piggyback on federal pronouncements regarding arbitration rather than the other way around. The ill-fated judicial expansion of arbitration law thus "creeps" into state contract law and then becomes part of the background contract law that is applied to arbitration agreements. In other words, the notion that the "federal policy favoring arbitration" reflects state law becomes a self-fulfilling prophecy. Expressions by state courts of their pro-arbitration policies appear to track the language of *Moses H. Cone* itself or its collective-bargaining predecessors. *See, e.g.*, Rath, 790 So. 2d at 463. But for these federal decisions, it is not certain that states would have independently derived such a policy. The result is a pernicious feedback loop by which federal courts create new arbitration principles that deviate from state contract law and which are then followed by state courts. That new law becomes incorporated into state law, which courts can then point to when they claim to be applying state contract principles in interpreting arbitration clauses. In so doing, courts unintentionally broaden the scope and reach of the FAA while purporting to remain faithful to state contract law. *See, e.g.*, 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS, § 57:19 (4th ed. 2001) (describing the doctrine of equitable estoppel in arbitration by primary reference to federal-court decisions rather to state contract decisions).

Additionally, since *Moses H. Cone* declared that the federal policy applies in state courts and preempts contrary state law, states have had no choice but to adopt a pro-arbitration policy, at least with respect to all cases involving interstate commerce. *See, e.g.*, Qubty v. Nagda, 817 So. 2d 952, 955–56 (Fla. Dist. Ct. App. 2002) ("This case is governed by the Federal Arbitration Act, which by its terms applies to an arbitration clause in a contract involving interstate commerce. With respect to these contracts, federal law supersedes the Florida Arbitration Code, and the Florida Arbitration Code is applied in such cases only to the extent it is not inconsistent with federal law.") (citations omitted). Additionally, the Policy Statement to the Revised Uniform Arbitration Act (RUAA), which is a model law that many states have used as a guide in adopting their own arbitration statutes, specifically notes that it was drafted with the understanding that "state arbitration acts must be consistent with the federal pro-arbitration policy." Francis J. Pavetti, *Policy Statement: Revised Uniform Arbitration Act (RUAA)*, UNIFORM LAW COMMISSION ¶ 3 (May 15, 2000), *available at*: http://www.uniformlaws.org/shared/docs/arbitration/arbpswr.pdf.

that the policy was created in a case that was not really about arbitration or the meaning of the FAA. The slapdash nature of the way in which the Court articulated the policy shows both that the Court's statements were poorly considered and highlights how giving the policy a broad reading places it in irreconcilable conflict with the FAA's goals and purposes.

First, what is perhaps most noticeable about the Court's articulation of the policy favoring arbitration is that the Court never attempted to tie its statements either to the statutory text or to congressional intent.[69] This is troubling given that the Court was not expressing an opinion but was purporting to describe the aims of the FAA's framers. In the words of one commentator, the policy favoring arbitration was created "out of whole cloth."[70] In fact, the policy appears to represent an entirely new development in arbitration law. For most of the period following the enactment of the FAA, the Court was "at most, policy-neutral respecting the desirability of arbitration," with the "emphatic federal policy in favor of arbitral dispute resolution" emerging only in the wake of *Moses H. Cone*.[71]

Second, not only are the Court's pronouncements unsupported, but when construed broadly, they appear to be inconsistent with the Act's goal of making arbitration clauses like other contact provisions. The Court's primary flaw was transforming a statute that eliminated a presumption against arbitration into one that establishes a presumption favoring arbitration.[72] Eliminating the presumption against arbitration simply creates neutrality regarding arbitration clauses: they are no better and no worse than other contracts. A broad reading to *Moses H. Cone*, however, suggests that arbitration clauses should be given special favor as a matter

69. The Court does, however, cite a number of lower court cases to support its conclusion. *See Moses H. Cone*, 460 U.S. at 25 n.31. Those cases, however, all base their statements on a series of Supreme Court cases involving the interpretation of arbitration clauses in the context of collective bargaining disputes. As explained below, the policy favoring arbitration as a means of resolving labor disputes and avoiding industrial strife does not necessarily translate outside of the collective-bargaining context. *See infra* notes 82–86 and accompanying text.

70. Moses, *supra* note 26, at 123. *See also* Cunningham, *supra* note 16, at 133–34; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 17–18 (1997) (asserting that the Court never provided the source for the federal policy favoring arbitration over litigation).

71. Drahozal, *supra* note 14, at 701, 703 (quoting 1 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 14.1 at 14:3 (1994 & Supp. 1999) (quotation marks omitted); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

72. *See* Jean R. Sternlight, *Protecting Franchises from Abusive Arbitration Clauses*, 20 FRANCHISE L.J. 45, 77 n.6 (2000) ("There is a big difference between eliminating a hostility and stating a preference, with a whole lot of room in between.") (quoting Cliff Palefsky, *Arbitrary Arbitration: The Founders Would Frown on Mandatory ADR*, S.F. DAILY, Mar. 1, 1995, at 4).

of federal law—even if state contract law would hold otherwise—because the Court established that if there is any ambiguity over whether an arbitration clause covers a particular dispute, that ambiguity must be resolved in favor of arbitration.

The conflict between the Court's reading of the federal policy as favoring arbitration clauses over other contract provisions and the FAA's purpose of equating arbitration clauses with other contract provisions is further evidenced by the uneasy tension between the federal policy and the Supreme Court's repeated emphasis on the contractual nature of arbitration law. The Supreme Court often has stressed that "arbitration is a matter of contract,"[73] that both courts and arbitrators "must 'give effect to the contractual rights and expectations of the parties,'"[74] and that the FAA does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)."[75] Indeed, when the Court has cited *Moses H. Cone* for the proposition that all doubts concerning arbitrability must be resolved in favor of arbitration, it has stated in the same opinion or even the same paragraph that the FAA makes arbitration agreements as enforceable as other contracts, but not more so.[76] Similarly, the Court has emphasized repeatedly the primacy of the parties' intent rather than general policy considerations in deciding if a dispute is arbitrable. In several cases, the Court has stated that courts may not "use policy considerations as a substitute for party agreement,"[77] and that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[78]

The Court's statements are difficult to reconcile with the federal policy favoring arbitration if that policy is construed to justify treating arbitration clauses more favorably than other contracts. If it is uncertain whether the parties to a dispute agreed to submit that dispute to arbitration, using the FAA to resolve those uncertainties in favor of arbitration, as *Moses H.*

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73. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011) (quoting Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010)) (quotation marks omitted).

74. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Standford Junior Univ., 489 U.S. 468, 479 (1989)).

75. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630 (2009).

76. *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 293–94 (2002) (noting both that "[t]he FAA directs courts to place arbitration agreements on equal footing with other contracts" and that "ambiguities in the language of the agreement should be resolved in favor of arbitration").

77. Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2859 (2010); *accord Waffle House*, 534 U.S. at 294 ("[W]e look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.").

78. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)) (quotation marks omitted).

Cone suggests, puts the cart before the horse. The FAA only applies where the parties have agreed to submit their dispute to arbitration. Moreover, by ordering courts to apply the federal policy to resolve doubts in favor of arbitration, *Moses H. Cone* suggests applying policy considerations to establish the parties' intent over whether to arbitrate a particular dispute. This conflict highlights just how much a broad reading of the federal policy favoring arbitration appears to depart from traditional contract law principles.

Third, the Court's statement contains internal inconsistencies which suggest that the policy was not intended to have a far-reaching doctrinal impact. In the beginning of its description of the policy, the Court first says that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[79] This appears to refer to questions relating to interpretation of the terms of an arbitration agreement. In other words, if the parties have agreed to an arbitration provision, but there is some question as to whether the scope of the provision covers the dispute in question—suppose the clause requires arbitration of disputes arising out of the contract, but the dispute involves a statutory claim such as employment discrimination—then the arbitration clause must be interpreted to cover the dispute and require arbitration.

The remainder of the sentence, however, states: "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[80] Other than a dispute involving "the construction of the contract language itself," none of the identified defenses involve questions of the agreement's scope or interpretation. Most defenses to arbitrability do not involve interpretation of the arbitration clause. Rather, they are raised where the parties agree that the arbitration clause, as written, governs the dispute but that the clause is nonetheless unenforceable for some other reason, say because the contract was never validly formed, the arbitration provision is unconscionable or in violation of public policy, or one of the parties waived its right to pursue arbitration.[81] That inconsistency suggests that the Court may not have been thinking clearly about the impact of a federal policy favoring arbitration or intending for it to have significant doctrinal implications.

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79. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

80. *Id.* at 25.

81. For a sampling of various defenses to the enforcement of arbitration clauses, see BLAND ET AL., *supra* note 9, at 69–214, 271–96.

To be sure, the Court's endorsement of a federal policy favoring arbitration in the FAA has some pedigree. The Court's language is very similar to language that the Court used in a series of collective-bargaining arbitration cases under federal labor statutes. In evaluating arbitration disputes in collective-bargaining agreements, which are governed by the Federal Labor Management Relations Act (LMRA), the Court has long held that arbitration should be ordered "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[82] But the cases relying on that policy also make very clear that the policy is one arising under the LMRA and make no mention of the FAA.[83] Moreover, other commentators have pointed out that in the labor law arena, fostering arbitration has been seen as a way of avoiding labor strife and promoting industrial peace.[84] The federal policy promoting arbitration of collective bargaining disputes also is based on the notion that a collective bargaining agreement "is not an ordinary contract" and should not always be treated like an ordinary contract.[85] This contrasts sharply with the FAA, which is motivated not by the public purpose of promoting labor peace, but primarily by the private purpose of making arbitration agreements just like other contracts.[86] Thus, the federal policy, when

82. *United Steelworkers*, 363 U.S. at 582–83.

83. *See id.* at 582; *accord* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964) ("This Court has in the past recognized the central role of arbitration in effectuating national labor policy.").

84. Moses, *supra* note 26, at 124 ("[T]here are strong national policy justifications for favoring arbitration of collective bargaining agreements—to prevent strikes and worker violence, to preserve labor peace, and to promote industrial stabilization."); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS., Issues 1 & 2, Winter/Spring 2004, at 5, 43 ("Significantly, the analogy between federal labor policy and the FAA is faulty. Arbitration pursuant to collective bargaining agreements is a part of a substantive national labor policy. It is a quid pro quo for a union's giving up the right to strike, and therefore a stabilizing and therapeutic influence that promotes industrial stabilization and industrial peace nationwide.") (quotations marks omitted).

85. *Livingston*, 376 U.S. at 550 (holding that a corporate successor was bound to the predecessor's arbitration provision and collective bargaining agreement even though "the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party").

86. Moreover, even if the policy favoring labor arbitration could justify a similar policy favoring arbitration under the FAA, it is notable that the labor policy has been given a much more constrained reading than that given to *Moses H. Cone*. The presumption favoring labor arbitration "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*." Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 78 (1998). Indeed, the presumption does not apply to determining whether statutory claims or other claims that do not directly require an interpretation of the collective bargaining agreement are subject to arbitration. *Id.* at 79. By contrast, the federal policy established in *Moses H. Cone* applies regardless of whether the dispute involves a contract, other common-law, or statutory claim. *See, e.g.*, Mitsubishi

examined carefully, is something that should be read in harmony with state contract law, not as something that elevates arbitration clauses to a higher status than other contract provisions.[87]

C. A Life of its Own

Notwithstanding the various indicia that *Moses H. Cone*'s federal policy favoring arbitration should be read narrowly, it has spawned a revolution in the arbitration field. Following the Court's statements in *Moses H. Cone* that the FAA creates federal substantive law, and particularly in combination with the Court's decision one year later in *Southland Corp. v. Keating* that the FAA applies in state courts and preempts state laws that disfavor arbitration,[88] the use of arbitration clauses exploded. Arbitration clauses are now inserted in millions of contracts and are pervasive in many spheres, including banking, credit cards, home building, investment advising, cell phones, and auto dealers.[89]

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (finding statutory claims arbitrable and relying in part on the federal policy favoring arbitration).

87. One might argue that even if the *Moses H. Cone* Court did not intend the broad reading of the federal policy favoring arbitration that subsequent lower courts have given it, the fact that Congress has not amended the FAA to correct the current interpretation of the FAA shows that Congress is satisfied with a broad reading and has essentially ratified it. That argument is unpersuasive for several reasons. First, the fact that Congress has not acted to overturn a judicial interpretation of a statute does not mean that Congress has ratified it. Congress may fail to amend a statute for any number of reasons, many of which have little to do with its view of the statute's substance. Indeed, the current emphasis on congressional gridlock merely underscores this point. *See, e.g.*, Robert Reich, *Why Congress' Gridlock Paralyzes Democracy, Not Government*, CHRISTIAN SCI. MONITOR (Aug. 15, 2013), http://www.csmonitor.com/Business/Robert-Reich/2013/0815/Why-Congress-gridlock-paralyzes-democracy-not-government ("With just 15 bills signed into law so far this year, the 113th Congress is on pace to be the most unproductive since at least the 1940s."). For this reason, the Supreme Court has refused to rely on congressional silence to infer approval of the Court's interpretation of a statute, particularly when Congress has not revisited the statute in a comprehensive way. *See* Alexander v. Sandoval, 532 U.S. 275, 292 (2001) ("And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: 'It is "impossible to assert with any degree of assurance that congressional failure to act represents" affirmative congressional approval of the Court's statutory interpretation.'") (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989)). The FAA has been amended only once since *Moses H. Cone*, and that involved a relatively minor amendment in 1988 to add a right of interlocutory appeal to orders denying motions to compel arbitration. Pub. L. No. 100-702, 102 Stat. 4642 (1988) (adding 9 U.S.C. § 16). Moreover, even if Congress is aware of the federal policy favoring arbitration, it is far from clear that Congress is aware of, let alone satisfied with, the way that the federal policy has been interpreted in the areas discussed in this Article.

88. 465 U.S. 1, 10–12 (1984). *Southland* concerned the arbitrability of a dispute between 7-Eleven convenience store franchisees and Southland Corp., the owner and franchisor of 7-Eleven, alleging that Southland had committed fraud and omitted necessary disclosures under the California Franchise Investment Law. *Id.* at 3–4.

89. *See supra* note 7 and accompanying text.

Given that the enforceability of arbitration agreements is likely "the single most litigated contractual issue" today,[90] the impact of the judiciary's interpretation of *Moses H. Cone* has significant implications.

As the use of arbitration has grown, particularly in consumer and employment contracts, it has become increasingly controversial. Although the merits and demerits of arbitration as a policy matter are outside the scope of this paper, detractors of arbitration argue that arbitration systematically disfavors consumers and employees relative to the corporations that stand on the other side of the contract. Arbitration opponents assert that many corporations draft arbitration clauses with terms that are designed to favor them, by barring plaintiffs from proceeding in class actions, shortening statutes of limitations, requiring the parties to keep the arbitration proceedings secret, and limiting the ability of parties to seek discovery or obtain necessary evidence to support their claims.[91] They also argue that arbitration creates a "repeat player" bias whereby arbitrators are inclined to support the repeat player—most often the corporation—out of fear that they will not be chosen by the company for future cases if they rule against it;[92] however, evidence regarding the bias so far appears inconclusive.[93] Finally, detractors point out that arbitrators act in secret, that arbitrators are not bound to apply the law in the way judges are, and that the FAA provides for only extremely limited judicial review of an arbitrator's decision.[94]

By contrast, supporters assert that arbitration offers a faster, cheaper, and more efficient alternative to litigation.[95] They note that it offers greater

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90. Frank Z. LaForge, Note, *Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under* Grigson v. Creative Artists, 84 TEX. L. REV. 225, 225 (2005).

91. *See, e.g.*, BLAND ET AL., *supra* note 9, at 4–14 (canvassing the various criticisms of binding mandatory arbitration).

92. *See, e.g.*, Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998); BLAND ET AL., *supra* note 9, § 1.3.3 at 5–6 ("There is some empirical evidence and a good deal of commentary suggesting that arbitrators do, in fact, have a tendency to favor 'repeat player' clients.").

93. *See* SEARLE CIVIL JUSTICE INSTITUTE, CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION: PRELIMINARY REPORT 13–16 (2009) (describing no statistically significant repeat-player effect in its analysis of American Arbitration Association data and ascribing any repeat player effect to better case screening by repeat players than to arbitrator bias).

94. Section 10 of the FAA provides the grounds for vacating an arbitrator's award. 9 U.S.C. § 10 (2012). Those grounds are limited mostly to whether the award resulted from corruption or fraud, or if the arbitrators grossly exceeded their powers. *Id.* Courts have interpreted the grounds for vacating an award extremely narrowly. *See, e.g.*, *In re* Andros Compania Maritimia, S.A., 579 F.2d 691, 703 (2d Cir. 1978) ("We have consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards . . . .").

95. *See, e.g.*, Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements in Consumer Contracts*, *in* 17TH ANNUAL CONSUMER FINANCIAL SERVICES INSTITUTE, CORPORATE LAW AND

predictability to businesses and helps reduce the passing of litigation costs onto consumers that can lead to higher prices.[96] Supporters argue that arbitration may increase access to justice for many individuals who cannot seek redress in court because litigation has become too expensive and time-consuming.[97] Supporters also rely on some studies suggesting that individuals fare better (or at least no worse) in arbitration than in litigation,[98] though the value of that evidence has been vigorously disputed.[99]

In light of the controversy surrounding arbitration, it is not surprising that many persons, both individual and corporate, have challenged the enforceability and applicability of the arbitration agreements that they have signed. But many of the avenues for contesting arbitration clauses have been cut off by a Supreme Court that has been very friendly to arbitration. Numerous state legislative attempts to make arbitration fairer have failed[100] because the Supreme Court has determined that the FAA

PRACTICE, COURSE HANDBOOK SERIES, B-1946 201, 221–22 (Practicing Law Institute 2012) (describing one study of arbitration participants showing that a majority thought that arbitration was faster, cheaper and simpler than going to court); Dwight Golann, *Developments in Consumer Financial Services Litigation*, 43 BUS. LAW. 1081, 1091 (1988) ("The primary advantage for consumers in binding arbitration is that it offers at least the possibility of a faster and cheaper decisionmaking mechanism for their complaints.").

96. *See, e.g.*, *Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 95, 105–06 (2007) (prepared statement of Peter B. Rutledge) (arguing that eliminating mandatory arbitration would "increase the costs of dispute resolution, and a portion of these costs would be passed onto employees (in the form of lower wages), consumers (in the form of higher prices) and investors (in the form of lower share prices)").

97. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–64 (2001) (claiming that mandatory arbitration actually expands opportunities by giving plaintiffs the ability to bring cases that they could not bring in court); *see also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2000) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

98. *See, e.g.*, David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1578 (2005) ("Still, despite the flaws, there are some conclusions about which we can be confident regarding the 'fairness' of arbitration. First, there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true.").

99. *See, e.g.*, Schwartz, *supra* note 14, at 1287–89 (critiquing the methodologies of empirical studies on arbitration); W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1108–09 n.69 (2012) (concluding that the evidence regarding outcomes in arbitration versus litigation "is mixed").

100. For a sampling of state attempts to regulate arbitration that have been found to be preempted by the FAA, see Schwartz, *supra* note 18, at app. A (identifying forty-nine different state statutes that were found preempted by judicial decisions in the years 2002–2004 alone).

overrides any state law that is specifically directed toward arbitration.[101] Similarly, some general state contract-law doctrines that exist to protect against one-sided bargains and to preserve fairness have been found inapplicable to arbitration agreements.[102] Moreover, the Supreme Court has held that other challenges to contracts containing arbitration clauses, including that the contract is illegal and void or that it was procured by fraud, do not affect the validity of the arbitration clauses even if they may invalidate the rest of the contract, and that such disputes must be decided in arbitration rather than by a court.[103] As a result, challenges to the scope and interpretation of an arbitration clause are one of the few avenues left for litigants seeking to keep their case in court.[104]

By reading the federal policy favoring arbitration broadly to confer special status on arbitration clauses, courts have misapplied it and consequently have over-enforced arbitration clauses in ways that are inconsistent with the intent and purpose of the FAA.[105] Instead of applying traditional rules of state contract law, courts have fashioned special rules unique to arbitration agreements that give such agreements advantages over other contracts.[106] Ironically, these special rules often have been crafted by courts that are seeking to rein in what they perceive as

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101. *See id.*; Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (stating that the FAA prohibits states from enacting laws applicable "*only* to arbitration provisions"); *see also supra* note 18 and accompanying text.

102. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (holding that the FAA preempts state law that invalidated classwide bans in arbitration clauses as unconscionable).

103. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (holding that all challenges to "the contract as a whole, and not specifically to the arbitration clause," must be decided by an arbitrator, even if the contract as a whole is ultimately determined to be void and unenforceable).

104. Similarly, a challenge to whether a valid agreement for arbitration was ever formed between the parties remains a viable avenue for fighting arbitration. For a discussion of contract formation issues as they relate to arbitration, see BLAND ET AL., *supra* note 9, at 107–143.

105. For a discussion of the purpose of the FAA, see *supra* notes 32–38 and accompanying text.

106. While this Article focuses on ways in which the federal policy has been misused in interpreting the scope of arbitration clauses and defenses against their enforcement, the policy has been misused in other contexts as well. Although *Moses H. Cone* makes clear that courts should apply a policy favoring arbitration when interpreting the scope of arbitration clauses, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983), courts also have relied on the federal policy to give expansive readings to the FAA's statutory text, an issue that has nothing to do with the scope of arbitration provisions. Specifically, a number of courts of appeals relied on the federal policy favoring arbitration to hold that a statutory exemption that makes the FAA inapplicable to contracts of employees engaged in interstate commerce should be read extremely narrowly to apply only to transportation workers rather than all employees. *See, e.g.*, O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this section 1 exemption."); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 601–02 (6th Cir. 1995); *see also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132 (Stevens, J., dissenting) (criticizing the majority's reliance on "a policy that strongly favors private arbitration" in agreeing with those courts of appeals that have interpreted section 1 narrowly).

continued judicial hostility to arbitration, when, in reality, that purported hostility simply represents decisions placing arbitration clauses on equal footing with other contracts, as the FAA requires. The next Part identifies three areas where courts are deviating from state contract law and are over-enforcing arbitration clauses as a result.

III. OVERRIDING STATE CONTRACT LAW

This Article focuses on three specific areas where courts are distorting contract law by enforcing arbitration clauses that likely would not be enforced under ordinary contract principles. First, courts have applied the federal policy favoring arbitration to interpret ambiguous arbitration agreements in favor of arbitration instead of applying the longstanding contract doctrine of interpreting ambiguity against the party that drafted the agreement. Ambiguity in arbitration clauses can occur quite often, given that such clauses are typically placed in contracts of adhesion that leave no opportunity for bargaining or amendment. The two principles often collide because, particularly in consumer and employment cases, it is the drafter of the agreement that seeks to enforce the arbitration clause against the non-drafting party. Interpreting ambiguous contracts in favor of the drafter encourages manipulative and deliberately unclear arbitration clauses that will lead individuals to waive their rights in ways that they never realized when signing the underlying contract.

Second, in addressing whether a party waived its right to enforce an arbitration clause, many (but not all) courts require a finding of prejudice to the opposing party and will refuse to find waiver in the absence of prejudice. This directly contravenes basic contract law, which establishes that waiver depends on the intent of the waiving party rather than on whether there is detrimental reliance by the opposing party. Such a rule creates bad policy by allowing parties to litigate their dispute and then subsequently turn to arbitration if it looks like they are not going to get the result they want in court.

Third, courts have relied on the federal policy favoring arbitration to give non-signatories to the agreement a greater ability to enforce the agreement and compel arbitration of a dispute than they would have for other contracts. The result has been to blur the distinction between signatories and non-signatories by giving non-signatories many of the exact same rights under the agreement as signatories. That distinction is important because, understandably, contract law treats parties to a contract very differently from parties that have no connection to it.

A. Ambiguous Contracts

Numerous courts, at both the state and federal level, have construed the policy favoring arbitration expansively so as to override the long-standing and well-settled contract rule that ambiguities in standard-form contractual terms should be interpreted against the drafting party.[107] Known by its Latin formulation, *contra proferentem*,[108] this doctrine is a well-established tenet of contract law.[109] Although some authorities have said that the doctrine should be used as a "last resort" when extrinsic evidence fails to resolve the ambiguity,[110] extrinsic evidence is often unavailable in arbitration disputes, and the doctrine has been frequently applied to standard-form contracts of all types.[111]

Courts and commentators offer several sensible rationales for the doctrine.[112] The main justification is that the rule encourages greater clarity in contracts through better drafting. If the party who drafts the contract runs the risk of losing when ambiguities arise, that party has an incentive to eliminate those ambiguities.[113] Otherwise, drafting parties have the perverse incentive to write purposefully ambiguous contracts that they can exploit to their benefit and to the detriment of the non-drafting

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107. *See infra* note 118 and accompanying text.

108. *Contra proferentem* is Latin for "against the offeror." BLACK'S LAW DICTIONARY 377 (9th ed. 2009).

109. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."); 11 WILLISTON & LORD, *supra* note 68, § 32:12 ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity . . . will be interpreted against the drafter.").

110. *See, e.g.*, 11 WILLISTON & LORD, *supra* note 68, § 32:12 ("The rule of *contra proferentem* is generally said to be a rule of last resort and is applied only where other secondary rules of interpretation have failed to elucidate the contract's meaning.").

111. *See, e.g.*, David Horton, *Flipping the Script:* Contra Proferentem *and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 436 (2009) (asserting that *contra proferentem* has gone from being the last step in the interpretive process to the first while also indicating that the doctrine has been "on the wane") (citing Shelby Cnty. State Bank v. Van Diest Supply Co., 303 F. 3d 832, 838 (7th Cir. 2002); *see also* 11 WILLISTON & LORD, *supra* note 68, § 32:12 ("Indeed, any contract of adhesion, [which is] a contract entered without any meaningful negotiation by a party with inferior bargaining power, is particularly susceptible to the rule that ambiguities will be construed against the drafter.") (footnote omitted).

112. At the same time, the doctrine is not without critics. *See, e.g.*, Michelle E. Boardman, Contra Proferentem*: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1121–25 (2006) (disputing the rationale for *contra proferentem*); Michael B. Rappaport, *The Ambiguity Rule and Insurance Law: Why Insurance Contracts Should Not Be Construed Against the Drafter*, 30 GA. L. REV. 171 (1995) (arguing that a rule of interpreting ambiguities against the drafter in insurance contracts is inefficient and creates more costs than benefits).

113. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 206 cmt. a; Horton, *supra* note 111, at 459.

party.[114] A second justification is that the rule operates as a "penalty default,"[115] which requires the drafting party to reveal information about itself and its preferences through the inclusion of express terms rather than ambiguous ones.[116] Third, the rule can be seen as serving a fairness function. It helps correct the imbalance stemming from the rise of contracts of adhesion in which the non-drafting party typically has inferior bargaining power and little or no ability to negotiate the terms of the agreement.[117]

Although courts apply *contra proferentem* to all types of standard-form contracts, they treat arbitration agreements differently. While courts have split on the question, the majority has read *Moses H. Cone*'s policy favoring arbitration to trump the doctrine of *contra proferentem* and to require ambiguities to be interpreted in favor of arbitration, even if it is the drafting party that seeks to enforce the arbitration clause.[118]

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114. *See, e.g.*, Horton, *supra* note 111, at 476–78 (describing the incentives for "opportunistic ambiguity"); *see also* RESTATEMENT (SECOND) OF CONTRACTS, § 206 cmt. a (noting the drafting party is "more likely than the other party to have reason to know of uncertainties of meaning" and may "leave meaning deliberately obscure").

115. The "penalty default" theory of contracts was pioneered by Ian Ayres and Robert Gertner. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

116. Horton, *supra* note 111, at 462–66; Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 475 (2011) (identifying a possible benefit of *contra proferentem* in "inducing the more knowledgeable party to reveal information through attempts to contract around the default").

117. STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 188 (2009) (noting that the rule corrects for "an imbalance in the fairness of the exchange"); Horton, *supra* note 111, at 466–72; Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1724 (1997) (stating that *contra proferentem* "may be justified on grounds of personal responsibility, fairness, efficiency, and redistribution").

118. *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 35 (1st Cir. 2006) ("Where the federal policy favoring arbitration is in tension with the tenet of *contra proferentem* for adhesion contracts, and there is a scope question at issue, the federal policy favoring arbitration trumps the state contract law tenet."); McKee v. Home Buyers Warranty Corp. II, 45 F.3d 981, 984–85 (5th Cir. 1995) (stating that doubts regarding the scope of an arbitration clause are resolved by the federal policy favoring arbitration rather than the state rule of "requiring that ambiguities in a document be resolved against the sophisticated drafter"); Arakelian v. N.C. Country Club Estates Ltd. P'ship, Civil Action No. 08-5286, 2009 WL 4981479, at *9 (D.N.J. Dec. 18, 2009) ("In ordinary circumstances, North Carolina law specifies that ambiguity in contract language like that described above is construed against the drafter. Because, however, the ambiguity here occurs in the context of an arbitration clause, the ambiguity must be resolved in favor of arbitration.") (citation omitted); Erickson v. Aetna Health Plans of Cal., Inc., 84 Cal. Rptr. 2d 76, 84 (Ct. App. 1999) ("[A]lthough we might in other circumstances construe any uncertainty against . . . the drafting party, that principle is subordinate to the policy favoring arbitration when construing FAA agreements."); Chan v. Drexel Burnham Lambert Inc., 223 Cal. Rptr. 838, 842 (Ct. App. 1986) ("It follows also then that ambiguities in an arbitration clause are to be resolved in favor of arbitration, notwithstanding the California rule that a contract is construed most strongly against the drafter.") (citation omitted); Allen v. Pacheco, 71 P.3d 375, 378 n.3 (Colo. 2003) (en banc) ("Although the court of appeals correctly stated that ambiguities in an insurance

Resolving ambiguities in favor of arbitration, instead of against the drafter, can make all the difference in determining whether a party loses its access to a judicial forum. Many arbitration clauses lack clarity as to whether a particular dispute falls within the scope of a mandatory arbitration provision.[119] Those ambiguities now permit a drafting party to enforce an ambiguous arbitration clause even though, in almost every other contractual setting, the court would adopt a contrary interpretation of the contractual term. Indeed, courts often have found ambiguity to be dispositive, sending a dispute to arbitration precisely because the agreement was unclear as to whether the dispute belonged in arbitration.[120]

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contract generally are construed against the drafter, the court of appeals failed to recognize . . . that courts must afford ambiguities in arbitration agreements a presumption in favor of arbitration.") (citations omitted); Blimpie Int'l, Inc. v. Choi, 822 N.E.2d 1091, 1096 n.5 (Ind. Ct. App. 2005) ("Under the Federal Arbitration Act, ambiguities in an arbitration clause are to be resolved in favor of arbitration, notwithstanding the rule that a contract is construed most strongly against the drafter."); Freeman v. Minolta Bus. Sys., Inc., 699 So. 2d 1182, 1187 (La. Ct. App. 1997) (holding that under the FAA ambiguities regarding the scope of an arbitration clause must be resolved in favor of arbitration, notwithstanding a state contract rule requiring ambiguities to be construed against the drafter); Gulf Ins. Co. v. Neel-Schaffer, Inc., 904 So. 2d 1036, 1049 (Miss. 2004) ("Based on clearly established federal law and our case law addressing arbitration issues, there is no doubt here that in those instances where this Court must interpret *arbitration provisions*, the doctrine of *contra proferentem* must succumb to the federal policy.").

Other courts have continued to apply the doctrine of *contra proferentem* to arbitration agreements, notwithstanding the federal policy favoring arbitration. However, those decisions appear to be primarily at the federal district court level, though a few state supreme courts have reached the same result. *See, e.g.*, Mims v. Global Credit & Collection Corp., 803 F. Supp. 2d 1349, 1356 (S.D. Fla. 2011) (interpreting an ambiguous contract against the party seeking to enforce the arbitration clause); Johnson v. Branch Banking & Trust Co., Civil Action No. 10-918, 2011 WL 93062, at *3 (E.D. Pa. Jan. 10, 2011) (applying Georgia law that ambiguous terms are construed against the drafter to conclude that the plaintiff was not a "Cardholder" under the arbitration agreement and therefore not bound to arbitrate); Karnette v. Wolpoff & Abramson, L.L.P., 444 F. Supp. 2d 640, 647 (E.D. Va. 2006) ("Notwithstanding the federal policy favoring arbitration, the rule of *contra proferentem* applies to arbitration clauses just as to other contractual terms."); Caldwell v. KFC Corp., 958 F. Supp. 962, 973–74 (D.N.J. 1997) (relying in part on doctrine of *contra proferentem* to find that an ambiguous arbitration clause did not cover the dispute); Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149, 156 (Del. 2002) ("The policy that favors alternate dispute resolution mechanisms, such as arbitration, does not trump basic principles of contract interpretation."); Victoria v. Superior Court, 710 P.2d 833, 838–40 (Cal. 1985) (In Bank) (resolving ambiguities in arbitration agreement against the drafter); Seifert v. U.S. Home Corp., 750 So. 2d 633, 641 (Fla. 1999) (same); Luke v. Gentry Realty, Ltd., 96 P.3d 261, 269 (Haw. 2004) (same); Barrett v. McDonald Invs., Inc., 870 A.2d 146, 150–52 (Me. 2005) (same); Union Planters Bank, Nat'l Ass'n v. Rogers, 912 So. 2d 116, 120 (Miss. 2005) (same).

119. *See Hearing*, *supra* note 7, at 59, 64 (statement of F. Paul Bland, Senior Attorney, Pub. Justice) ("I have seen hundreds of arbitration clauses, including clauses used by some of the largest and richest corporations in the United States, that are . . . cast in dense and cryptic legalese incomprehensible to lay persons (and even many lawyers) . . . ."); 11 WILLISTON & LORD, *supra* note 68, § 32:12 (noting that ambiguity "frequently occurs in the language used by the parties to express their meaning").

120. *See, e.g.*, *Kristian*, 446 F.3d at 35–36 (holding that because the contract was ambiguous as to whether the arbitration clause applied retroactively to disputes arising before the clause went into

The policy of interpreting ambiguities in favor of arbitration also has been applied to other challenges to the applicability of an arbitration clause. One type of challenge involves Section 5 of the FAA, which governs when a substitute arbitrator can be appointed if the arbitrator designated in the agreement becomes unavailable, or when the unavailability means that the arbitration clause becomes unenforceable.[121] This seemingly mundane question has generated a large and growing amount of litigation, as many companies draft arbitration clauses to require arbitration in front of a single arbitration provider, usually because the company believes that the provider is more likely to rule in the company's favor. One notable example involves the National Arbitration Forum (NAF), which until recently was one of the nation's leading arbitration providers and the leading provider for arbitration of debt-collection matters.[122] Many arbitration clauses require arbitration in front of NAF, and, as revealed in a lawsuit brought by the state of Minnesota, NAF was riddled with conflicts of interest that caused it to systematically favor companies over individuals in resolving arbitrations.[123] NAF settled the lawsuit by agreeing to not accept any new

effect, the dispute must be sent to arbitration); Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793, 798 (10th Cir. 1995) ("Notwithstanding the ambiguity of the February 1992 version of the Code (or perhaps more correctly, because of such ambiguity), we conclude that the most appropriate construction of the February 1992 Code is to apply its arbitration provisions to employment disputes involving these Plaintiffs."); *Arakelian*, Civil Action No. 08-5286, 2009 WL 4981479, at *9 (acknowledging ambiguity regarding whether defendant could enforce arbitration clause and relying on ambiguity to send the dispute to arbitration); *Erickson*, 84 Cal. Rptr. 2d at 84 (acknowledging ambiguity and requiring arbitration as a result); *Allen*, 71 P.3d at 381 (finding that a non-signatory who was a spouse of a signatory was required to arbitrate a wrongful death dispute where the contract bound the signatory's "heirs" to arbitration and was ambiguous as to whether a spouse was an heir); *see also* Webb v. Investacorp, Inc., 89 F.3d 252, 259 (5th Cir. 1996) (relying on the federal policy favoring arbitration to send dispute to arbitration even though the arbitration clause "could have been drafted with more precision"); *cf. McKee*, 45 F.3d at 984–85 (construing ambiguity in agreement as to whether arbitration would be binding or non-binding to require binding arbitration).

121. 9 U.S.C. § 5 (2012) ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.").

122. *See* Brief of National Consumer Law Center & Consumer Action as *Amici Curiae* in Support of Respondent at 7, Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010) (No. 09-497), 2010 WL 1410709 [hereinafter Brief of National Consumer Law Center].

123. *See* Complaint, State v. Nat'l Arbitration Forum, Inc., No. 27-CV-09-18550 (Minn. Dist. Ct. July 14, 2009); Consent Judgment, State v. Nat'l Arbitration Forum, Inc., No. 27-CV-09-18550 (Minn.

arbitrations or influence any of its pending arbitrations.[124] Litigation has ensued over whether clauses requiring arbitration in front of NAF can be enforced by substituting a new arbitrator.

Although litigation in this area is still emerging, courts generally will agree to substitute a new arbitrator unless they find that the contract's designation of a specific arbitrator was "integral" to the agreement.[125] However, answering that question necessarily requires the court to make a subjective judgment, and a contract rarely will specify whether the designation of a particular arbitrator is integral. Thus, the contract will almost always be silent or ambiguous on the question, and some courts have relied on that ambiguity to permit substitution of a new arbitrator and hence enforcement of the arbitration agreement.[126]

This extension of the federal policy favoring arbitration by lower courts is incorrect and is not compelled by *Moses H. Cone*. No doctrinal basis exists for overriding the general rule of *contra proferentem* and for sending disputes to arbitration when it is not clear that the parties agreed to arbitrate a particular dispute. Indeed, the drafters of the FAA emphasized that they intended to preserve the defense that the parties did not agree to arbitrate a particular dispute, and there is no indication that the drafters intended for the Act to place any limits or restrictions on that defense.[127]

Nor has the Supreme Court itself always required arbitration in the presence of ambiguity. For example, the Court has held that the question of an arbitration clause's enforceability can be resolved in arbitration only when the arbitration clause contains "clear and unmistakable" language delegating that question to the arbitrator.[128] Similarly, the Court recently

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Dist. Ct. July 17, 2009). For a discussion of NAF's biased practices in favor of companies over consumers, see Brief of National Consumer Law Center, *supra* note 122, at 5–18.

124. *See* Consent Judgment ¶ 3, State v. Nat'l Arbitration Forum, Inc., No. 27-CV-09-18550.

125. *See, e.g.*, Khan v. Dell Inc., 669 F.3d 350, 354 (3d Cir. 2012); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1222 (11th Cir. 2000). An arbitrator would be "integral" if the agreement reflected the parties' intent to arbitrate before a particular person or entity, rather than an intent to arbitrate generally. *See, e.g.*, *Khan*, 669 F.3d at 354.

126. *See, e.g.*, *Khan*, 669 F.3d at 356 (relying on the federal policy favoring arbitration to decide that ambiguity as to whether the contract's designation of NAF was "integral" requires enforcement of the arbitration clause).

127. Cohen & Dayton, *supra* note 31, at 271 ("At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim."). *But cf. id.* at 274–75 n.20 (asserting that arbitration agreements should be construed liberally).

128. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (citing AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)). In *First Options*, the Court held that the FAA "reverses the presumption" favoring arbitration when it comes to the question of who decides whether a dispute falls within the scope of an arbitration clause. *Id.* at 945. The Court did not explain how the

interpreted an arbitration agreement's silence on the availability of classwide arbitration to mean that classwide arbitration ordinarily is unauthorized, even if that leads to less arbitration as a result.[129] Thus, *Moses H. Cone* does not give lower courts carte blanche to ignore general contract principles regarding interpretation of ambiguous agreements.

Moreover, overriding the rule of *contra proferentem* in the arbitration context makes for bad policy. First, it encourages manipulative behavior by entities that use arbitration clauses in their standard-form agreements. They have every incentive to make those clauses increasingly vague as to which disputes require arbitration, with the knowledge that if the clause is ambiguous, courts will require arbitration, even if the non-drafting party would not have reasonably anticipated that such disputes would be covered by the clause.[130]

There appears to be some evidence, particularly in the consumer context, that companies intentionally make their arbitration clauses difficult to understand so that consumers will not fully realize what rights they are giving up. For example, an expert on readability analyzed the arbitration agreements of several payday loan companies[131] and found that (a) "the vast majority of Americans would have difficulty comprehending the [companies'] arbitration agreements," (b) a reader would require a college-level education to understand them, (c) the companies used terms that were undefined and did not appear in conventional dictionaries, and (d) the companies used sentences so long (including a 288-word sentence) as to render them "essentially not comprehensible."[132] By contrast, the text that the companies used on their websites to solicit loan business and market their products was written in much simpler language that was "far easier to read" than the language in the arbitration agreement.[133] This discrepancy suggests that companies know how to make themselves

law reverses that presumption with any greater clarity than it explained in *Moses H. Cone* why there is a federal policy favoring arbitration in the first place. Rather, it simply declared that "the law treats silence or ambiguity about the question *who* (primarily) should decide arbitrability differently from the way it treats silence or ambiguity about the question *whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement." *Id.* at 944–45 (quotation marks omitted). *But see* Cunningham, *supra* note 16, at 136–38 (critiquing the *First Options* decision).

129. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

130. *Cf.* Sternlight, *supra* note 70, at 35 n.125 (asserting that "drafters of the clause can use their superior knowledge to draft a clause that places them at a great advantage").

131. "A payday loan is a loan of short duration, typically two weeks, at an astronomical annual interest rate . . . ." Smith v. Steinkamp, 318 F.3d 775, 775–76 (7th Cir. 2003).

132. Affidavit of Beth Weir, ¶¶ 20, 38, McQuillan v. Check 'N Go of N.C., Inc., Case No. 04-CVS-2858 (N.C. Sup. Ct., Aug. 5, 2005).

133. *See id.*, ¶ 18.

understood and how to make themselves difficult to understand. When it comes to arbitration clauses, they prefer the latter to the former.

Second, overriding the *contra proferentem* doctrine undermines the fairness and distributive justice concerns that the doctrine protects. *Contra proferentem* is particularly suited to arbitration clauses,[134] which are often placed in standard-form contracts between companies that are repeat players in alternative dispute resolution and unsophisticated consumers and employees who have no opportunity to bargain over contract terms. Because *contra proferentem* was designed to protect unsophisticated parties lacking in bargaining power, the doctrine fits well with the legislative history of the FAA suggesting that the Act was intended only for disputes between sophisticated commercial parties.[135] Additionally, fairness concerns would appear to apply with particular strength when the issue is a party's waiver of its Seventh Amendment right to a jury trial in a judicial forum. Interpreting ambiguities against the party drafting the arbitration clause is consistent with the general rule requiring a clear statement that a party intended to waive its Seventh Amendment rights.[136]

In fact, the rule of *contra proferentem* plays an even more important role in arbitration than it does in other contexts, because other efforts that state legislatures or courts may take to promote clarity in arbitration agreements are likely to be preempted by the FAA on the ground that they disfavor arbitration. For example, the Supreme Court has found that a state statute which required that "[n]otice that a contract is subject to arbitration" be "typed in underlined capital letters on the first page of the contract" in order to reduce uncertainty and ambiguity was preempted.[137] Additionally, although *contra proferentem* often works in tandem with the

134. The Supreme Court has acknowledged that the fairness concerns underlying the *contra proferentem* doctrine apply to arbitration clauses. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62–63 (1995) (interpreting an ambiguous arbitration clause against the drafter so as to permit the arbitrator to award punitive damages and noting that the purposes of *contra proferentem* were "well suited to the facts of this case").

135. *See supra* note 40 and accompanying text.

136. For a more detailed discussion of the tension between judicial interpretation of the FAA and judicial interpretation of the Seventh Amendment, see Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

137. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 684, 687 (1996). Presumably, rules requiring greater clarity in all contracts, rather than just arbitration agreements, would not be preempted. However, courts often have found that statutes or rules that are not limited to arbitration are preempted. *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1147–48 (9th Cir. 2003) (finding that the FAA preempts the California Consumer Legal Remedies Act, which made "'unenforceable and void' any waiver by a consumer of the statutory rights provided for" under the Act) (citing Am. Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 707 (2001)).

doctrine of unconscionability to protect fairness in the contracting process,[138] unconscionability defenses are not always available in arbitrability disputes. The Supreme Court has found that certain unconscionability challenges to arbitration clauses are preempted by the FAA[139] and that other unconscionability challenges must be resolved in arbitration rather than in court.[140] Thus, unlike with other contracts, *contra proferentem* may be one of the only ways to protect against unfair arbitration agreements. Taking that doctrine away as well, as many courts have done, simply undermines the fairness of the arbitration process.

As a result, interpreting ambiguous arbitration clauses in favor of arbitration, which often means interpreting the clause in favor of the drafter, is both inconsistent with the purpose of the FAA and poor policy. In what is already a situation of unequal bargaining power between individuals and corporations, a broad reading of the federal policy favoring arbitration takes one more protection away from the side of the transaction that needs it most.

B. Waiver

A second area where courts have departed from traditional contract-law principles in order to favor arbitration agreements concerns whether a party has waived its right to enforce an arbitration clause. Waiver ordinarily results when a party fails to demand arbitration of a dispute, chooses instead to participate in litigation, and later decides that it wants to enforce the arbitration clause. In determining whether a waiver has occurred, the majority of courts have tacked on an extra requirement—that the party arguing for waiver shows that it was prejudiced by the opposing party's conduct, even though prejudice is not required to establish waiver of other contractual terms. As a consequence, courts have over-enforced arbitration clauses by submitting disputes to arbitration even where one party has knowingly acted inconsistently with its right to arbitrate. Just as with ambiguous arbitration clauses, this creates bad policy by encouraging strategic behavior.

The consequences of erecting greater hurdles for finding waiver of arbitration agreements than for other contracts are significant because

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138. *See* RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (comparing the application of *contra proferentem* to the refusal to enforce "an unconscionable clause").

139. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (holding that the FAA preempts state law that invalidated classwide bans in arbitration clauses as unconscionable).

140. Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010) (sending a dispute over unconscionability of an arbitration clause to the arbitrator to decide).

disputes over waiver are litigated with surprising frequency.[141] When waiver questions are litigated, the prejudice requirement often is determinative in deciding whether or not a waiver occurred.[142] Additionally, the prejudice requirement has become a hot litigation topic. The Supreme Court recently granted certiorari to determine whether prejudice is required for an arbitration waiver, but the case was dismissed after the parties settled.[143]

Waiver of an arbitration clause, just like waiver of any other contract provision, is a contractual question.[144] As a general contract matter, a waiver requires an intentional relinquishment of a known right.[145] Courts are reluctant to find contractual waivers and generally recognize a presumption against waiver.[146] At the same time, a foundational and long-standing principle of waiver is that waiver does not require prejudice to the opposing party.[147] Prejudice typically means that the opposing party relies on the waiver in some way and consequently suffers harm when the waiving party changes its mind and attempts to enforce the contract.[148] In the arbitration context, courts generally define prejudice in two ways. Substantive prejudice occurs where a party tries to litigate the same issue

141. *See, e.g.*, James W. Davis, *When Does a Party Waive Its Right to Enforce Arbitration?*, 63 ALA. LAW. 42, 43 (2002) ("[O]ne would think that in every case where an arbitration clause is present, at least one of the parties would immediately locate and seek to enforce the agreement. However, there are a surprising number of reported cases in which a party is accused of waiving its right to arbitration because of delay in asserting that right.").

142. *See, e.g.*, Rota-McLarty v. Santander Consumer USA, Inc., 700 F.3d 690, 702 (4th Cir. 2012) ("The dispositive determination is whether the opposing party has suffered actual prejudice."); Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 222 (3d Cir. 2007) (stating that "prejudice is the touchstone for determining whether the right to arbitrate has been waived") (quotation marks omitted); Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 497 (5th Cir. 1986) ("[P]rejudice . . . is the essence of waiver."); Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp., 338 S.E.2d 631, 634 (S.C. 1985) ("[I]t is not inconsistency, but the presence or absence of prejudice which is determinative.").

143. Stok & Assocs., P.A. v. Citibank, N.A., 131 S. Ct. 1556 (2011) (granting certiorari); Stok & Assocs., P.A. v. Citibank, N.A., 131 S. Ct. 2955 (2011) (dismissing case following settlement).

144. *See, e.g.*, Welborn Clinic v. Medquist, Inc., 301 F.3d 634, 637 (7th Cir. 2002) ("Like any other contractual right, the right to arbitrate a claim may be waived."); Burton-Dixie Corp. v. Timothy McCarthy Constr. Co., 436 F.2d 405, 407 (5th Cir. 1971) ("It is well established that agreements to submit disputes to . . . arbitrators, just like any other contract terms, may be waived.").

145. *See, e.g.*, Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 n.12 (Fla. 2001) (defining waiver as "the voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right"); *accord* RESTATEMENT (SECOND) CONTRACTS, § 84, cmt. b (1981) (defining waiver and distinguishing waiver from estoppel).

146. *See, e.g.*, Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P., 850 N.E.2d 653, 658 (N.Y. 2006).

147. *See infra* note 148 and accompanying text.

148. *See, e.g.*, BLACK'S LAW DICTIONARY 1299 (9th ed. 2009) (defining prejudice as "[d]amage or detriment to one's legal rights or claims").

twice in both court and arbitration, and economic prejudice occurs when a party's decision to seek arbitration after invoking the litigation process forces the opposing party to experience unnecessary delay or expense.[149]

The reason that prejudice is not required for a general contract waiver is that waiver is based solely on the intent and conduct of the party who is waiving the contractual right at issue. It does not depend on the effect of that party's conduct on the other parties to the contract.[150] As a result, an intentional relinquishment of a known right will, as it should, give rise to a waiver even if the opposing party is not prejudiced. Instead, prejudice, or detrimental reliance, is an element of an entirely different doctrine—estoppel, which looks to the effect on the opposing party regardless of the intent of the waiving party.[151]

When it comes to arbitration agreements, however, many courts treat waiver differently than in other contracts. Not only do courts require a party to act inconsistently with its right to arbitrate—say, by instituting or participating in litigation rather than seeking to compel arbitration—but the vast majority of courts also require prejudice.[152] In other words, it is

149. *See, e.g.*, Thyssen, Inc. v. Calypso Shipping Corp., S.A., 310 F.3d 102, 105 (2d Cir. 2002).

150. *See, e.g.*, Pitts v. Am. Sec. Life Ins. Co., 931 F.2d 351, 357 (5th Cir. 1991) ("Strictly defined, *waiver* describes the act, or the consequences of the act, of one party only, while *estoppel* exists when the conduct of one party has induced the other party to take a position that would result in harm if the first party's act were repudiated."); Royal Air Props., Inc. v. Smith, 333 F.2d 568, 571 (9th Cir. 1964) ("[N]o detriment to a third party is required for waiver, it is unilaterally accomplished."); City of Glendale v. Coquat, 52 P.2d 1178, 1180 (Ariz. 1935) ("[W]aiver depends upon what one himself intends to do, regardless of the attitude assumed by the other party . . . . Waiver does not necessarily imply that the other party has been misled to his prejudice . . . ."); Nathan Miller, Inc. v. N. Ins. Co. of N.Y., 39 A.2d 23, 25 (Del. Super. Ct. 1944) ("[Waiver] depends on what one party intended to do, rather than upon what he induced his adversary to do, as in estoppel. The doctrine does not necessarily imply that one party to the controversy has been misled to his detriment in reliance on the conduct of the other party . . . ."); Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334, 353 (Haw. 1996) ("Waiver is essentially unilateral in character, focusing only upon the acts and conduct of the insurer. Prejudice . . . or detrimental reliance is *not* required.") (citing Salloum Foods & Liquor, Inc. v. Parliament Ins. Co., 388 N.E.2d 23, 27–28 (1979)); Brown v. State Farm Mut. Auto. Ins. Co., 776 S.W.2d 384, 387 (Mo. 1989) (En Banc); 28 AM. JUR. 2D *Estoppel & Waiver*, § 35 (2011) ("The intent to relinquish a right is a necessary element of waiver but not of estoppel while detrimental reliance is a necessary element of estoppel but not of waiver."); *see also* Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995) ("[I]n ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance.") (citing E. ALLAN FARNSWORTH, CONTRACTS § 8.5 (2d ed. 1990); 3A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 753 (1960)).

151. *See* 28 AM. JUR. 2D *Estoppel & Waiver*, § 35 ("The intent to relinquish a right is a necessary element of waiver but not of estoppel while detrimental reliance is a necessary element of estoppel but not of waiver."); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 n.23 (1983); *see also infra* note 207 and accompanying text.

152. *See* Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1090 (8th Cir. 2007); Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 223 (3d Cir. 2007); *In re* Tyco Int'l Ltd. Sec. Litig., 422 F.3d 41, 44 (1st Cir. 2005); Republic Ins. Co. v. PAICO Receivables, LLC, 383 F.3d 341, 346 (5th Cir. 2004); Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc., 380 F.3d 200, 204 (4th Cir. 2004);

not enough for a party to act inconsistently with its right to arbitrate. It must also do so in a way that materially harms the opposing party. Many of the courts that require prejudice have explicitly stated that this extra burden derives from the federal policy favoring arbitration and exists as a matter of federal law irrespective of whether state contract law requires prejudice.[153] Thus, courts have created a federal law of arbitration waiver that differs from and is more onerous than the waiver standard for contracts generally.

The imposition of this additional element is consequential. To be sure, there are many cases in which a party's litigation conduct, such as participating in discovery or filing a motion for summary judgment, will cause prejudice. But there are also numerous cases in which courts have refused to find waiver, notwithstanding that a party acted inconsistently with the right to arbitrate, because they determined that the opposing party

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O.J. Distrib., Inc. v. Hornell Brewing Co., 340 F.3d 345, 355–56 (6th Cir. 2003); *Thyssen*, 310 F.3d at 105; United Computer Sys., Inc. v. AT&T Corp., 298 F.3d 756, 765 (9th Cir. 2002); Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315–16 (11th Cir. 2002); Companion Life Ins. Co. v. Whitesell Mfg., Inc., 670 So. 2d 897, 899 (Ala. 1995); *In re* Noel R. Shahan Irrevocable & Inter Vivos Trust, 932 P.2d 1345, 1349 (Ariz. Ct. App. 1996); Saint Agnes Med. Ctr. v. PacifiCare of Cal., 82 P.3d 727, 738 (Cal. 2003); Advest, Inc. v. Wachtel, 668 A.2d 367, 372 (Conn. 1995) (following federal law); Wesley Ret. Servs., Inc. v. Hansen Lind Meyer, Inc., 594 N.W.2d 22, 30 (Iowa 1999); Rauscher Pierce Refsnes, Inc. v. Flatt, 632 So. 2d 807, 810 (La. Ct. App. 1994) (following federal law); Hughes v. Lund, 603 N.W.2d 674, 676 (Minn. Ct. App. 1999); Mueller v. Hopkins & Howard, P.C., 5 S.W.3d 182, 187 (Mo. Ct. App. 1999); Good Samaritan Coffee Co. v. LaRue Distrib., Inc., 748 N.W.2d 367, 375 (Neb. 2008) (following federal law); Nev. Gold & Casinos, Inc. v. Am. Heritage, Inc., 110 P.3d 481, 485 (Nev. 2005); Bd. of Educ. Taos Mun. Sch. v. Architects, Taos, 709 P.2d 184, 185 (N.M. 1985); Advest, Inc. v. Wachtel, 677 N.Y.S.2d 549, 551 (App. Div. 1998) (following federal law); Sturm v. Schamens, 392 S.E.2d 432, 433 (N.C. Ct. App. 1990); Wilbur-Ellis Co. v. Hawkins, 964 P.2d 291, 292 (Or. Ct. App. 1998) (following federal law); Rich v. Walsh, 590 S.E.2d 506, 509–10 (S.C. Ct. App. 2003) (following federal law); Tjeerdsma v. Global Steel Bldgs., Inc., 466 N.W.2d 643, 645 (S.D. 1991) (following federal law); Perry Homes v. Cull, 258 S.W.3d 580, 593–95 (Tex. 2008); Chandler v. Blue Cross Blue Shield of Utah, 833 P.2d 356, 359–60 (Utah 1992); Jackson State Bank v. Homar, 837 P.2d 1081, 1088 (Wyo. 1992).

Only a handful of courts have held that prejudice is not required. *See, e.g.*, *Cabinetree of Wis.*, 50 F.3d at 388; Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1489 (10th Cir. 1994); Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 777 (D.C. Cir. 1987); Raymond James Fin. Servs., Inc. v. Saldukas, 896 So. 2d 707, 711 (Fla. 2005); Conseco Fin. Servicing Corp. v. Wilder, 47 S.W.3d 335, 344 (Ky. Ct. App. 2001); Blackburn v. Citifinancial, Inc., No. 05AP-733, 2007 WL 927222, at *5 (Ohio Ct. App. Mar. 29, 2007).

153. *See, e.g.*, *Thyssen*, 310 F.3d at 104–05 (explaining that because of the federal policy favoring arbitration, waiver "is not to be lightly inferred," and that the "key to a waiver analysis is prejudice"); MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 250 (4th Cir. 2001) (explaining that "in light of the federal policy favoring arbitration," the circumstances giving rise to waiver "are not to be lightly inferred") (quoting Maxum Founds., Inc. v. Salus Corp., 779 F.2d 974, 981 (4th Cir.1985)); *see also* UNIF. ARBITRATION ACT, § 6 cmt. 5 (2000) ("However, because of the public policy favoring arbitration, a court normally will only find waiver of a right to arbitrate where a party claiming waiver meets the burden of proving that the waiver has caused prejudice.").

did not suffer sufficient prejudice.[154] For example, while failing to seek to compel arbitration after a party initiates litigation is inconsistent with the right to arbitrate, courts have stressed that delay in seeking to enforce arbitration rights is not prejudicial.[155] Thus, courts have permitted parties who had litigated a dispute in court for months or even years to change their mind and seek arbitration.[156] Courts also have found that putting an opposing party through the time and expense of discovery was not sufficiently prejudicial to give rise to waiver.[157] Other courts have held that substantial litigation conduct, such as filing a complaint, counterclaim, or crossclaim, did not, on its own, constitute prejudice and was insufficient to prevent the party from changing its mind and seeking arbitration.[158]

The problem with requiring prejudice is that it imposes additional burdens on parties opposing arbitration that are not present in traditional contract law. First, while a party may lose the right to enforce an ordinary contractual term *either* by virtue of the party's intent (waiver) *or* by virtue

154. *See, e.g.*, Dumont v. Sask. Gov't Ins., 258 F.3d 880, 886–87 (8th Cir. 2001) (finding no waiver based on defendant's motion to dismiss, which referred to intent to seek arbitration); Walker v. J.C. Bradford & Co., 938 F.2d 575 (5th Cir. 1991) (finding that defendant's thirteen-month delay, during which it removed the case to federal court and served interrogatories on plaintiffs, did not establish waiver); Reidy v. Cyberonics, Inc., No. 1:06-CV-249, 2007 WL 496679, at *7 (S.D. Ohio Feb. 8, 2007) ("[T]hough Defendant removed this case to federal court, filed an answer, and engaged in discovery, Defendant's actions do not rise to the level of substantial participation in litigation . . . .") (footnote omitted); Harsco Corp. v. Crane Carrier Co., 701 N.E.2d 1040 (Ohio Ct. App. 1997) (finding no waiver where an answer was filed and limited discovery and depositions took place); *In re* Medallion, Ltd., 70 S.W.3d 284 (Tex. App. 2002) (holding that limited discovery, participation in mediation, and entering into an agreed order regarding the existence of a settlement were not sufficient to support a finding of waiver).

155. *See, e.g.*, Rota-McLarty v. Santander Consumer, USA, Inc., 700 F.3d 690, 703 (4th Cir. 2012); Saga Commc'ns of New England, Inc. v. Voornas, 756 A.2d 954, 961 (Me. 2000); Major Cadillac, Inc. v. Gen. Motors Corp., 280 S.W.3d 717, 723 (Mo. Ct. App. 2009).

156. *See, e.g.*, Tenneco Resins, Inc. v. Davy Int'l, AG, 770 F.2d 416, 421 (5th Cir. 1985); Am. Gen. Home Equity, Inc. v. Kestel, 253 S.W.3d 543, 553–56 (Ky. 2008) (holding that months of litigation conduct, including defending motions and filing answers, did not constitute waiver where the party consistently mentioned in its papers that the case "may be subject to arbitration").

157. *See, e.g.*, *Rota-McLarty*, 700 F.3d 690 (finding that the taking of discovery, including a deposition of the plaintiff, was not prejudicial); Keytrade USA, Inc. v. Ain Temouchent M/V, 404 F.3d 891, 898 (5th Cir. 2005) (finding that discovery would not cause prejudice as long as the party does not "shower" the opposing party with discovery requests); McFadden v. Clarkeson Research Grp., Inc., No. CV 09-0112, 2010 WL 2076001, at *6 (E.D.N.Y. May 18, 2010) (finding no waiver where limited discovery requests did not result in prejudice).

158. *See, e.g.*, Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 661–62 (5th Cir. 1995) (counterclaim); Jock v. Sterling Jewelers, Inc., 564 F. Supp. 2d 307, 311 (S.D.N.Y. 2008) (no waiver based on simply initiating suit because party seeking waiver had not "engage[d] in protracted litigation that results in prejudice to the opposing party") (citing S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2d Cir 1998)); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., 586 S.E.2d 581, 585 (S.C. 2003) (third-party complaint).

of causing prejudice to the opposing party (estoppel), waiver of an arbitration right requires both. Requiring both elements in the arbitration context—an intent to act inconsistently with the right to arbitrate as well as prejudice—combines the elements of waiver and estoppel into a single doctrine, thus erecting two hurdles to finding a waiver rather than one.[159] By making it easier for a party to avoid waiver of an arbitration clause than to avoid waiver of other contractual provisions, courts have given arbitration clauses special and unwarranted status.

Second, engrafting a prejudice requirement into the waiver analysis also contravenes general contract law by making waivers presumptively revocable. According to the standard for waiver in arbitration agreements, a party can intentionally relinquish its right to arbitrate by participating in litigation and then voluntarily retract that waiver as long as the opposing party was not prejudiced. The general rule, however, is that a waiver is irrevocable without consent from the opposing party.[160]

Third, making waiver more difficult to establish in the arbitration context than in other contexts is particularly unsettling in light of the willingness of courts to utilize the federal policy favoring arbitration in order to indulge a presumption in favor of finding a waiver of one's

159. To be sure, one could argue that estoppel, rather than waiver, is the proper framework and that as a result prejudice should be required. Acting inconsistently with the right to arbitrate—say, by waiting until after the onset of litigation to seek arbitration—may not always reveal a deliberate intent to forgo arbitration as much as inadvertence or oversight. Rather, acting inconsistently with the right to arbitrate might more closely approximate action giving rise to an estoppel, namely, action that sends an improper message to the opposing party and causes harm when it induces detrimental reliance by that party. Despite its surface appeal, that argument is unpersuasive. As many courts recognize, where a party knows that it has signed an arbitration clause and nonetheless takes actions inconsistent with the right to arbitrate, it is a reasonable inference that it is intentionally waiving its arbitration rights. *See, e.g.*, Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC, 588 F.3d 963 (8th Cir. 2009) (rejecting defendant's argument that it was unaware of its right to arbitrate until another case was decided); Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390–91 (7th Cir. 1995) (explaining that acting inconsistently with the right to arbitrate ordinarily indicates an intent to relinquish one's arbitration rights); AZ Holding, L.L.C. v. Frederick, No. CV-08-0276-PHX-LOA, 2010 WL 500443 at *5 (D. Ariz. Feb. 10, 2010) (finding constructive knowledge of arbitration clause where defendants signed clause and clause was prepared by law firm that represented defendants). In the unusual situation where knowledge plus inconsistent action does not compel an inference of intent, courts can look at prejudice—but are not required to do so—as a way of evaluating whether a party should lose its right to demand arbitration. *See Cabinetree*, 50 F.3d at 390–91. That view seems more consistent with traditional contract principles than the view that prejudice is always required, even if there is evidence of an intent to forego arbitration.

160. *See, e.g.*, Ins. Corp. of Ir., Ltd. v. Bd. of Trs. of S. Ill. Univ., 937 F.2d 331, 337 (7th Cir. 1991); First Ala. Bank of Montgomery, N.A. v. First State Ins. Co., 899 F.2d 1045, 1064 (11th Cir. 1990) ("The fact that a subsequent letter . . . contains nonwaiver language does not work to reverse the waiver because a waiver is irrevocable and cannot be recalled."); State *ex rel.* Johnson v. Indep. Sch. Dist. No. 810, Wabasha Cnty., 109 N.W.2d 596, 602 (Minn. 1961) (holding that a waiver, "when once established . . . is irrevocable even in the absence of consideration therefor").

judicial rights. Arbitration is itself a type of contractual waiver, and the ease with which courts find that parties waived their right to go to court contrasts sharply with their reluctance to find that parties waived their right to arbitrate.

In addition to departing from the general principles of contract law that the FAA was supposed to incorporate, requiring prejudice makes bad policy by encouraging strategic behavior and reducing efficiency. First, erecting additional burdens to finding waiver promotes gamesmanship and encourages parties to seek two bites at the apple. If waiver will not occur in the absence of prejudice, parties have greater freedom to test the waters in litigation, and then, if it looks like they will receive an adverse result, they can turn around and seek to compel arbitration. This is particularly true given that courts have held that filing certain dispositive motions such as a motion to dismiss is not inherently prejudicial.[161] Thus a party can seek to dismiss an action in court, and if the motion is granted they win. If the motion is denied, then the party can usually try again in arbitration. This creates, in the words of one court, a "heads I win, tails you lose" situation.[162]

The prejudice requirement is particularly unsuitable for arbitration because one of the primary motivations of the FAA's drafters was to stop this kind of strategic behavior. Several of the FAA's drafters lamented that because pre-FAA courts would refuse to require specific performance of arbitration clauses, parties could "back out" of arbitration "at the last moment when they see the case is going against them."[163] Yet, the imposition of a prejudice requirement gives parties greater leeway to "back out" of litigation if they know that their inconsistent conduct will not necessarily give rise to a waiver.

Second, requiring prejudice undermines the speed and efficiency goals that arbitration seeks to promote. One reason that Congress passed the

161. Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1270–71 (9th Cir. 2002) (finding no waiver based on defendant's motion to dismiss second amended complaint when plaintiff failed to show prejudice); Bellevue Drug Co. v. Advance PCS, 333 F. Supp. 2d 318, 325–26 (E.D. Pa. 2004) (holding that ten-month delay and ruling on a motion to dismiss that did not address the merits did not constitute waiver); Redemptorists v. Coulthard Servs., Inc., 801 A.2d 1104 (Md. Ct. Spec. App. 2002) (holding that filing of a motion to dismiss for lack of jurisdiction was not a waiver of arbitration).

162. *Cabinetree*, 50 F.3d at 391.

163. *Joint Hearings*, *supra* note 27, at 5, 7 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of N.Y.); *accord id.* at 33, 35 (written statement of Julius Henry Cohen, Member, ABA) (emphasizing that "a party has been at absolute liberty to disregard his engagement to enter into arbitration at any time before the award actually is handed down" and that a party will change their mind about arbitrating when that party "sees an advantage in the delay and trouble to which his opponent will be put to enforce his rights through the courts").

FAA was to provide a faster and cheaper alternative to litigation.[164] Allowing parties to delay enforcing their arbitration rights, or to litigate first and then arbitrate, slows down the process rather than speeding it up. It also increases costs by having the same issues addressed both in court and in arbitration.[165] Thus, while courts have derived the prejudice requirement from the federal policy favoring arbitration, the rule is not only inconsistent with the FAA's goal of treating arbitration clauses like other contracts, it also makes alternative dispute resolution a more costly and less efficient process. The way in which courts have used the federal policy favoring arbitration to shield arbitration clauses from challenge shows just how much the Court's statements in *Moses H. Cone* have twisted the FAA away from its original purpose of incorporating, rather than overriding, state contract law.

C. Non-Signatories

A third area in which the law of arbitration has deviated from traditional contract law concerns the situation where parties that did not sign an arbitration agreement nonetheless can enforce it against a signatory to the agreement. Attempts by non-signatories to attach themselves to a contract and to force arbitration of a dispute arise frequently and are a fertile source of litigation.[166] In this area, courts purport to apply traditional common-law rules of contract and agency in determining the rights of non-signatories, but in actuality they have given non-signatories greater rights to enforce arbitration clauses than other contractual provisions. The result is that a party can be forced to arbitrate a dispute with an entity that was not a party to the arbitration agreement and never signed it, and in situations where there was never any express understanding that the entity would have a right to demand arbitration.

Courts are fond of pointing out that "arbitration is a matter of contract."[167] The Supreme Court has emphasized that "[i]t goes without

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164. *See* S. REP. NO. 68-536, at 3 (1924) (stating that the FAA will allow parties to avoid "the delay and expense of litigation").

165. 2 MACNEIL ET AL., *supra* note 71, § 21.3.3 (arguing that "[t]he requirement of prejudice, particularly in courts loathe to find prejudice, protects the federal contract right to arbitrate at considerable cost to efficiency").

166. *See supra* note 90 and accompanying text; *see also infra* notes 211–12 and accompanying text for a discussion of the frequency with which non-signatory parties seek to force another party into arbitration.

167. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011) (quoting Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010)).

saying that a contract cannot bind a nonparty,"[168] and courts have recognized that, as a general matter, non-signatories are neither bound by nor entitled to enforce an arbitration agreement.[169] At the same time, general principles of contract and agency law allow non-parties to a contract to enforce it in certain circumstances. These circumstances include incorporation by reference, alter ego, equitable estoppel, third-party beneficiary, and agency.[170] The following Sections discuss two of those doctrines: agency and equitable estoppel.

While the above principles are consistent with general contract law, the way in which courts have applied them to arbitration agreements is not. While purporting to remain faithful to traditional contract and agency principles, courts have interpreted certain doctrines broadly to give non-signatories expanded rights to enforce arbitration clauses, and have relied on the federal policy favoring arbitration in doing so.[171] It is possible that courts might give less weight to the federal policy favoring arbitration following the Supreme Court's decision in *Arthur Andersen LLP v. Carlisle*, in which the Court suggested in dicta that a non-signatory can enforce an arbitration clause "if the relevant state contract law allows him"

168. EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002).

169. *See, e.g.*, Bridas S.A.P.I.C. v. Gov't of Turkm., 345 F.3d 347, 353 (5th Cir. 2003) ("In order to be subject to arbitral jurisdiction, a party must generally be a signatory to a contract containing an arbitration clause.").

170. *See, e.g.*, Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1045 (9th Cir. 2009); *Bridas*, 345 F.3d at 356; E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 195 (3d Cir. 2001).

171. Several courts have stated that the federal policy applies in determining whether a particular issue is arbitrable, but not to whether a particular party is subject to arbitration. *See, e.g.*, Becker v. Davis, 491 F.3d 1292, 1298 (11th Cir. 2007); Comer v. Micor, Inc., 436 F.3d 1098, 1104 n.11 (9th Cir. 2006) ("The question here is not whether a particular issue is arbitrable, but whether a particular *party* is bound by the arbitration agreement. Under these circumstances, the liberal federal policy regarding the scope of arbitrable issues is inapposite."); Fleetwood Enters., Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002) (refusing to apply the policy favoring arbitration to determine whether a party was bound by the arbitration clause); McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994) ("The federal policy, however, does not extend to situations in which the identity of the parties who have agreed to arbitrate is unclear."); Cnty. of Contra Costa v. Kaiser Found. Health Plan, Inc., 54 Cal. Rptr. 2d 628, 633 (Ct. App. 1996) ("Even the strong public policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement . . . ."); Slusher v. Ohio Valley Propane Servs., 896 N.E.2d 715, 723 (Ohio Ct. App. 2008) ("Thus, the principle favoring arbitration does not apply when there is a question as to whether the parties before the court are the same as the parties to the agreement to arbitrate.") (citing West v. Household Life Ins. Co., 867 N.E.2d 868, 872 ¶ 11 (Ohio Ct. App. 2007)); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lockey Inv. Grp., L.L.C., 195 S.W.3d 807, 817 (Tex. App. 2006) ("[T]he strong presumption favoring arbitration does not arise until a person seeking to compel arbitration proves that a valid arbitration agreement exists."); Bybee v. Abdulla, 189 P.3d 40, 48 (Utah 2008). Nonetheless, as explained in this Part, although courts may state that the federal policy does not apply, the federal policy favoring arbitration substantially influences the reasoning of courts that have granted non-signatories broad rights to enforce arbitration agreements.

to do so.[172] While some courts have relied on *Carlisle* in addressing non-signatory questions, they usually have done so only to determine whether a non-signatory's ability to enforce an arbitration clause is a question of state law or federal law.[173] But as the following Sections explain, even where courts claim to apply state law, they in fact deviate from it and give arbitration agreements special treatment not afforded to other contracts.

1. Agency

Courts have extended the federal policy favoring arbitration to give non-signatory agents broad authority to enforce arbitration clauses that they did not sign or that they signed on behalf of their principals. By contrast, general principles of agency law do not give an agent a right to enforce a contract signed by the agent on behalf of the principal.

Agency questions surface in a number of contexts. They often arise when employees of a company are sued for misconduct and attempt to rely on an arbitration clause signed by the plaintiff and the company to force the dispute to arbitration.[174] They also commonly arise in cases where the holder of a debt sells the claim to a debt collector that then gets sued for engaging in harassing or unlawful conduct,[175] and in cases involving patient abuse at nursing homes, where the patient does not sign the admission agreement (which contains the arbitration clause), but a family member does.[176]

The following is a typical example of an agency problem arising in an arbitration context. A customer buys an automobile based on the

172. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 632 (2009) (distinguishing between the issue of whether an order denying a motion to compel arbitration is appealable, a question of federal law, from the question of whether a non-signatory can enforce an arbitration clause, a question of state contract law).

173. *See, e.g.*, Murphy v. DirecTV, Inc., 724 F.3d 1218 (9th Cir. 2013); *In re* Wholesale Grocery Prods. Antitrust Litig., 707 F.3d 917, 921 (8th Cir. 2013) ("[S]tate contract law governs the ability of nonsignatories to enforce arbitration provisions.") (internal quotation marks omitted); Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128 (9th Cir. 2013); Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 449 Fed. Appx. 704, 708–09 (10th Cir. 2011); Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1170–71 (11th Cir. 2011) (clarifying that *Carlisle* establishes that state law determines when a non-signatory can enforce an arbitration clause); Donaldson Co. v. Burroughs Diesel, Inc., 581 F.3d 726, 732 (8th Cir. 2009) (same). Other courts have disagreed over whether federal law or state law controls this question. *See, e.g.*, Graves v. BP Am., Inc., 568 F.3d 221, 222–23 (5th Cir. 2009) (acknowledging competing approaches regarding whether to apply federal law or state law).

174. *See infra* note 178 and accompanying text.

175. *See* BLAND ET AL., *supra* note 9, § 7.5.3 at 260–62.

176. *See id.* § 7.5.4 at 262–66.

representation of a salesperson about the vehicle's condition.[177] When purchasing the vehicle, the customer signs a purchase contract containing an arbitration clause requiring her to resolve all disputes with the dealership in arbitration. An agent of the dealership signs the contract on behalf of the dealership. The customer subsequently learns that the salesperson falsely represented the vehicle's condition and sues the salesperson and the insurance company under the tort theory of fraudulent inducement. The salesperson then seeks to compel arbitration of the claim against him, even though the salesperson either did not sign the purchase contract with the arbitration clause, or did so in his capacity as an agent of the dealership.

Under general agency law principles, the salesperson would not be permitted to enforce the arbitration clause. Although an agent's signature on behalf of the principal binds the principal to the contract, it does not confer any rights on the agent. The agent is not a party to the contract and can neither enforce it nor be bound by it.[178] As a result, "the agent should not be able to assert rights as an individual derived from the contract in the absence of indicia that the parties to the contract so intended."[179] This rule makes perfect sense, because the agent is not acting for its own sake but on behalf of the principal. Moreover, where an agent does claim a right to enforce the contract, general agency principles typically place the burden on the agent to show that the parties intended to give the agent rights under the contract and may demand proof by clear and convincing evidence.[180]

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177. The facts are drawn from *Wolff Motor Co. v. White*, 869 So. 2d 1129 (Ala. 2003); *see also* Christopher Driskill, Note, *A Dangerous Doctrine: The Case Against Using Concerted-Misconduct Estoppel to Compel Arbitration*, 60 ALA. L. REV. 443, 446 (2009) (describing a similar example).

178. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006) ("When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, . . . the agent is not a party to the contract unless the agent and third party agree otherwise."); *id.* at reporter's note b (citing cases); 12 WILLISTON & LORD, *supra* note 68, § 35:34 ("The agent cannot enforce the contract, nor is he bound by it.") (footnote omitted); 3 AM. JUR. 2D *Agency* § 285 (2002) (noting that a contract signed by an agent "generally does not give rise to any contractual obligation running to the agent").

179. RESTATEMENT (THIRD) OF AGENCY § 6.01 cmt. d(1). To be sure, an agent who is sued can raise all the same defenses that a principal can raise, which presumably would include the defense that the dispute must be submitted to arbitration. *See* 12 WILLISTON & LORD, *supra* note 68, § 35:53. The right of the agent to raise defenses, however, presupposes that the agent is a party to or is otherwise bound by the contract. If the agent is not a party to the contract, then the contract cannot be enforced against the agent at all, and the agent has no need to raise any defenses. In other words, only when an agent is a party to the contract can the agent raise defenses that the principal can raise. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 6.01 cmt. e ("In an action against an agent *who is a party to a contract*, the agent may assert all defenses that arise out of the contract itself and all defenses that are personal to the agent.") (emphasis added).

180. RESTATEMENT (THIRD) OF AGENCY § 6.01 reporter's note d(1).

In short, agency law looks to party intent in determining the agent's rights. Because an agent acts on behalf of the principal rather than for herself, agency principles assume that the parties did not intend for the agent to have rights under the contract unless there is clear evidence to the contrary.

In the arbitration context, however, courts have given short shrift to the signatory parties' collective intent and have given employees, salespersons, debt collectors, and other agents broad rights to compel arbitration, even though they are not signatories to the agreement.[181] The prevailing view is that there is a presumption that an arbitration clause requires a party to arbitrate not just against a signatory but also against non-signatory agents with whom no arbitration agreement was ever reached.[182] This presumption sounds very similar to *Moses H. Cone*'s presumption favoring arbitration. In fact, courts have explicitly relied on the federal policy favoring arbitration in giving non-signatory agents the right to force a plaintiff into arbitration.[183]

At first blush, this view of contractual intent may seem persuasive. But as discussed already, giving agents unfettered rights to force a dispute into

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181. *See, e.g.*, Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993) ("Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement."); Arnold v. Arnold Corp.–Printed Commc'ns for Bus., 920 F.2d 1269, 1282 (6th Cir. 1990) (finding that agents and employees were protected by the arbitration agreement signed by their principal); Messing v. Rosenkrantz, 872 F. Supp. 539 (N.D. Ill. 1995) (holding that an agent can enforce or be bound by an arbitration clause signed by its principal); Monsanto Co. v. Benton Farm, 813 So. 2d 867 (Ala. 2001); *Ex parte* Gray, 686 So. 2d 250 (Ala. 1996) (finding that a salesperson can enforce an arbitration agreement entered into by the dealership employing the salesperson); *In re* Kaplan Higher Educ. Corp., 235 S.W.3d 206, 210 (Tex. 2007) (permitting admissions officers to compel arbitration of students' claim of fraudulent inducement to enroll at a college because the officers were agents of the college and could enforce the arbitration clause between the students and the college); Ayala v. Cont'l Servs., 146 Wash. App. 1046 (2008) (allowing employees and supervisors to enforce an arbitration clause signed by the employer).

182. *See, e.g.*, Qubty v. Nagda, 817 So. 2d 952, 958 (Fla. Dist. Ct. App. 2002) ("[B]road arbitration provisions [are] intended to obligate signatories to the agreement to arbitrate disputes brought not only against the principal, but claims made against the principal's agents."); *In re* Vesta Ins. Grp., Inc., 192 S.W.3d 759, 762 (Tex. 2006) ("When contracting parties agree to arbitrate all disputes 'under or with respect to' a contract (as they did here), they generally intend to include disputes about their agents' actions . . . .") (citing Holloway v. Skinner, 898 S.W.2d 793, 795 (Tex. 1995)).

183. *See, e.g.*, Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1122 (3d Cir. 1993) ("In keeping with the federal policy favoring arbitration, we . . . will extend the scope of the arbitration clauses to agents of the party who signed the agreements."); *Arnold*, 920 F.2d at 1281 (agreeing with other federal courts that a rule allowing agents to enforce arbitration clauses "is an outgrowth of the strong federal policy favoring arbitration"); Letizia v. Prudential Bache Secs., Inc., 802 F.2d 1185, 1187–88 (9th Cir. 1986); *see also In re* Merrill Lynch Trust Co., 235 S.W.3d 185, 189 (Tex. 2007) (reasoning that allowing non-signatory agents to enforce arbitration clauses is necessary to "place such clauses on an equal footing with all other parts of a corporate contract").

arbitration, even though there was no agreement to arbitrate between the plaintiff and the agent, does not comport with traditional contract and agency rules.[184] The judicial presumption that arbitration clauses are intended to cover agents stands in direct contrast to the general agency presumption that parties do not intend for agents to have contractual rights unless the agent can rebut that presumption with clear and convincing evidence.[185] Thus, while courts like to think that allowing agents to enforce arbitration clauses is necessary to fulfill the FAA's mandate of "plac[ing] such clauses on an equal footing with all other parts of a corporate contract,"[186] such a rule in fact treats arbitration clauses more favorably than other contract provisions.

The mistake that courts have made is to focus only on the intent of the party employing the agent rather than on the intent of both parties. The reasoning that all agents, which may include a company's entire workforce, can enforce the arbitration clause because that is what the company intended, is problematic. What matters is what both parties intended. It is far from clear that an individual signing an arbitration clause with a company intended to waive his or her judicial rights not only

184. *See supra* notes 178–80 and accompanying text.

185. To be sure, not all courts have categorically permitted agents to enforce arbitration clauses signed on behalf of principals. A few courts have followed traditional common-law principles and have refused to afford such rights to agents absent a clear indication that the contract was intended to give agents the right to enforce the arbitration clause. *See, e.g.*, Westmoreland v. Sadoux, 299 F.3d 462, 466 (5th Cir. 2002) ("[A] nonsignatory cannot compel arbitration merely because he is an agent of one of the signatories."); McCarthy v. Azure, 22 F.3d 351, 357 (1st Cir. 1994) (suggesting that employees can enforce an arbitration clause signed by an employer only when the contractual language demonstrates an intent to benefit both the employer and employee alike); Britton v. Co-op Banking Grp., 4 F.3d 742 (9th Cir. 1993) (agent was not entitled to enforce arbitration clause); Housh v. Dinovo Invs., Inc., No. Civ. A. 02-2562-KHV, 2003 WL 1119526, at *5 (D. Kan. Mar. 7, 2003) (employee could not enforce arbitration clause signed by employer); Usina Costa Pinto S.A. Acucar e Alcool v. Louis Dreyfus Sugar Co., 933 F. Supp. 1170, 1178 (S.D.N.Y. 1996); Koechli v. BIP Int'l, Inc., 870 So. 2d 940, 944 (Fla. Dist. Ct. App. 2004); Constantino v. Frechette, 897 N.E.2d 1262, 1266–67 (Mass. App. Ct. 2008) (employees of nursing home could not enforce arbitration clause signed by nursing home when the agreement expressed no intent to cover the employees); I Sports v. IMG Worldwide, Inc., 813 N.E.2d 4, 11 (Ohio Ct. App. 2004). However, these cases appear to be a minority, and some have been contradicted by other cases within the same jurisdiction. *Compare, e.g.*, *Westmoreland*, 299 F.3d at 466 (concluding "that a nonsignatory cannot compel arbitration merely because he is an agent of one of the signatories,"), *with* DK Joint Venture 1 v. Weyand, 649 F.3d 310, 314–17 (5th Cir. 2011) (explaining that agents are not ordinarily bound by arbitration clauses even though they may be able to enforce such clauses against a signatory); *compare Koechli*, 870 So. 2d at 944 ("We reject the broad construction of the agency exception urged by appellants, which would permit a non-signatory agent to a signatory to invoke arbitration simply because the agency relationship exists."), *with Qubty*, 817 So. 2d at 958 (allowing non-signatory agent to enforce arbitration agreement); *compare Britton*, 4 F.3d at 742 (refusing to allow non-signatory agent to enforce arbitration clause), *with Letizia*, 802 F.2d at 1187–88 (finding that the arbitration clause covered non-signatory agents).

186. *In re Merrill Lynch*, 235 S.W.3d at 189.

against the company, but also against every single employee and agent of the company.[187] The singular focus on the intent of the party drafting and seeking to benefit from the arbitration clause highlights just how strongly *Moses H. Cone*'s dicta regarding the presumption in favor of arbitration informs the courts' reasoning, even when courts purport to apply general rules of contract law.

Second, such a rule becomes even more difficult to justify under traditional contract and agency law when the underlying dispute involves a tort or statutory violation rather than a breach of contract. While agents have no obligation under the contract, they are still answerable for any torts that they commit against a contracting party because tort obligations are based in law and not in the contract.[188] In other words, an agent's rights and duties are completely independent of the contract, and in light of that framework, the agent has no standing to rely on the contract to force an opposing party out of court and into arbitration.

Third, giving agents rights under the contract simply because of their status as agents may lead to anomalous results. Unless courts intend to explicitly create special rules for arbitration clauses, if an agent is subject to the arbitration clause of a contract, then the agent presumably is subject to the other provisions of the contract as well. But it seems unlikely that courts would be willing to allow plaintiffs who sign contracts with corporations to sue not just the corporation, but also any of its employees, for every breach. If an employer fails to pay an employee for example, it is doubtful that the employee can sue all other employees of the company in addition to the company itself. Moreover, if an agent can enforce the arbitration clause, then presumably it would be bound by the arbitration clause as well and could be required to arbitrate a dispute brought against it even though the agent did not sign the arbitration agreement. However, courts have been much more reluctant to bind an agent to an arbitration clause than to allow the agent to enforce the arbitration clause.[189] That

187. *See, e.g.*, *Constantino*, 897 N.E.2d at 1266 (refusing to allow non-signatory employees of a nursing home to enforce an arbitration clause where the plaintiff "could not reasonably have understood that she was agreeing to waive her right to a jury trial not only against the nursing home, but also against all its employees").

188. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 343 (1958); 3 AM. JUR. 2D *Agency* § 280 (2002) ("Generally, agency law does not insulate an agent from liability for his or her own torts, because an agent's tort liability is not based upon the contractual relationship between the principal and agent . . . . ") (footnote omitted).

189. *See, e.g.*, *DK Joint Venture 1*, 649 F.3d at 314–17 (explaining that agents are not ordinarily bound by arbitration clauses even though they may be able to enforce such clauses against a signatory); *see also McCarthy*, 22 F.3d at 361 (refusing to allow an agent to enforce arbitration clause because "[i]n appellant's scenario, then, the agent, though he could not be compelled to arbitrate,

discomfort with binding agents to a contract and hence to the contract's arbitration clause merely reinforces how a rule allowing agents to enforce arbitration clauses gives arbitration clauses special status and deviates from standard common-law principles.

This does not mean that non-signatory agents should never be able to enforce arbitration clauses. Instead, it means that courts are using the wrong doctrine in analyzing such cases. In many ways, agency theory is ill-suited for addressing whether a plaintiff is required to arbitrate lawsuits filed against non-party agents for their own illegal conduct. The discussion of agency theory presumes a situation where an agent negotiates a contract on behalf of the principal and then the question arises whether the negotiating agent is bound by that contract.[190] But many agency cases may involve misconduct by employees, debt collectors, or other agents who played no role in drafting or negotiating the agreement and whose agency role for the company arises in an entirely different capacity.[191]

The doctrine that seems most applicable to lawsuits brought against non-signatory agents and employees is not agency but third-party beneficiary. That is because in agency cases, courts often focus on whether the arbitration agreement was intended to cover agents as well as principals.[192] That language of intent speaks directly to third-party beneficiary doctrine. Under that doctrine, a non-signatory is a third-party beneficiary with rights to enforce the contract where the signing parties intend to confer a benefit on the non-signatory, such as where a party contracts to perform a service but directs that payment be provided to a third party.[193] The crucial inquiry is intent.[194] Only intended beneficiaries

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nonetheless could compel the claimant to submit to arbitration"); Flink v. Carlson, 856 F.2d 44, 46 (8th Cir. 1988) ("Signing an arbitration agreement as agent for a disclosed principal is not sufficient to bind the agent to arbitrate claims against him personally."); Riley v. Ennis, Docket No. 290510, 2010 WL 673369, at *1 (Mich. Ct. App. Feb. 25, 2010) (refusing to enforce arbitration agreement in lawsuit against signatory's agent).

190. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006) (discussing the obligations of "an agent . . . [who] makes a contract on behalf of a disclosed principal").

191. *See supra* notes 172–73 and accompanying text.

192. *See supra* text accompanying note 182; *see also* Letizia v. Prudential Bache Secs., Inc., 802 F.2d 1185, 1188 (9th Cir. 1986) (concluding that the employer "has clearly indicated its intention to protect its employees" by including an arbitration clause in its customer agreement and therefore a non-signatory employee could enforce the arbitration clause); BLAND ET AL., *supra* note 9, § 7.4.4 at 255–58 (describing third-party beneficiary doctrine as the proper framework rather than agency law).

193. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

194. *See id.*; 9 JOHN E. MURRAY, JR., CORBIN ON CONTRACTS § 44.1 (rev. ed. 2007); *accord* R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 164 (4th Cir. 2004) (stating that a third party may enforce a contract "if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person") (quoting Goode v. St. Stephens United Methodist Church, 494 S.E.2d 827, 833 (S.C. 1997)); E.I. DuPont de Nemours & Co. v. Rhone

have rights under the contract; incidental beneficiaries do not.[195] Thus, in addressing attempts by agents to enforce arbitration clauses, courts should apply third-party beneficiary principles rather than the special agency principles that they have created to allow agents to compel arbitration.

Although it may seem academic to argue that courts should switch from an agency-based doctrine to a third-party beneficiary doctrine, there are significant differences between the two, at least as courts have applied them to arbitration provisions. Whereas courts have operated under a default presumption that agents and employees can enforce arbitration clauses, even if they are not explicitly named in the agreement, unless the arbitration clause specifically excludes them, third-party beneficiary doctrine works the opposite way. There, the presumption is that a non-signatory is not an intended beneficiary of the contract, and the burden is on the non-signatory to present evidence of beneficiary status.[196] Moreover, the fact that the contract or the arbitration clause fails to mention the non-signatory often is sufficient on its own to defeat any claim to third-party beneficiary status.[197] As a result, there are many situations where a non-signatory will qualify as an agent, but not as a third-party beneficiary.[198] Thus, applying the correct contractual doctrine,

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Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 200 n.7 (3d Cir. 2001) ("Under the third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed.").

195. *See, e.g.*, Nitro Distrib., Inc. v. Dunn, 194 S.W.3d 339, 345 (Mo. 2006) (En Banc) ("To be bound as a third-party beneficiary, the terms of the contract must clearly express intent to benefit that party or an identifiable class of which the party is a member. In cases where the contract lacks an express declaration of that intent, there is a strong presumption that the third party is not a beneficiary and that the parties contracted to benefit only themselves. Furthermore, a mere incidental benefit to the third party is insufficient to bind that party.") (citations omitted); RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. a.

196. *See, e.g.*, McCarthy v. Azure, 22 F.3d 351, 362 (1st Cir. 1994); 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 10.3 (1990).

197. *See, e.g.*, Brantley v. Republic Mortg. Ins. Co., 424 F.3d 392, 396–97 (4th Cir. 2005) (finding that a mortgage insurer was not a third-party beneficiary of a contract between the consumer and the mortgage lender because the contract made no reference to the insurer or otherwise evinced any intent by the parties to benefit the insurer); Bridas S.A.P.I.C. v. Gov't of Turkm., 345 F.3d 347, 362 (5th Cir. 2003) (finding that a failure to identify the beneficiary in the contract showed that it was not a third-party beneficiary); InterGen N.V. v. Grina, 344 F.3d 134, 146 (1st Cir. 2003) (holding that an arbitration clause limited to explicitly defined "Buyer" and "Seller" did not evince an intent to benefit other parties because "the law requires 'special clarity' to support a finding 'that the contracting parties intended to confer a benefit' on a third party") (citing *McCarthy*, 22 F.3d at 362).

198. *See, e.g.*, *McCarthy*, 22 F.3d at 362 (finding that non-signatory seeking to enforce arbitration clause was an agent of the signatory, but not a third-party beneficiary); Britton v. Co-op Banking Grp., 4 F.3d 742, 745–48 (9th Cir. 1993) (same); Qubty v. Nagda, 817 So. 2d 952, 957 (Fla. Dist. Ct. App. 2002) ("Qubty concedes that the contract involved here does not designate him to be a third party beneficiary of the contract. He nonetheless contends he has a right to enforce the arbitration agreement

rather than creating special agency doctrines in the arbitration context, will have a significant effect on the ability of third parties to enforce arbitration provisions.

To be sure, some courts have reasoned that limiting an agent's right to enforce an arbitration clause is improper (a) because entities can act only through their agents,[199] and (b) because it will allow plaintiffs to circumvent arbitration clauses by suing non-signatory agents instead of the signatory corporation.[200] These concerns, however, are overblown. First, applying third-party beneficiary doctrine instead of the current agency doctrine does not eliminate a non-signatory's ability to enforce the arbitration clause. It merely establishes that the non-signatory will not be able to enforce it in the absence of clear evidence showing that the parties intended to give enforcement powers to non-signatories. If an entity utilizing an arbitration clause wishes to protect its employees and agents, all it needs to do is to draft the arbitration clause to include them as well. While some courts have suggested that it is too cumbersome to require drafting parties to spell out all the employees and agents that can enforce the clause,[201] there is no reason why this is the case.[202] Plenty of contracts spell out the intended third-party beneficiaries, and if third-party beneficiary doctrine can function effectively for other contractual provisions, there is no reason to think it cannot function effectively for arbitration clauses as well. Indeed, it seems only fair to require the parties to spell out the intended beneficiaries in the contract. A party that is giving up its right to go to court is entitled to know with whom it will be required to arbitrate rather than finding out only after a dispute arises.

Second, suing a non-signatory agent instead of the signatory principal carries its own set of risks. If the plaintiff sues on a contract claim, then the claim will fail if the agent is the only defendant because the agent is

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under principles of agency. We agree."); Constantino v. Frechette, 897 N.E.2d 1262, 1265–68 (Mass. App. Ct. 2008).

199. *See, e.g.*, *In re* Merrill Lynch Trust Co., 235 S.W.3d 185, 188 (Tex. 2007).

200. *See, e.g.*, Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993) ("[W]e believe that the parties fully intended to protect the individual Chairs to the extent they are charged with misconduct within the scope of the agreements. If it were otherwise, it would be too easy to circumvent the agreements by naming individuals as defendants instead of the entity Agents themselves.").

201. *See, e.g.*, *In re Merrill Lynch*, 235 S.W.3d at 189.

202. In fact, many arbitration clauses specifically identify employees or agents as intended beneficiaries. *See, e.g.*, Hoefs v. CACV of Colo., LLC, 365, F. Supp. 2d 69, 74 (D. Mass. 2005) (arbitration clause stated that it applied to "[a]ny claim or dispute ('Claim') by either you or us against the other, or against employees, agents, or assigns of the other"); Jones v. Jacobson, 125 Cal. Rptr. 3d 522, 536–37 (Ct. App. 2011) (noting that the language of the arbitration clause stated that the clause "shall also apply to any such controversy involving any agent or employee of yours").

not a party to the contract. For other claims, an agent may not be as wealthy as a principal and may not be able to pay the full judgment. If the principal is not a party, then the plaintiff cannot recover under a respondeat superior theory either.[203] For these reasons, most tort plaintiffs choose to sue the principal rather than the agent alone.[204]

Third, companies may intentionally choose not to include agents and employees within the purview of the arbitration clause because they may not want them to be bound by the arbitration clause. If employees wish to avoid being bound by an arbitration clause, they, as a matter of fairness, also should not be permitted to enforce the clause.

Finally, and perhaps most importantly, the concern that allowing a plaintiff to unfairly escape its obligation to arbitrate by suing non-signatory agents presumes the answer to the question of what disputes, and against whom, the plaintiff agreed to arbitrate. The fact that a plaintiff has agreed to arbitrate a certain type of dispute against one party does not mean that the plaintiff has agreed to arbitrate that dispute against all possible parties. Rather, that plaintiff has only agreed to arbitrate disputes against other signatories, absent any express indication in the contract to apply the arbitration clause to agents or other non-signatories. In fact, it is quite common to have a lawsuit against both signatory and non-signatory parties where all the claims arise out of the same contract or the same set of facts. *Moses H. Cone* was such a case.[205] In these situations, the FAA does not require the plaintiff to arbitrate all claims against all parties, signatories and non-signatories alike, simply because the claims arise out of the same facts. Instead, courts can require arbitration of the claims against the signatory, but they have no authority to require arbitration of the claims against the non-signatory. Courts simply retain discretion either to stay the non-arbitrable claims until the conclusion of the arbitration or to allow both sets of cases to proceed in tandem.[206] By presuming that a plaintiff who sues non-signatory agents is

203. Under the doctrine of respondeat superior, an employer is liable for the torts of its employees committed within the scope of employment. *See* DAN B. DOBBS, THE LAW OF TORTS 905 (2000) (defining respondeat superior).

204. *See, e.g.*, 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 26.1 (Aspen 3d ed. 2008) ("[I]n the vast majority of cases the plaintiff seeks satisfaction from the employer alone.").

205. In that case, the Hospital had two substantive disputes—one with Mercury, which was a party to the arbitration clause, and one with the Architect that could not be sent to arbitration because there was no agreement to arbitrate between the Hospital and the Architect. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 19–20 (1983).

206. *See Moses H. Cone*, 460 U.S. at 20 n.23 (stating that the decision whether to stay resolution of the non-arbitrable claims or to allow them to proceed "is one left to the district court (or to the state trial court under applicable state procedural rules) as a matter of its discretion to control its docket").

avoiding its obligation to arbitrate, courts are begging the question of with whom the plaintiff agreed to arbitrate.

In short, courts have used the federal policy favoring arbitration to deviate from traditional common-law principles and give agents and employees a presumptive right to enforce arbitration clauses that they never signed. As a result, courts are requiring individuals to arbitrate disputes against parties with whom they never agreed to arbitrate. In doing so, courts are improperly denying those parties their day in court and also undermining the basic purpose of the FAA to make arbitration agreements just like other contracts.

2. Equitable Estoppel

Another way in which courts have improperly expanded the federal policy favoring arbitration to give non-signatories broader rights to enforce arbitration clauses than other contract provisions is through the doctrine of equitable estoppel. Many courts have interpreted the doctrine so broadly as to give non-signatories virtually the exact same rights under the contract as a signatory, and have omitted basic limitations on the breadth of estoppel, such as the requirements of misrepresentation and detrimental reliance.

The basic purpose of equitable estoppel is to prevent a party from taking unfair advantage of another party by inducing that party to rely on the contract and then later seeking to avoid the contract's burdens. Equitable estoppel generally is defined as "a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way."[207] As the definition shows, equitable estoppel requires (1) inconsistent or false statements that (2) induce detrimental reliance—i.e., causing an opposing party to act to his or her detriment based on a statement that is false or that the party later disavows. Detrimental reliance is widely described in treatises and in case law as a critical and defining feature of equitable estoppel.[208] Such a requirement

207. BLACK'S LAW DICTIONARY 630 (9th ed. 2009); *see also* T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 388 (2008) (describing the contours of equitable estoppel).

208. *See* Lyng v. Payne, 476 U.S. 926, 935 (1986) ("An essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations . . . ."); RESTATEMENT (SECOND) OF TORTS § 894 (1979); 28 AM. JUR. 2D *Estoppel and Waiver* § 74 (West 2014) ("A requisite element of the doctrine of equitable estoppel is that the party invoking it must show that he or she relied on the

makes sense, since a primary purpose of estoppel is to prevent parties from taking advantage of others through false and inconsistent statements. If the opposing party has not relied on the false or misleading statement, then that party has not been unfairly disadvantaged.

The stated purpose of equitable estoppel in arbitration is similar: to prevent a party who sues to recover on a claim that relates to the contract containing the arbitration clause from avoiding the contract's burdens, namely, compelled arbitration.[209] The theory is that by suing non-signatories instead of signatories, the plaintiff is trying to have it both ways by relying on the contract to make a claim, while disavowing the contract's arbitration clause at the same time.

With this concern in mind, courts have permitted non-signatories to enforce arbitration clauses under an equitable estoppel theory in two situations: (1) where the claims—whether sounding in contract, tort, or statute—are sufficiently intertwined with the contract containing the arbitration clause; or (2) where the signatory brings claims that allege "substantially interdependent and concerted misconduct" between a non-signatory and a signatory.[210] Not surprisingly, in developing the arbitration version of the equitable estoppel doctrine, courts have relied on the federal policy favoring arbitration, concluding that if a signatory were allowed to avoid arbitration by naming non-signatories, "the federal policy in favor of arbitration [would be] effectively thwarted."[211]

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other party's conduct to his or her detriment or prejudice."); 31 C.J.S. *Estoppel and Waiver* § 113 (2008) (describing "detrimental reliance on another's misrepresentations" as "an essential element of estoppel"). *But cf.* Anenson, *supra* note 207, at 388–98 (stating that some courts have moved away from strictly requiring detrimental reliance for various forms of estoppel without speaking to equitable estoppel directly).

209. *See, e.g.*, R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 160–61 (4th Cir. 2004) ("In the context of arbitration, the doctrine [of equitable estoppel] applies when one party attempts to hold another party to the terms of an agreement while simultaneously trying to avoid the agreement's arbitration clause.") (quotation marks and punctuation omitted); MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999) (warning that a signatory should not be permitted to have it both ways).

210. Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir. 2000) (quoting MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th. Cir.1999)) (quotation marks omitted); CD Partners, LLC v. Grizzle, 424 F.3d 795, 800 (8th Cir. 2005).

211. Sam Reisfeld & Son Imp. Co. v. S. A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976); *accord* Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citing Avila Group, Inc. v. Norma J. of Cal., 426 F. Supp. 537, 542 (S.D.N.Y. 1977)); *Franklin*, 177 F.3d at 947.

Equitable estoppel comes up often in arbitration cases[212] and "is the most common argument used by non-parties as the basis for enforcing an arbitration provision."[213] Part of the reason is that courts have made it much easier to apply equitable estoppel with respect to arbitration clauses than with respect to other contractual provisions. The expansion of equitable estoppel in the arbitration context beyond the doctrine's traditional parameters has occurred in several ways.

First, the hallmark element of traditional equitable estoppel—detrimental reliance—is not a relevant consideration in the arbitration context.[214] Instead of focusing on whether the opposing party suffers detriment, the arbitration version of equitable estoppel looks solely at the actions of the signing party—namely whether that party is seeking to benefit from the contract while at the same time trying to unfairly avoid the contract's arbitration clause.[215] Most cases applying equitable estoppel do not discuss (let alone require) detrimental reliance at all.[216] The shift away from detrimental reliance and toward focusing solely on whether the signing party made an inconsistent or false statement likely derives in part from the federal policy favoring arbitration. Courts appear to have concluded that allowing a signatory to an arbitration agreement to bring a dispute in court against a non-signatory would undermine the federal policy, even if the non-signatory suffers no harm.[217]

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212. *See, e.g.*, Ross v. Am. Express Co., 478 F.3d 96, 100 (2d Cir. 2007) ("[C]ourts have frequently stayed proceedings and compelled arbitration under the FAA on equitable estoppel grounds."); James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 PEPPERDINE DISP. RESOL. L.J. 469, 489 (2004) (describing equitable estoppel as "a doctrine frequently invoked in commercial arbitration").

213. Richard M. Alderman, *The Fair Debt Collection Practices Act Meets Arbitration: Non-parties and Arbitration*, 24 LOY. CONSUMER L. REV. 586, 596 (2012).

214. Only a small minority of jurisdictions appear to require detrimental reliance in the arbitration context. *See, e.g.*, Peach v. CIM Ins. Corp., 816 N.E.2d 668, 674 (Ill. App. Ct. 2004) (holding that detrimental reliance is an element of equitable estoppel); B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So. 2d 483, 492 (Miss. 2005) (same); Angrisani v. Fin. Tech. Ventures, L.P., 952 A.2d 1140, 1148 (N.J. Super. Ct. App. Div. 2008) (same); *see also* Donaldson Co. v. Burroughs Diesel, Inc., 581 F.3d 726 (8th Cir. 2009) (stating that Mississippi law requires detrimental reliance for equitable estoppel to apply, unless there is substantial and concerted misconduct between a signatory and a non-signatory).

215. *See supra* notes 206–07 and accompanying text.

216. *See* LaForge, *supra* note 90, at 246–51 (arguing that courts have eliminated or "radically transform[ed]" the reliance requirement for equitable estoppel in the arbitration context); Nima H. Mohebbi, Comment, *Back Door Arbitration: Why Allowing Nonsignatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U. PA. J. BUS. L. 555, 571–76 (2010) (arguing that courts have not required detrimental reliance for equitable estoppel in arbitration).

217. *See supra* note 208 and accompanying text. In addition, some courts have acknowledged that while state law generally requires detrimental reliance, the federal policy favoring arbitration overrides the reliance requirement. *See, e.g.*, Pearson v. Hilton Head Hosp., 733 S.E.2d 597, 601 (S.C. Ct. App. 2012) (holding that "the federal substantive law of arbitratbility," which includes the "liberal federal

The result has been to greatly expand the reach and applicability of equitable estoppel so that it can apply almost any time a party to an arbitration clause sues a non-signatory. "Without reliance, estoppel extends to an infinite variety of situations because its operation no longer depends on a prior relationship between the parties to the lawsuit."[218] If all that matters is whether the signatory's suit against the non-signatory is seen as inconsistent with its decision to sign a contract with an arbitration clause, then equitable estoppel can apply in almost all non-signatory situations. This expansion is significant because detrimental reliance is unlikely to arise in many arbitration cases. Most non-signatories to a contract with an arbitration clause, such as an employee of a signatory company or a sub-contractor of a signatory contractor, have little or no knowledge of the terms of the contract between the signatory parties, let alone whether there is an arbitration clause and what disputes that clause covers. Moreover, even if a non-signatory party is aware of the arbitration clause, it will not always be the case that the party relied on that knowledge. In the prior example of a salesperson making a false representation about the quality of an automobile,[219] it is unlikely that the salesperson's willingness to make false statements was induced by the presence of the arbitration provision—i.e. that in the absence of the arbitration provision, the salesperson would have given truthful information.

Even if there were reliance by a non-signatory party, it is not clear that the reliance would be reasonable. General principles of equitable estoppel require not just reliance, but reasonable reliance, by the non-signatory.[220] It would not necessarily be reasonable for a non-signatory to assume that an arbitration clause in a contract between two parties would cover non-signatories in the absence of express language indicating intent to cover them. Indeed, given the Supreme Court's emphasis that arbitration "is a matter of consent, not coercion,"[221] it would seem unreasonable for a

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policy favoring arbitration agreements," determines whether equitable estoppel applies). Recently, however, the Supreme Court has suggested in dicta that state law determines if and when a non-signatory can enforce an arbitration agreement. Arthur Andersen, LLP v. Carlisle, 556 U.S. 624, 632 (2009) ("[A] litigant who was not a party to the relevant arbitration agreement may invoke § 3 if the relevant state contract law allows him to enforce the agreement.").

218. Anenson, *supra* note 207, at 390.

219. *See supra* text accompanying note 174.

220. *See* 28 AM. JUR. 2D *Estoppel and Waiver* § 74 (stating that for estoppel to occur, the estopped party must "induce reasonable reliance by the other party"); Anenson, *supra* note 207, at 389 (noting that "some courts specify that the reliance be reasonable under the circumstances").

221. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

third party to try to rely on an arbitration provision that it never signed. Yet, courts appear to seldom check for reasonable reliance before finding that a party is required to give up its right to go to court on grounds of equitable estoppel.

The effect of giving arbitration clauses special status in the estoppel context is especially evident when equitable estoppel is examined alongside the waiver doctrine discussed previously.[222] It is notable that in the waiver context, courts have superimposed a reliance requirement in order to make it more difficult for a party to *lose* the ability to send a dispute to arbitration. By contrast, with respect to equitable estoppel, courts have largely eliminated the reliance requirement so as to make it easier for non-signatories to *gain* the right to compel arbitration. In other words, courts have simply manipulated the element of reliance to require it when doing so promotes arbitration and to take it away when it would impede arbitration.

Second, some courts have expanded the scope of equitable estoppel in arbitration so far as to blur the distinction between a signatory and a non-signatory. As currently interpreted, equitable estoppel allows a non-signatory to enforce an arbitration clause in almost any circumstance that a signatory can enforce it. Given the default presumption that arbitration agreements bind only the parties that sign them, the blending of signatory and non-signatory rights suggests that equitable estoppel has grown beyond what general common-law principles permit.

Courts have also broadly interpreted what constitutes inconsistent behavior by the signatory who signed the arbitration clause but is suing a non-signatory in court. The purpose of estoppel is to prevent a party from having it both ways by seeking to enforce the contract in order to obtain a remedy, but to avoid the contractual requirement of submitting disputes to arbitration. Thus, applying equitable estoppel might make sense where a signatory sues a non-signatory third party for breach of contract and claims that the third party is somehow bound by the contract. There, the signatory is trying to enforce the contract and at the same time bypass the contract's arbitration provision. Consequently, the early cases involving equitable estoppel reflected a more conventional view of estoppel, as they speak in terms of plaintiffs seeking to enforce the contract or rely on its terms, or were cases where a plaintiff took what was essentially a contract claim and tried to recast it as a tort claim in order to avoid arbitration.[223]

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222. *See supra* Part III.B.

223. *See, e.g.*, Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir. 2000) (describing estoppel as applying when the signatory "must rely on the terms of the written agreement

The doctrine has subsequently grown, however, and is no longer limited to breach of contract claims or breach of contract claims that are dressed up as tort claims. Many courts have found that equitable estoppel requires arbitration of non-contract claims so long as the claims refer to the contract, are intertwined with the contract, or presume the contract's existence.[224] Although it may seem that courts are still tying estoppel back to the underlying contract, that language in practice turns out to have broad reach and really requires only that the claims relate to the contract in some way. As a result, the standard ends up being very similar to the standard used for determining whether claims against a signatory must be resolved in arbitration. A standard arbitration clause will cover any dispute that bears a "significant relationship" to the contract, "touches upon" the contract, or that has its genesis in the contract.[225] Because many arbitration clauses are broadly written and interpreted liberally, only a dispute between signatories that is wholly unrelated to the contract will not be subject to arbitration.[226] As a result, courts have conferred, through equitable estoppel, virtually the same rights to non-signatories as they have to signatories. This threatens to make equitable estoppel the exception that swallows the general rule that non-signatories cannot enforce arbitration provisions. Perhaps recognizing that such a broad application of estoppel would erase the distinction between signatories and non-signatories, courts have been more willing to find that claims against non-signatories are unrelated to the contract than similar claims brought by signatories.[227] Nonetheless, the close similarity between signatories and non-signatories in their abilities to compel arbitration suggests that courts

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in asserting its claims against the nonsignatory"); McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342, 344 (11th Cir. 1984) (finding estoppel applicable where the essence of the plaintiff's claims was that the defendant breached its contractual duties and speculating that estoppel would not apply to unrelated tort claims); Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp., 659 F.2d 836, 838–39 (7th Cir. 1981) (applying estoppel after concluding that the plaintiff tried to artfully recast a contract claim as a tort claim).

224. *See, e.g.*, CD Partners, LLC v. Grizzle, 424 F.3d 795, 799 (8th Cir. 2005) (finding that equitable estoppel applied to tort claims of fraud and negligence against a non-signatory party because the claims "rely upon, refer to, and presume the existence of the written agreement between the two corporations"); Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 758 (11th Cir. 1993) (finding that equitable estoppel applied to plaintiff's multiple tort claims, including fraud claims, because each claim "makes reference" to the licensing agreement containing the arbitration clause).

225. *See* BLAND ET AL., *supra* note 9, § 7.3.3 at 224–32.

226. *See, e.g.*, Ford v. NYLCare Health Plans of the Gulf Coast, Inc., 141 F.3d 243, 251 (5th Cir. 1998) (finding that a doctor's false advertising claim against a health maintenance organization (HMO) was not related to the contract between the doctor and the HMO covering the performance of medical services).

227. *See, e.g.*, Hill v. GE Power Sys., Inc., 282 F.3d 343 (5th Cir. 2002) (finding no estoppel where the plaintiff's claim did not rely on the express terms of the agreement).

have overreached in interpreting and applying the doctrine of equitable estoppel.

Just as with the courts' expansion of agency doctrine, the expansion of estoppel appears motivated by the belief that estoppel is necessary to prevent plaintiffs from having their cake and eating it too. That belief is misguided for the same reason that it is misguided in the agency context.[228] If the party sues signatories and non-signatories, then courts can still require arbitration against the signatory and stay the non-arbitrable claims until the conclusion of the arbitration. Additionally, there is no reason why traditional equitable requirements, including detrimental reliance, are sufficient to protect fairness in other contexts but not in the arbitration context. Perhaps most importantly, the unfairness argument presumes that the signatory plaintiff is trying to hold the non-signatory to the terms of the contract. In those circumstances, where the plaintiff's claim is essentially a breach of contract claim, equitable estoppel may well be applicable, assuming detrimental reliance. But tort claims, like fraud and fraudulent inducement, and statutory claims do not arise out of the contract. They are grounded in duties created in law. In those situations, the plaintiff is not trying to hold a defendant to the contract but is trying to hold the defendant accountable for its violations of legal duties. Simply put, the plaintiff is not trying to have it both ways.[229]

228. *See supra* notes 198–203 and accompanying text.

229. Another aspect of equitable estoppel that has received some criticism is the doctrine of "concerted misconduct" estoppel. Under this doctrine, a non-signatory can enforce or be bound by an arbitration clause where there is "concerted misconduct" between a signatory and a non-signatory. In other words, a non-signatory gets to obtain the benefits of the contract simply because its illegal activity is bound up with the illegal actions of a signatory. There appears to be no contract-law analog for rewarding a party that behaves illegally by granting the party rights under the contract. As a result, this prong of estoppel has been extensively criticized. *See, e.g.*, J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?*, 21 REV. LITIG. 593 (2002); Driskill, *supra* note 180; Alexandra Anne Hui, Note, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 711 (2007). Some courts have started to retreat from recognizing "concerted misconduct" estoppel. *See, e.g.*, *In re* Humana Inc. Managed Care Litig., 285 F.3d 971, 976 (11th Cir. 2002) ("The plaintiff's actual dependence on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel."), *rev'd on other grounds*, *sub nom.* PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003); Nitro Distrib., Inc. v. Dunn, 194 S.W.3d 339, 350–51 (Mo. 2006) (rejecting argument for estoppel that claims against the non-signatory were inextricably intertwined with claims against the signatory as inconsistent with general contract principles); Angrisani v. Fin. Tech. Ventures, L.P., 952 A.2d 1140, 1149–50 (N.J. Super. Ct. App. Div. 2008) (rejecting argument that estoppel applied because the non-signatory's claims were inextricably intertwined with the signatory's claims); *In re* Merrill Lynch Trust Co., 235 S.W.3d 185, 191 (Tex. 2007) ("But we have never compelled arbitration based solely on substantially interdependent and concerted misconduct, and for several reasons we decline to do so here."); *see also* Ross v. Am. Express Co., 547 F.3d 137, 144 (2d Cir. 2008) (limiting concerted misconduct estoppel to parties that

Due in no small part to the liberal federal policy favoring arbitration, courts have created a "unique" doctrine of equitable estoppel as it applies to arbitration.[230] Gone is the bedrock requirement of detrimental reliance, and courts instead have read the doctrine broadly so as to blur the distinction between signatories and non-signatories. Given the growth of estoppel doctrine into areas that spread far beyond the doctrine's common law roots, it is no surprise that estoppel has become the most common way to force parties to arbitrate disputes against non-signatory parties with whom they never agreed to arbitrate.

CONCLUSION

Arbitration clauses are in millions of contracts that govern numerous relationships in individuals' lives. Because of the far-reaching ramifications of forcing individuals to resolve disputes in arbitration rather than in court, it is important to ensure that arbitration clauses are properly interpreted. Unfortunately, current interpretation of the FAA has drifted away from the Act's original goals. Thanks in part to the judiciary's overly broad reading of the Supreme Court's poorly-conceived description of a federal policy favoring arbitration, courts have moved away from treating arbitration clauses like other contracts. Instead, arbitration clauses have become "super contracts," subject to special rules that ensure that they remain enforceable even when other contractual provisions are not. The result not only runs afoul of the original purpose of the FAA, but also unfairly deprives many litigants of their right to seek redress in a court of law.

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share a close corporate relationship, such as a parent and a subsidiary). The merits of "concerted misconduct" estoppel fall outside the scope of this Article.

230. Michael A. Rosenhouse, Annotation, *Application of Equitable Estoppel to Compel Arbitration by or Against Nonsignatory—State Cases*, 22 A.L.R. 6th 387, 387 (2007) (stating that courts have created "a unique body of 'equitable estoppel' law that is peculiarly applicable" to arbitration).