

# The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act

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*Since 1984, a majority of the Supreme Court has held that the Federal Arbitration Act (“FAA”) preempts conflicting state arbitration laws, and that the FAA must be applied in state courts. Consequently, federal courts have invalidated many states’ attempts to regulate arbitration. This reality has shaped American arbitration law for over three decades. Justice Clarence Thomas has vigorously fought against this approach to arbitration policy since he joined the Supreme Court. Indeed, he has been among the most vocal and consistent opponents of the application of the FAA in state court proceedings. Yet his voice has always been in dissent, most recently in the December 2015 decision in *DIRECTV, Inc. v. Imburgia*. This Article represents the most comprehensive examination to date of Justice Thomas’ views on both the FAA and arbitration more broadly. Beginning with a background on the FAA’s history and the Supreme Court’s arbitration jurisprudence, it explores his unique judicial philosophy and its intersection with arbitration policy. In an area of procedural law that evades facile labels of ‘liberal’ and ‘conservative,’ Justice Thomas shows the ways in which a conservative preference for states’ rights can actually lead to liberal procedural and substantive outcomes.*

## CONTENTS

I.	Introduction . . . . .	34
II.	A Brief History of the FAA . . . . .	37

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III.	State Arbitration Statutes and the Supreme Court . . .	40
	A. State Arbitration Statutes . . . . .	40
	B. The Supreme Court and the FAA . . . . .	43
IV.	Justice Thomas and the Federal Arbitration Act . . . . .	48
	A. Justice Thomas' Background and Jurisprudence ..	48
	1. The Commerce Clause . . . . .	49
	2. The Privileges or Immunities Clause . . . . .	52
	3. 'Social' Issues: Abortion, Affirmative Action and Marriage Equality . . . . .	55
	4. Criticism, Reputation and Legacy . . . . .	55
	B. Justice Thomas and FAA Preemption . . . . .	61
V.	Conclusion . . . . .	73

## I. INTRODUCTION

In December 2015, the Supreme Court handed down its decision in *DIRECTV, Inc. v. Imburgia*.<sup>1</sup> The outcome was hardly shocking to the legal community, given the Court's past decade of arbitration jurisprudence.<sup>2</sup>

The underlying dispute arose from a 2008 lawsuit by former customers of DIRECTV, a satellite television provider, over the company's early termination fees. They sought to bring a class action with other similarly situated customers. Although their contract with DIRECTV contained a mandatory arbitration clause and class action waiver, California courts had previously held that such waivers were unenforceable in consumer contracts of adhesion.<sup>3</sup> Consequently, the

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1. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). Arbitration is a dispute resolution process whereby the parties submit their dispute to a third-party neutral who then issues a binding award on the disputants. See Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 435–36 (2007) (listing four defining elements of arbitration as (i) a process to settle disputes between parties; (ii) a neutral third party; (iii) an opportunity for the parties to be heard; and (iv) a final, binding decision by the third party).

2. The result in *DIRECTV* was widely anticipated by the legal community. See, e.g., Charles M. Dyke, Christopher M. Mason, & Dan Deane, *Supreme Court agrees to decide the third case in five years involving enforcement of class-arbitration waivers in FAA-governed arbitration agreements*, NIXON PEABODY (Mar. 24, 2015), <https://www.nixonpeabody.com/en/ideas/articles/2015/03/24/supreme-court-agrees-to-decide-the-third-case-in-five-years-involving-enforcement-of-cl> (last visited Apr. 20, 2017); Scott O'Connell & Dan Deane, *Will SCOTUS put the hammer down on class actions?*, NIXON PEABODY (Sept. 23, 2015), <https://www.nixonpeabody.com/ideas/articles/2015/09/23/will-scotus-put-the-hammer-down-on-class-actions> (last visited Apr. 20, 2017).

3. The California Supreme Court, in the earlier decision of *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), held that class action waivers in consumer

plaintiffs sued in California state court. Conscious of California state law, DIRECTV made no attempt to compel arbitration.

In 2011, while that litigation was proceeding, American law suddenly changed. In *AT&T Mobility v. Concepcion*, the Supreme Court held that California's ban of class action waivers was incompatible with the Federal Arbitration Act ("FAA").<sup>4</sup> Seizing the opportunity, DIRECTV quickly moved to dismiss the consumers' lawsuit and require arbitration since, under *Concepcion*, class arbitration waivers were now enforceable.

The California trial court nevertheless denied DIRECTV's motion, relying on the specific language of the contract along with existing California law. The California Court of Appeal affirmed, and the California Supreme Court denied review.<sup>5</sup>

DIRECTV appealed to the U.S. Supreme Court, which reversed. Justice Stephen Breyer, writing for the six-member majority, rejected the California state courts' interpretation of the class arbitration waiver in a way that invalidated the arbitration agreement. Instead, the Supreme Court found that such an interpretation violated the requirement of the FAA that agreements to arbitrate should be placed on the same footing as all other contracts.<sup>6</sup> In short, the FAA must trump California's policy preferences.

As one commentator noted, the Court added *DIRECTV* "to the ever-growing line of decisions reversing state court refusals to enforce arbitration agreements."<sup>7</sup> The decision did not receive a great deal of public attention. To the extent that it generated broader coverage in

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arbitration agreements were unconscionable, and thus unenforceable, in certain circumstances. Specifically, the California court declined to enforce class action arbitration waivers if (i) the agreement is contained in an adhesion contract; (ii) disputes between the parties are likely to involve small amounts of damages; and (iii) the party with lesser bargaining power alleges a deliberate scheme to defraud. These factors became known as the "Discover Bank Rule," a judicially-created doctrine to protect consumers.

4. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (finding that the so-called "Discover Bank Rule" stood as an impermissible obstacle to Congress's objectives under the FAA).

5. *Imburgia v. DIRECTV Inc.*, 2012 WL 7657788 (Cal. Super. Feb. 26, 2012), *aff'd*, 225 Cal. App. 4th 338 (Cal. App. 2014).

6. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 423 (1967) (citing H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) and noting that "[t]he avowed purpose of the Act was to place arbitration agreements upon the same footing as other contracts").

7. Roland Mann, *Opinion Analysis: Justices Rebuke California Courts (Again) for Refusal to Enforce Arbitration Agreement*, SCOTUSBLOG (Dec. 14, 2015), <http://www.scotusblog.com/2015/12/opinion-analysis-justices-rebuke-california-courts-again-for-refusal-to-enforce-arbitration-agreement/> (last visited Apr. 20, 2017).

the mainstream press, it was for Justice Ruth Bader Ginsburg's scorching dissent on the evils of forced consumer arbitration waivers.<sup>8</sup> Her dissent echoed recent media coverage on the unfairness of binding consumer arbitration – a process that critics complain wrongfully shuts the courthouse door to plaintiffs.<sup>9</sup>

But there was a second dissent in *DIRECTV*. This one was much shorter and received far less media fanfare: the terse dissent of Justice Clarence Thomas. In a single paragraph, Justice Thomas declined to support the view of the majority in reversing the state court: "I remain of the view that the [FAA] does not apply to proceedings in state courts. . . Thus, the FAA does not require state courts to order arbitration. Accordingly, I would affirm the judgment of the California Court of Appeal."<sup>10</sup> This dissent cited five of his prior dissents, dating back to 1995, in which he adopted an identical position. The view expressed in these dissents is heavily grounded on the FAA's legislative history, as well as his own unique states' rights jurisprudence that extends to areas of the law far beyond arbitration.

Justice Thomas – considered among the most reliably conservative justices of his generation<sup>11</sup> – has been remarkably consistent in his interpretation of the FAA during his decades on the Court. But his short dissents in FAA-related cases have rarely attracted much notice. Perhaps this is because of their brevity and rote consistency; perhaps this is because they advocate a view of FAA preemption that the Court has long-since abandoned.<sup>12</sup> Whatever the reason, Justice Thomas presents a view of the FAA and its relationship to state law that is worthy of examination.

This Article examines the roots, application and impact of Justice Thomas' views. Part II traces the history of the FAA; Part III

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8. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting) ("It has become routine, in a large part due to this Court's decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses. . . I would take no further step to disarm consumers, leaving them without effective access to justice.").

9. See, e.g., Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *The New York Times*, October 31, 2015, available at <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (last visited Apr. 20, 2017).

10. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (Thomas, J., dissenting).

11. A recent empirical study named Justice Thomas as the second most conservative member of the Court since 1937 behind only Chief Justice William Rehnquist. See LEE EPSTEIN, WILLIAM LANDES & RICHARD POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE*, Harvard University Press (2013).

12. See *infra* Part III.

examines the Supreme Court's recent decisions involving the FAA, as well as various attempts by states to legislate around it; Part IV surveys Justice Thomas' jurisprudence on a variety of areas of constitutional and statutory interpretation, tying these views to his FAA-related dissents; and Part V concludes with the continued import of his dissents, despite the majority's wholesale rejection of his approach to arbitration.

## II. A BRIEF HISTORY OF THE FAA

Arbitration is a creature of contract, and most contract law is state-based. So why do we have a federal arbitration law, and what does it do? Perhaps any discussion of the FAA's applicability – whether in state or federal courts – should begin with these basic questions.

The FAA aims to position arbitration as a meaningful alternative to litigation as a matter of national policy. Using its procedural framework, individuals and businesses can resolve their disputes peacefully, efficiently and fairly. As attorneys and legal scholars readily acknowledge, “[n]ot everyone thinks the American litigation system does a good job.”<sup>13</sup> For decades, critics have complained of “lengthy delays due to crowded dockets, discovery wars, arcane rules of evidence, and the obsolescence of jury trials in civil cases.”<sup>14</sup> These aspects of litigation can result in expensive and time-consuming processes. Arbitration can sidestep many of these problems – so long as the courts enforce arbitration agreements and awards. The FAA's purpose is to ensure that strong judicial backstop.

Arbitration did not always enjoy such support. The FAA's history can be traced to the origins of American law, which has its genesis in English law. Seventeenth and eighteenth-century English judges historically limited arbitration's use. English courts were heavily concerned that arbitration agreements “ousted” the powers of the state. Put differently, they feared that private arbitrators were making decisions that only duly appointed judges should be empowered to make. Consequently, arbitration agreements were often voided.<sup>15</sup> Courts also honored the doctrine of revocability, which allowed either

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13. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 482 (2006).

14. *Id.*

15. See generally, Addison C. Burnham, *Arbitration as a Condition Precedent*, 11 HARV. L. REV. 234 (1897) (discussing the history of British common law on arbitration agreements and its application in early America).

party to retract their initial assent to arbitrate until the arbitrator ruled.<sup>16</sup> Between the courts that condemned arbitration as anathema to the power of the state, and the courts that allowed a party to essentially revoke their agreement to arbitrate at will, the entire process was somewhat toothless.<sup>17</sup> Why would a business or individual bother to arbitrate, or even enter into an arbitration agreement, when the whole procedure could be so easily invalidated? It was a dispute resolution process built on sand.

Unfortunately for American businesses, state and federal courts had adopted this English skepticism of arbitration. In an effort to build a sturdier foundation for arbitration, a process widely seen as more efficient than litigation, Congress passed the FAA in 1925. Its goal was to abolish this “anachronism of our American law”<sup>18</sup> whereby courts would decline to enforce arbitration agreements or the resulting awards. The FAA sought to make agreements to arbitrate specifically enforceable – that is, contracts that courts could order to be performed.<sup>19</sup> The FAA was broadly intended to create “national policy favoring arbitration.”<sup>20</sup> As Justice Sandra Day O’Connor wrote, “[o]ne rarely finds a legislative history as unambiguous as the FAA’s.”<sup>21</sup> Passed by Congress without dissent and only lightly amended over the past century, the FAA’s goal was to create “judicial respect for commercial arbitration at the front end and back end of the arbitral process.”<sup>22</sup> Put differently, the legislation’s twin

16. David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1225–26 (2013).

17. *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. 39 (1924) (brief of Julius Henry Cohen) (describing the rules as “rooted originally in the jealousy of courts for their jurisdiction”).

18. H.R. REP. NO. 68-96, at 1-2 (1924).

19. Horton, *supra* note 16, at 1225–26; *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (stating that the FAA requires that courts “rigorously enforce agreements to arbitrate”); *Volt Info. Sciences, Inc. v. Board of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (1989) (stating that the FAA gives the right to obtain “order directing that ‘arbitration proceed in the manner provided for in [the parties] agreement’”) (quoting 9 U.S.C. § 4 (1947)).

20. Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1232 (2011)

21. *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O’Connor, J., dissenting).

22. Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 180 (2002). Hayford and Palmiter note that the House of Representatives passed its version of the bill unanimously on June 6, 1924. The Senate bill passed without amendment on January 21, 1925. The House concurred with the Senate’s minor differences, and President Calvin Coolidge signed the bill into law on February 12, 1925, becoming effective on January 1, 1926.

goals were to enforce both arbitration agreements and the resulting awards by giving parties recourse in the courts.

The central provision of the Act is Section 2, which today reads: A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>23</sup>

In short, the provision makes “valid, irrevocable, and enforceable” any agreement to arbitrate that “involv[es] commerce[,]” and allows invalidation only when a reason exists “for the revocation of any contract.”

Furthermore, Section 3 of the FAA gives courts the power to compel arbitration when one party has improperly attempted to file litigation, and can “stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.”<sup>24</sup> Section 9 requires courts to confirm arbitral awards, noting that, upon application for a court order confirming an arbitral award, “the United States court in and for the district” where the award was made “must grant such an order” unless “vacated, modified or corrected.”<sup>25</sup>

Vacating an award is not easy. Awards are typically final and binding.<sup>26</sup> A losing party that hopes to have a court vacate the award will need to meet one of four narrow criteria, defined in Section 10: (1) corruption, fraud, or undue means; (2) evident arbitrator partiality or corruption; (3) arbitrator misconduct; or (4) excess or imperfect execution of arbitrator powers.<sup>27</sup> Given these narrow avenues, it is unsurprising that it is far more common for courts to confirm awards than to vacate them.<sup>28</sup> One study found that federal courts vacate

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There was no dissenting vote in either the House or Senate. See American Bar Association Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153 (1925).

23. 9 U.S.C. § 2 (1947).

24. *Id.* § 3.

25. *Id.* § 9.

26. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (stating that grounds for vacatur listed in FAA § 10 all “address egregious departures from the parties’ agreed-upon arbitration” and holding that “the text [of the FAA] compels a reading of [these] categories [for vacating an award] as exclusive”).

27. *Id.* § 10.

28. See generally, Susan Wiens & Roger Haydock, *Confirming Arbitration Awards: Taking the Mystery Out of A Summary Proceeding*, 33 WM. MITCHELL L. REV. 1293, 1295–96 (2007) (“Although confirmation requires judicial involvement, it is intended to be a summary proceeding. The FAA expresses a presumption that courts shall confirm arbitration awards. . . Even where one party objects to confirmation, the

only 4.3% of arbitration awards.<sup>29</sup> This judicial deference was precisely the legislative purpose of the FAA. While courts also have the power to modify arbitral awards in certain circumstances – for example, where there was a mathematical miscalculation in the award<sup>30</sup> – this intervention is also rare.

Taken together, the FAA created a structure in which agreements to arbitrate and the resulting awards became fully enforceable. No longer could one party easily “back out” of such an agreement. No longer would judges look skeptically at the legitimacy of arbitrator’s power. And no longer could awards be easily challenged or ignored. Simply put, the FAA gave judicial support to arbitration and thus brought the process into the legal mainstream.

### III. STATE ARBITRATION STATUTES AND THE SUPREME COURT

Although the FAA was passed in 1925, it was not until the 1950s that states began to develop their own local arbitration statutes. Some states adopted the FAA’s structure wholesale, while others experimented with their own variations. Often, states attempted to impose greater restrictions on the arbitration process than the federal statutes, resulting in potential conflict. To examine these conflicts, we begin with a review of some state arbitration laws.

#### A. *State Arbitration Statutes*

In the decades following the passage of the FAA, many states began enacting their own unique arbitration statutes. The 1955 Uniform Arbitration Act (“UAA”), promulgated by the National Conference of Commissioners on Uniform State Laws, was adopted in 35 states, with 14 others adopting substantially similar arbitration laws.<sup>31</sup> The goal of the UAA, as with all uniform laws, was to create consistency across jurisdictions and ensure that each state’s arbitration framework covered substantially the same issues. The Revised

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court plays a very limited supervisory role and is not authorized to review all aspects of the arbitration or to second-guess the arbitrator”).

29. Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1 (2009) (describing a study of approximately 300 challenges to arbitration awards and noting the courts’ general deference to arbitrators).

30. 9 U.S.C. § 11 (1947).

31. Unif. Arbitration Act (1955).

Uniform Arbitration Act (“RUAA”) was promulgated in 2000, updating and modernizing the UAA. So far, it has been adopted in 18 states and the District of Columbia.<sup>32</sup>

Both the UAA and RUAA aim to ensure the enforceability of agreements to arbitrate and the finality of arbitration awards in the face of sometimes hostile state courts. Like the FAA, the UAA and RUAA are “succinct procedural frameworks governing enforcement of arbitration awards, appointment of arbitrators, method of arbitration hearing, means of compelling testimony and evidence at the hearing, and reviewability of arbitral awards.”<sup>33</sup> State arbitration statutes apply most often when parties explicitly choose to apply a particular state’s arbitration law by agreement.<sup>34</sup>

Many states – a mix of traditionally conservative and liberal ones – have enacted twists on these statutes with more restrictive requirements for arbitration agreements and proceedings. Generally, these are intended to protect consumers or parties with unequal bargaining power. Such statutes typically fall into two categories: (i) those that try to limit the types of disputes that can be arbitrated,

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32. These include Alaska, Arizona, Arkansas, Colorado, the District of Columbia, Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington and West Virginia. The RUAA is also currently under consideration in Massachusetts and Pennsylvania. See *Arbitration Act*, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, available at [http://www.uniformlaws.org/shared/docs/arbitration/arbitration\\_final\\_00.pdf](http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf) (last visited Apr. 20, 2017). Conspicuously absent from this list is New York. When the FAA was passed, it was substantially influenced by New York’s existing arbitration statute, C.P.L.R. § 75 et seq. However, New York never formally adopted the UAA.

33. Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 2–3 (2001) (noting that the RUAA “includes provisions on such matters as utilizing new means of electronic communications in arbitration; whether courts or arbitrators decide arbitrability; provisional remedies; arbitrator disclosure of interests and relationships; immunity of arbitrators and arbitration organizations; the arbitrator’s power to order prehearing conferences and decide dispositive motions; discovery; court enforcement of pre-award rulings by arbitrators; punitive damages, attorney’s fees, and other remedies; court awards of attorney’s fees to arbitrators, arbitration organizations and prevailing parties in litigation involving an arbitration matter; which sections of the RUAA are waivable; and a phased-in effective date for when the RUAA will apply to all arbitration agreements.”).

34. See, e.g., *Volt Info. Sciences, Inc. v. Board of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (holding that a clearly expressed contractual agreement to conduct an arbitration under state law rules trumps the preemptive effect of the FAA, as long as the state law principles invoked by the choice-of-law provision do not conflict with the FAA’s prime directive that agreements to arbitrate be enforced).

and (ii) those that try to create procedural safeguards within the arbitration process.<sup>35</sup>

First, some state legislatures have attempted to remove entire categories of disputes from arbitration. This removal is typically predicated on a consumer-friendly public policy. For example, California's legislature attempted to prevent nursing homes from requiring applicants or residents to sign an arbitration agreement as "a precondition for medical treatment or for admission to the facility."<sup>36</sup> Missouri's arbitration statute specifically excludes contracts that "warrant new homes against defects in construction" as well as insurance contracts.<sup>37</sup> Montana excludes arbitration in transactions of goods or services in which the amount of consideration was \$5,000 or less.<sup>38</sup> In all of these cases, the state legislature is attempting to prevent parties with greater bargaining power from forcing parties with weaker bargaining power into arbitration.

Second, and more common, are state requirements that attempt to impose certain procedural safeguards onto the arbitration process. In California, for example, arbitrators must make extensive disclosures of potential conflicts of interest.<sup>39</sup> While such conflict checks are common in arbitration, not all states require disclosure by statute. Missouri requires an arbitration clause to be in ten point capital letters above or adjacent to the signature line on the first page of a

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35. However, federal courts will often invalidate statutes in both categories as being preempted by the FAA (*see infra* Part III, Section B).

36. CAL. HEALTH & SAFETY CODE § 1599.81(a) (invalidated by *Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016 (E.D. Cal. 2014), *appeal dismissed* [Aug. 7, 2014]).

37. MO. REV. STAT. § 435.350 (2004). State laws that prohibit the enforcement of arbitration agreements would, on first blush, appear to run afoul of federal preemption. However, the U.S. Court of Appeals for the Eighth Circuit has held that Missouri's law is not preempted because of the McCarran-Ferguson Act, which states that the regulation of insurance is expressly left to the States. *See* 15 U.S.C.A. § 1012(b) (1994) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."). Therefore, the FAA does not preempt the McCarran-Ferguson Act's preservation of the state regulation scheme that prohibits insurance contracts from including arbitration clauses. *See Std Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821 (8th Cir. 2001); *accord Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003); *Friday v. Trinity Universal*, 939 P.2d 869 (Kan. 1997).

38. MONT. CODE ANN. § 25-5-114(2)(b) (1995).

39. Judicial Council of California, Ethics Standards for Neutral Arbitrators in Contractual Arbitration (effective Jan. 1, 2003), available at [http://www.courts.ca.gov/documents/ethics\\_standards\\_neutral\\_arbitrators.pdf](http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf) (last visited Apr. 20, 2017); *see also* CAL. CIV. PROC. CODE § 1281.9(a).

contract.<sup>40</sup> Similarly, South Carolina has a statute requiring that “[n]otice that a contract is subject to arbitration . . . shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.”<sup>41</sup> In these cases, the legislatures’ goal is to ensure that parties know that they are signing a contract with a binding arbitration clause that could prevent them from filing litigation.

Both categories of arbitration regulation are, objectively, liberal. The state governments are inserting themselves in various ways into the ostensibly *private* arbitration process. As we will see, state legislators’ attempts to remove certain categories of disputes from arbitration or expand procedural safeguards, have been met with increasing scrutiny by federal courts.

### B. *The Supreme Court and the FAA*

The FAA has been an important topic for the federal courts since its enactment. The Supreme Court has long acknowledged that the FAA’s purpose is, in part, to relieve congestion in the courts and to provide parties with an alternative method for resolving disputes that can be faster and less expensive than litigation.<sup>42</sup> But the past three decades in particular have seen an active reshaping of the FAA by the Court, particularly with respect to the statute’s relationship to state laws.<sup>43</sup>

Through a steady line of cases, the Court has addressed situations where state arbitrations laws are perceived to conflict with the

40. MO. REV. STAT. § 435.460 (2004).

41. S.C. CODE ANN. § 15-48-10 (invalidated by *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531 (2001)).

42. *Wilko v. Swan*, 346 U.S. 427, 431 (1953) (stating that the FAA establishes the desirability of arbitration as a method of avoiding the delays and expenses of litigation).

43. As Part IV, *infra*, will discuss, Justice Thomas has vehemently opposed this reshaping. Significantly, state courts themselves have also resisted the Supreme Court’s recent tendency to invalidate state arbitration laws. Justice Terry Triewieler of the Montana Supreme Court commented on this phenomenon in an opinion that was itself later reversed by the Supreme Court:

Nothing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as therapy for their crowded dockets. These decisions have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up.

*Casarotto v. Lombardi*, 268 Mont. 369, 385 (1994) (Triewieler, J., concurring).

FAA. Generally, these cases hold that the provisions of the FAA concerning the enforceability of arbitration agreements involving commerce bind *both* federal *and* state courts.<sup>44</sup> Under the Constitution's Supremacy Clause, "the Laws of the United States . . . shall be the supreme Law of the Land."<sup>45</sup> Thus, when state laws seek to "limit the enforceability of arbitration agreements contained in contracts, [those] involving commerce are [typically] preempted by . . . the FAA."<sup>46</sup> States cannot "impose restrictions upon the enforceability of arbitration agreements . . . that exceed those provided [in] the FAA."<sup>47</sup> In other words, if a state arbitration statute is found to conflict with the FAA, the Supreme Court will invalidate it.

Challenges to state arbitration laws by federal courts began in earnest with the 1984 decision of *Southland Corp. v. Keating*.<sup>48</sup> There, the Supreme Court held for the first time that Section 2 of the FAA applies in state courts and preempts conflicting state law.

*Southland* involved a dispute between Southland Corporation – the owner and franchisor of 7-Eleven convenience stores – and many of its California franchisees. In 1977, Richard Keating, one such franchisee, filed a class action against Southland on behalf of approximately 800 other franchisees. He alleged "fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law."<sup>49</sup> Because the contracts between Southland and its franchisees provided for arbitration of such disputes, Southland sought to compel arbitration pursuant to the FAA.

The California state trial court granted Southland's motion and ordered arbitration of all the claims except those claims based on the California Franchise Investment Law ("CFIL"). The CFIL provided that: "Any condition, stipulation or provision purporting to bind any

44. See generally, Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 ME. L. REV. 263, 271–72 (1988) (noting the Supreme Court's uncompromising stand on the preemptive effect of the FAA on conflicting state arbitration laws).

45. U.S. CONST. art. VI, cl. 2. See *Chapman v. Hous. Welfare Rights Org.*, 441 U.S. 600, 613 (1979) (noting that the Supremacy Clause "secure[s] federal rights by according them priority whenever they come in conflict with state law").

46. Thomas A. Diamond, *Choice of Law Clauses and Their Preemptive Effect on the Federal Arbitration Act: Recognizing the Supreme Court with Itself*, 39 ARIZ. L. REV. 35, 39 (1997).

47. *Id.* at 40.

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

49. *Id.* at 4.

person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.”<sup>50</sup> The state appeals court reversed the trial court’s decision to exclude the CFIL claims from arbitration.

The California Supreme Court affirmed the order to arbitrate all the other claims but reversed the appeals court and held that the claims under the CFIL were not subject to arbitration under the FAA. In other words, the California Supreme Court held that the state law nullified the arbitration clauses in the 7-Eleven franchise agreements. The court reasoned that the CFIL’s effectiveness is lessened in arbitration as compared to judicial proceedings “in part because of the limited nature of judicial review.”<sup>51</sup> This holding effectively placed California’s interests in the CFIL ahead of Congress’s interests in the FAA.

The U.S. Supreme Court reversed the California Supreme Court in an opinion by Chief Justice Warren Burger. The Court reasoned that Section 2 of the FAA did not explicitly limit its scope to federal courts, citing the references in the statute’s text and legislative history that linked its scope to Congress’s Commerce Clause power.<sup>52</sup> Because Congress usually displaces contrary state rules when it invokes its commerce prerogative, Chief Justice Burger declared that Section 2 “fore-close[s] state legislative attempts to undercut the enforceability of arbitration agreements.”<sup>53</sup> If the FAA applied only to federal courts, the Court reasoned, contradictory state law provisions would “encourage and reward forum shopping” by litigants, hardly what Congress would have intended.<sup>54</sup>

In a lengthy dissent joined by Justice William Rehnquist,<sup>55</sup> Justice O’Connor asserted that “Congress intended to require federal, not state, courts to respect arbitration agreements.”<sup>56</sup> The Court, she argued, took “the facial silence of [Section 2] as a license to declare that state as well as federal courts must apply [Section 2].”<sup>57</sup> In her

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50. CAL. CORP. CODE § 31512 (1977).

51. *Keating v. Superior Court*, 31 Cal. 3d 584, 596 (1982).

52. *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

53. *Id.* at 16.

54. *Id.* at 13 (“This broader purpose can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce.”).

55. *Southland Corp. v. Keating*, 465 U.S. 1, 21-36 (1984) (O’Connor, J., dissenting).

56. *Id.* at 23.

57. *Id.*

view, the majority was “impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA.”<sup>58</sup> Her arguments foreshadowed many of the arguments that Justice Thomas would later adopt.

Justice O’Connor’s analysis of congressional intent – an analysis with which many scholars agree<sup>59</sup> – argues that the 1925 Congress “viewed the FAA as a procedural statute, applicable only in federal courts.”<sup>60</sup> This view is supported by the legislative record, which rejects the idea that the FAA creates federal *substantive* law capable of binding the states, as opposed to merely a procedural rule. For example, the House Report on the FAA states that “[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law [of the] court in which the proceeding is brought and not one of substantive law.”<sup>61</sup> Thus, as Professor David Schwartz points out, *Southland* turned the FAA into the only federal statute that creates substantive law without giving rise to federal question jurisdiction.<sup>62</sup>

*Southland* was the first, but certainly not the last, major case to deal with federal preemption. Over the past two decades, arbitration

58. *Id.*

59. See, e.g., Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006) (describing today’s FAA as “unrecognizable” from the one intended by Congress); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 380 (“[T]he opinion of the Court was an extraordinarily disingenuous manipulation of the history of the 1925 Act”); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 5 (“The Court . . . transformed a quaint, sixty-year-old procedural statute into ‘a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes’ as well as an eviction of state lawmaking power over the traditional state domain of contract law”) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting)).

60. *Southland Corp. v. Keating*, 465 U.S. 1, 25 (1984) (O’Connor, J., dissenting).

61. H.R. REP. NO. 68-96, at 1 (1924) (“Before [arbitration] contracts could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States.”); see also *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. on the Judiciary*, 68th Cong. 37, 38 (1924) (brief of Julius Henry Cohen, Member, Am. Bar Ass’n) (“Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.”).

62. David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 5.

preemption has become a topic of increasing interest to the Court.<sup>63</sup> This trend has coincided with an overall growth in the field of alternative dispute resolution.<sup>64</sup> *DIRECTV, Inc. v. Imburgia* is just the latest in a series of Supreme Court cases that have rebuked state courts' anti-arbitration rulings or statutes, including: *AT&T Mobility LLC v. Concepcion* (California);<sup>65</sup> *Preston v. Ferrer* (California);<sup>66</sup> *Nitro-Lift Techs, L.L.C. v. Howard* (Oklahoma);<sup>67</sup> *Marmet Health Care Ctr., Inc. v. Brown* (West Virginia);<sup>68</sup> *KPMG LLP v. Cocchi* (Florida);<sup>69</sup> and *Citizens Bank v. Alafabco* (Alabama), to name just a handful.<sup>70</sup>

In all of these cases, the Court has pushed back against state arbitration statutes or state judicial interpretations that seem to encroach on the FAA's territory. The Court worried that "giving states authority over the validity of arbitration clauses would create a loophole the size of the statute itself. Under the guise of the public policy defense, state lawmakers could pass regulations that resurrect the very hostility to arbitration that the FAA eradicated."<sup>71</sup> Put differently, the federal courts have increasingly policed, and struck down, liberal safeguards on arbitration passed by state legislatures. Scholars have proposed a variety of analytical frameworks to understand

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63. The Supreme Court has heard a litany of such cases recently. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010); *Rent-a-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Arthur Andersen L.L.P. v. Carlisle*, 129 S. Ct. 1896 (2009); *14 Penn Plaza L.L.C. v. Pyett*, 129 S. Ct. 1456 (2009); *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

64. See generally, Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 257–59 (2008) (discussing the growth of arbitration to the point of touching on "nearly all civil disputes," including disputes between securities firms and their investors, employment disputes, and consumer disputes); see also Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. DISP. RESOL. 297 (1996) (reviewing the history of the contemporary alternative dispute resolution movement).

65. *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1750–52 (2011).

66. *Preston v. Ferrer*, 552 U.S. 346 (2008).

67. *Nitro-Lift Techs, L.L.C. v. Howard*, 133 S. Ct. 500 (2012).

68. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

69. *KPMG L.L.P. v. Cocchi*, 132 S. Ct. 23 (2011).

70. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).

71. Horton, *supra* note 16, at 1220–21 (2013); see also *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (noting that if state public policy could invalidate an arbitration clause, "states could wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts").

the types of state laws likely to face judicial scrutiny.<sup>72</sup> But most scholars agree that such scrutiny is now inevitable, and that severe state restrictions on arbitration will be invalidated.

However, not all jurists have quietly accepted this increasingly sweeping federal preemption of state arbitrations laws. Justice Thomas, picking up Justice O'Connor's torch, has become the most insistent critic of the Court's direction.

#### IV. JUSTICE THOMAS AND THE FEDERAL ARBITRATION ACT

Justice Thomas draws both admiration and scorn as one of the Court's most reliably conservative justices. To understand his view of arbitration and the FAA, we must first examine his judicial philosophy more broadly. His views on other areas of constitutional and statutory interpretation – particularly his steady emphasis on originalism and states' rights – serve as a crucial backdrop to his understanding of federal arbitration law.

##### A. *Justice Thomas' Background and Jurisprudence*

In a number of ways, Justice Thomas is biographically and ideologically distinct from his colleagues. Born near Savannah, Georgia in 1948, he graduated from Holy Cross College in 1971 and Yale Law School in 1974.<sup>73</sup> After stints as an Assistant Attorney General of Missouri, a Legislative Assistant to Senator John Danforth, and Assistant Secretary for Civil Rights of the U.S. Department of Education, he served as Chairman of the U.S. Equal Employment Opportunity Commission. In 1990, he was appointed as a Judge on the United States Court of Appeals for the District of Columbia Circuit. Just over a year later, when Justice Thurgood Marshall retired, President George H.W. Bush nominated Justice Thomas as an Associate Justice of the Supreme Court. He took his seat October 23, 1991. He is the second African American justice to sit on the Court.

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72. See, e.g., Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004) (proposing analytical framework to determine whether or not the FAA preempts a particular state law).

73. Biographical information adopted from "Biographies of Current Justices of the Supreme Court," <http://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 20, 2017). See also CLARENCE THOMAS, *MY GRANDFATHER'S SON*, (Harper, 2007) (noting that after a fire left Justice Thomas' family homeless, he lived with his maternal grandfather who became his most influential role model. Justice Thomas ran several of his own businesses and originally sought to become a Catholic priest).

Justice Thomas is widely known for his conservative judicial philosophy.<sup>74</sup> His opinions and dissents show a consistent application of originalism.<sup>75</sup> It is worth noting three particular areas where Justice Thomas' opinions have been particularly influential and consistent: (i) his view of the scope of the Commerce Clause; (ii) his views on the Fourteenth Amendment's Privileges or Immunities Clause; and (iii) his views on 'social' issues, including affirmative action, abortion and marriage equality. Through the prism of his writings on these issues, his opinions on the FAA begin to enter into sharper focus.

### 1. *The Commerce Clause*

Like many conservative jurists, Justice Thomas has taken a highly restrictive view of the Commerce Clause. From his concurrence in *United States v. Lopez*<sup>76</sup> to his dissent in *Nat'l Fed'n of Indep. Bus. v. Sebelius*,<sup>77</sup> Justice Thomas has repeatedly rejected the Court's longstanding jurisprudence that Congress has the power to regulate any activity merely because that activity may have a substantial effect on interstate commerce.

The Commerce Clause provides that: "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>78</sup> Congress's Commerce Clause power is generally split into three categories of regulatory authority: (i) the power to regulate the channels of interstate commerce (e.g., airspace and waterways); (ii) the power to regulate

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74. Legal scholars have long observed a dichotomy in Justice Thomas's conservative jurisprudence, generally taking "a 'liberal originalist' approach to civil rights issues, particularly affirmative action, and a 'conservative originalist' approach to civil liberties issues, such as abortion." *Justice Thomas's Inconsistent Originalism*, 121 HARV. L. REV. 1431, 1434–35 (2008). Liberal originalism embraces the broad principles of the Declaration of Independence, such as the natural law ideal of equality; conservative originalism relies more heavily on the Framers' specific language and intent. Justice Thomas's inconsistent approach "elicits strong criticism because this framework appears results-driven, a sort of racial exception to his generally conservative originalism, seeming to reflect little more than Justice Thomas's policy preferences and his desire to remain true to his view of racial equality." *Id.* See also, Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 80 (2014) ("Originalism, according to Justice Thomas, is the legitimate way to understand the Constitution, the secret to protecting judicial impartiality, and the elixir to preventing judges from imposing their values on constitutional decision-making").

75. Legal Information Institute, "Writings by Justice Thomas," <https://www.law.cornell.edu/supct/justices/thomas.dec.html> (last visited Apr. 20, 2017).

76. *United States v. Lopez*, 514 U.S. 549 (1995).

77. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

78. U.S. CONST. Art. I, § 8, cl. 3.

the instrumentalities of interstate commerce (e.g., railroads and airplanes); and (iii) the power to regulate local activities that have a substantial economic effect on interstate commerce (e.g., the local growth of a crop that could affect the broader market or the sale of illegal drugs).<sup>79</sup>

This third category, regulation based on the so-called “substantial effects” test, involves a complex constitutional analysis. Decades of cases have attempted to define the boundaries of a “substantial effect” that justifies congressional regulation.<sup>80</sup> Yet Justice Thomas completely rejects this line of cases – an iconoclastic position even for a conservative justice. “[T]he very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases,” he wrote in his concurrence to *United States v. Morrison*.<sup>81</sup> “By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits.”<sup>82</sup> He has long emphasized that the text, structure, and history of the Commerce Clause all indicate that, at the time of the founding, the term “commerce” consisted of selling, buying, and

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79. Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843, 849–50 (2000) (discussing three avenues of Congress’s commerce clause power).

80. *Gibbons v. Ogden*, 22 U.S. 1 (1824) first delineated Congress’s broad powers under the Commerce Clause, noting that “completely internal commerce of a state may be considered as reserved [for regulation by] the state itself.” *Id.* at 10. *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) expanded that boundary, allowing congressional regulation if the activity being regulated “substantially affects” interstate commerce. Five years later, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court further bolstered Congress’s power with the “cumulative” or “aggregate” effect theory. There, the Court considered congressional regulation of the purely intrastate growth of wheat crops under the Agricultural Adjustment Act of 1938. Because the intrastate activity had broader implications on agricultural markets, the Court held that Congress could regulate activity if that activity viewed broadly would have a substantial effect on interstate commerce.

81. *United States v. Morrison*, 529 U.S. 598, 627 (2000). In *Morrison* and *Lopez*, the Supreme Court declined to apply the aggregation theory of *Wickard* to the noneconomic activity at issue, reasoning that “in every case where we have sustained federal regulation under the aggregation principle . . . the regulated activity was of an apparent commercial character.” *Morrison*, 529 U.S. at 611 n.4. The Court thereby resisted “additional expansion” of the substantial effects and aggregation doctrines. *Lopez*, 514 U.S. at 567.

82. *Morrison*, 529 U.S. at 627.

bartering, as well as transporting for these purposes. That is, commerce or trade stood in contrast to productive activities like manufacturing and agriculture.<sup>83</sup> Justice Thomas has argued for “refashioning a coherent test [for Congress’s Commerce Clause authority] that does not tend to ‘obliterate the distinction between what is national and what is local and create a completely centralized government.’”<sup>84</sup>

Further separating Justice Thomas from his colleagues, he rejects the entire notion of a “dormant Commerce Clause” – a well-established judicial doctrine that invalidates state laws that burden interstate commerce, even in the absence of any conflicting federal law. The theory behind the “dormant Commerce Clause” is that the Commerce Clause intends to keep the field clear for Congress, should it ever decide to regulate that particular area of interstate commerce. Federal courts will generally strike down a state law if it mandates differential treatment of in-state and out-of-state economic interests to benefit the former and burden the latter.<sup>85</sup> Justice Thomas rejects this position as an ungrounded expansion of federal power.<sup>86</sup>

Though many judges and scholars criticize Justice Thomas’ restrictive interpretation of the Commerce Clause – noting that his position could invalidate as unconstitutional much of Congress’s work over the last century – this interpretation has defined his approach to

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83. Justice Thomas relies heavily on historical materials to understand the meaning of the Commerce Clause at the time that the Constitution was written. “Throughout founding-era dictionaries, Madison’s notes from the Constitutional Convention, *The Federalist Papers*, and the ratification debates, the term “commerce” is consistently used to mean trade or exchange—not all economic or gainful activity that has some attenuated connection to trade or exchange. . . . The term “commerce” commonly meant trade or exchange (and shipping for these purposes) not simply to those involved in the drafting and ratification processes, but also to the general public.” *Gonzales v. Raich*, 545 U.S. 1, 58–59 (2005) (Thomas, J., dissenting) (citing Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112–25 (2001)).

84. *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J. dissenting) (quoting *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36 (1937)).

85. See, e.g., *Granholm v. Heald*, 544 U.S. 460, (2005) (holding, over Justice Thomas’ dissent, that laws in New York and Michigan were unconstitutional because they permitted in-state wineries to ship wine directly to consumers, but prohibited out-of-state wineries from doing the same).

86. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting) (“[O]ur negative Commerce Clause jurisprudence [is] both overbroad and unnecessary. It [is] overbroad because, unmoored from any constitutional text, it brought within the supervisory authority of the federal courts state action far afield from the discriminatory taxes it was primarily designed to check. . . . The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application”).

many of the most controversial cases that have come before the Court.<sup>87</sup>

## 2. *The Privileges or Immunities Clause*

Another area of constitutional law where Justice Thomas stands apart from his colleagues is his interpretation of the Fourteenth Amendment's Privileges or Immunities Clause. Section 1, Clause 2 of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."<sup>88</sup> This Clause, which has a complex history and interpretation, but is generally understood to protect fundamental rights of American citizens in limited contexts.

Since the nineteenth century, the Clause has had fairly limited practical application, particularly after the *Slaughter-House Cases*.<sup>89</sup> In 1869, Louisiana passed a law that granted a monopoly to the Crescent City Livestock Landing & Slaughterhouse Company to slaughter animals in New Orleans. For that exclusive right, Crescent City agreed to comply with various state provisions regarding the output, price and quality of the meat. Louisiana's legislature believed that this monopoly – treating the slaughterhouse like a utility – was for the benefit of public health by centralizing the industry. Competing meat producers saw the law differently, impinging on their ability to earn a living. They sued, arguing that this scheme violated the Privileges or Immunities Clause.

The Court disagreed, holding that this Clause applies to national citizenship, not to state citizenship. The Clause "protects from the hostile legislation of the States the privileges and immunities of *citizens of the United States* as distinguished from the privileges and immunities of citizens of the States."<sup>90</sup> It covers rights that "arise out of the nature and essential character of the National government [and]

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87. See, e.g., Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 5 (1999) (examining the original meaning and understanding of the Commerce Clause and challenging the conclusions of Justice Thomas); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 606 (2000) (criticizing "highly debatable historical excursus by originalist judges").

88. U.S. CONST. amend. XIV, § 1.

89. *Slaughter-House Cases*, 83 U.S. 36 (1872).

90. *Id.* at 37 (emphasis in original).

Constitution . . . which are placed under the protection of Congress.”<sup>91</sup> The Louisiana law dealt with states’ rights, not rights that were conferred by the federal Constitution. The Court reasoned that the Clause was not intended “as a protection to the citizen of a State against the legislative power of his own State.” Rather the “privileges or immunities of citizens” guaranteed by the Fourteenth Amendment were limited to those “belonging to a citizen of the United States.”<sup>92</sup> The Court declined to specify the privileges or immunities that fell into this latter category, but it made it clear that very few did.

In the decades after the *Slaughter-House Cases*, the Court applied many provisions of the Bill of Rights to the states. This process, known as incorporation, holds state governments to the same standard as the federal government regarding certain constitutional rights. However, the Court channeled this incorporation through the Fourteenth Amendment’s Due Process Clause, rather than through its Privileges or Immunities Clause.<sup>93</sup> The Court used the Due Process Clause to overrule state laws or policies that violated protections guaranteed by the Bill of Rights.

Justice Thomas has consistently rejected the incorporation of rights to the states through the Due Process Clause.<sup>94</sup> Suggesting that the Privileges or Immunities Clause has been misinterpreted from the beginning, he has asserted that this Clause – rather than the Due Process Clause – is the proper mechanism for incorporating rights to the states. He advocated this view even before his tenure on the Supreme Court. For example, his remarks at a 1989 Federalist Society symposium, later published in the *Harvard Journal of Law and Public Policy*, argued for a “natural law” theory of the Privileges or Immunities Clause.<sup>95</sup> He believes this framework is not only historically warranted, but also the best defense of limited government.

Beginning with his dissent in *Saenz v. Roe*, Justice Thomas has invited the Court to reconsider the Privileges or Immunities Clause based on its original meaning.<sup>96</sup> In that case, the Court considered a

91. *Id.*

92. *Id.* at 38.

93. The Due Process Clause provides that: “[No] State [shall] deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

94. See generally, D. Scott Broyles, *Doubting Thomas: Justice Clarence Thomas’s Effort to Resurrect the Privileges or Immunities Clause*, 46 IND. L. REV. 341 (2013) (examining Justice Thomas’ interpretation of the Clause and the jurisprudence surrounding ‘Natural Rights Law’).

95. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63, 66 (1989).

96. *Saenz v. Roe*, 526 U.S. 489, 521 (1999).

California law that limited new residents to the welfare benefits they would have received in their prior state of residence. The Court struck down the law, holding that the Privileges or Immunities Clause protected a right to travel that encompassed the ability of citizens to move freely between states. Justice Thomas' dissent, relying heavily on citations to historians and early American texts, encouraged the Court to "look to history to ascertain the original meaning of the Clause."<sup>97</sup> He argued that at the time the Fourteenth Amendment was adopted, Americans "understood that 'privileges or immunities of citizens' were fundamental rights, rather than every public benefit established by positive law." Accordingly, he argued, the majority's conclusion that California violated the Privileges or Immunities Clause by 'discriminating' against recent state residents by denying certain state-created benefits "appears contrary to the original understanding and is dubious at best."<sup>98</sup> He concludes:

[I]t comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case. That is because . . . the *Slaughter-House Cases* sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence. Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence. The majority's failure to consider these important questions raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the 'predilections of those who happen at the time to be Members of this Court.'<sup>99</sup>

Nearly 20 years later, Justice Thomas had another opportunity to explain how the Privileges or Immunities Clause could effectively bring the Court to the correct result. In *McDonald v. City of Chicago*,

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97. *Id.* at 522 (Thomas, J., dissenting).

98. *Id.* at 527.

99. *Id.* at 527–28 (quoting *Moore v. E. Cleveland*, 431 U.S. 494 (1977)).

the Court considered a challenge to Chicago's strict gun control legislation.<sup>100</sup> By a 5-4 vote, the majority held that the Second Amendment was "among those fundamental rights necessary to our system of ordered liberty" and is therefore protected from states' encroachments through substantive due process.<sup>101</sup> In his concurring opinion, Justice Thomas agreed with the holding but again argued that the better vehicle for incorporation would be the Privileges or Immunities Clause. His 56-page concurrence, essentially a treatise on the interpretative history of the Clause, rejects the "legal fiction" of substantive due process. At the time the Constitution was written, he argues, the Framers would have considered "the right to keep and bear arms [to be] a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."<sup>102</sup>

In short, while the Privileges or Immunities Clause of the Fourteenth Amendment has rarely been invoked since the nineteenth century, Justice Thomas has tried to breathe new life into it. His writings have resulted in much conversation around the Clause and its potential ramifications for the relationships between citizens, states, and the federal government.<sup>103</sup> Indeed, his attention to the once-obscure Clause may become an important part of his legacy on the Court. While no other justice agreed with his views in *Saenz* or *McDonald*, his forceful advocacy demonstrates his insistence on originalism.

### 3. 'Social' Issues: Abortion, Affirmative Action and Marriage Equality

Any examination of Justice Thomas' jurisprudence must address his views on social issues and their intersection with the Constitution. From abortion, to affirmative action, to religious freedom, he has provided one of the most reliably conservative voices in the history of the Court. Here too, his decisions exhibit a healthy suspicion of federal power and an insistence on originalism that is reflected in his views on the FAA.

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100. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

101. *Id.* at 778.

102. *Id.* at 806 (Thomas, J., concurring).

103. See generally, Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1530 (2008) (citing Justice Thomas' reasoning and arguing that the Privileges or Immunities Clause should create a right to federal civil court access).

Justice Thomas has stated in no uncertain terms that, if given the opportunity, he would overturn *Roe v. Wade* and *Planned Parenthood of Se. Pennsylvania v. Casey*.<sup>104</sup> He has referred to the landmark decision in *Roe* as “grievously wrong.”<sup>105</sup> Because the Constitution is entirely silent on the issue, Justice Thomas reasons that abortion should not be forced upon the states. Rather, individual state legislatures should be able to determine whether or not to permit abortion. “Abortion is a unique act, in which a woman’s exercise of control over her own body ends, depending on one’s view, human life or potential human life,” Justice Thomas has written. “Nothing in our Federal Constitution deprives the people of this country of the right to determine whether the consequences of abortion to the fetus and to society outweigh the burden of an unwanted pregnancy on the mother. Although a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so.”<sup>106</sup>

His views on affirmative action are equally clear, and have attracted substantial attention particularly because he himself was a beneficiary of such policies. In his memoir, *My Grandfather’s Son*, Justice Thomas wrote at length about feeling stigmatized as a recipient of racial preferences. “Before long I realized that those blacks who benefitted from [affirmative action] were being judged by a double standard,” he wrote. “As much as it stung to be told that I’d done well in the seminary *despite* my race, it was far worse to feel that I was now at Yale *because* of it.” He found “the stigmatizing effects of racial preference” impossible to escape and “began to fear that it would be used forever after to discount my achievements.”<sup>107</sup>

Justice Thomas makes his views on this matter known whenever the issue comes before the Court. In *Adarand Constructors, Inc. v. Peña*, the Court held that a federal program that gave financial incentives to government contractors to hire subcontractors controlled

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104. *Roe v. Wade*, 410 U.S. 113 (1973) held that a woman’s right to an abortion falls within the right to privacy protected by the Fourteenth Amendment, giving women the ability to terminate a pregnancy within the first trimester. *Roe* provided a more complex analysis of the state’s interest in the pregnancy during the second and third trimesters. *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) affirmed the central holding of *Roe*, but created a new standard to determine the validity of laws restricting abortions, considering whether a state’s abortion regulation imposes an “undue burden” – defined as a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* at 878.

105. *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting).

106. *Id.* (emphasis in original); see also, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (Thomas, J., dissenting) (rejecting the majority’s decision to strike down a Texas statutory scheme that placed requirements on abortion clinics).

107. CLARENCE THOMAS, *MY GRANDFATHER’S SON*, 74–75 (Harper, 2007).

by historically disadvantaged groups was subject to strict scrutiny.<sup>108</sup> Justice Thomas' concurring opinion blasted the "racial paternalism" behind the program:

I believe that there is [an equivalence] . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law. . . In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.<sup>109</sup>

Eight years after *Adarand*, the Court considered the use of racial preferences in admission to the University of Michigan Law School. In *Grutter v. Bollinger*, the Court held that the University's "race conscious" admissions policy – where race was one factor among many in the evaluation of applicants – did not violate the Equal Protection Clause.<sup>110</sup> The majority acknowledged that the University had a compelling interest in the educational benefits that come from a diverse student body.<sup>111</sup> Justice Thomas took the majority to task, asserting that "blacks can achieve in every avenue of American life without the meddling of university administrators."<sup>112</sup> The Constitution, he wrote, "abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."<sup>113</sup> His views remained consistent in *Fisher v. Univ. of Texas at Austin*, which examined the use of racial preferences in undergraduate admissions at the University of Texas.<sup>114</sup> He dissented from the majority, which upheld the Texas program, noting that he would overrule *Grutter* because the use of race in admissions decisions violates the Equal Protection Clause.<sup>115</sup>

A final social issue worth considering is Justice Thomas' unwavering opposition to the federal right to same-sex marriage. Consider *United States v. Windsor*, which struck down the Defense of Marriage

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108. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

109. *Id.* at 240 (Thomas, J., concurring).

110. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

111. *Id.* at 318.

112. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part).

113. *Id.* at 353.

114. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

115. *Id.* at 2215-2243 (Thomas, J., dissenting).

Act (“DOMA”).<sup>116</sup> DOMA, enacted in 1996, stated that the words “marriage” and “spouse” refer only to legal unions between one man and one woman. The Court held that DOMA’s purpose and effect were to “impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States” – a goal that violates the Fifth Amendment’s guarantee of equal protection.<sup>117</sup> Justice Thomas joined Justice Samuel Alito’s dissent, which rejected the majority’s reasoning based on the Equal Protection Clause, emphasizing that individual states have the right to answer questions about the definition of marriage. “The silence of the Constitution [on the question of marriage equality] should be enough to end the matter as far as the judiciary is concerned. Yet, *Windsor* and the United States implicitly ask us to endorse [a] consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore,” he wrote. “Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.”<sup>118</sup>

Justice Thomas maintained his opposition to marriage equality in *Obergefell v. Hodges*, which established a federal right to same-sex marriage.<sup>119</sup> He filed a forceful dissent, citing documents from the Magna Carta to the Declaration of Independence in an effort to demonstrate that the Constitution did not intend to create this fundamental right:

To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in – making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one’s spouse – without governmental interference.<sup>120</sup>

Justice Thomas’ refusal to assign to the federal government powers that are not explicit in the Constitution ties together his dissents

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116. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

117. *Id.* at 2681.

118. *Id.* at 2718–19 (Alito, J., dissenting).

119. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

120. *Id.* at 2636 (Thomas, J., dissenting).

on abortion, affirmative action, and marriage equality. These issues, he argues, should instead be left to the states and the people.

#### 4. *Criticism, Reputation and Legacy*

Not surprisingly, Justice Thomas' positions on these social issues, along with his desire to curtail Congress's regulatory powers, have not endeared him to many members of academia, the judiciary, or the public. He has been no stranger to criticism during his decades on the Court.<sup>121</sup> As one scholar commented:

From the day that Thomas was nominated to sit on the Court, he has been a subject of great interest for many and has been critiqued and opposed by individuals from all walks of life. In particular, the Justice's intellectual abilities and competence as a jurist have been repeatedly and continually challenged. For example, Justice Thomas has been rumored to select clerks from the best law schools, to lean "especially heavily on them," and to publish their draft opinions with "little embellishment." Additionally, Justice Thomas has had his independence as a voter on the bench questioned, with the suggestion that he bases his votes on those of a colleague, Justice Antonin Scalia. Indeed, Justice Thomas has been referred to as "Scalia's puppet."<sup>122</sup>

It is not a stretch to infer that at least some of the coverage of Justice Thomas – suggesting he is not as intelligent or hardworking as the other justices – has racial undertones.<sup>123</sup> While the Scalias and Rehnquists of the world received accolades for their conservative judicial philosophies, Justice Thomas faces far greater scrutiny.<sup>124</sup>

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121. Although not the focus of this Article, it remains important to recognize the significant opposition to Justice Thomas' appointment to the Court following accusations of sexual harassment. Anita Hill, his former employee at the EEOC, leveled these allegations during the Senate confirmation hearings, igniting a firestorm of criticism and resulting in an unusually chaotic confirmation process. For more information and perspectives on these allegations and their important political and social consequences, see Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 STAN. L. REV. 443 (1993); Jesselyn Alicia Brown, *Review Essay: Brock's Word against Hers*, 5 YALE J.L. & FEMINISM 253 (1993); Robert F. Nagel, *The Thomas Hearings: Watching Ourselves*, 63 U. COLO. L. REV. 945 (1992).

122. Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 933 (2005) (internal citations omitted).

123. According to statistics compiled by Professor Stephen Vladeck of the University of Texas Law School, Justice Thomas wrote opinions in 38 of the 62 cases decided in the 2015-16 term – twice as many as Justice Alito, also a conservative. See Ariane de Vogue, *Clarence Thomas' Supreme Court Legacy*, CNN (Oct. 22, 2016), <http://www.cnn.com/2016/10/22/politics/clarence-thomas-supreme-court-25-years/>.

124. The contempt of some commentators was particularly clear as Justice Thomas celebrated his 25-year anniversary on the Court in 2016-17. See, e.g., Jeffrey

Among the ways that this scrutiny manifests, perhaps, is the media's general lack of coverage of his opinions compared to those of his colleagues. Indeed, Justice Thomas is often talked about most for his practice of saying the least. It is well reported that he rarely asks questions during oral arguments, including a decade-long stretch that ended with only one question in 2016.<sup>125</sup> His silence has received much attention and criticism from legal journalists.<sup>126</sup> Justice Thomas, for his part, has said publicly that he believes that oral argument should be a chance for the lawyers to make their arguments, rather than for the justices to advance sharp questions.<sup>127</sup> Adam Liptak, the Supreme Court correspondent for *The New York Times*, has perhaps the most apt description of Justice Thomas' approach to his work: "Laconic on the bench, prolific on the page and varied in his interests, Justice Thomas is committed to understanding the Constitution as did the men who drafted and adopted it centuries ago."<sup>128</sup>

What links together these strains of Justice Thomas' jurisprudence? Whether the issue is the scope of the Commerce Clause, affirmative action, or the right of a state to ban abortions, a careful reader of his opinions can see at least two important trends.

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Toobin, *Clarence Thomas's Twenty-Five Years Without Footprints*, THE NEW YORKER (Oct. 25, 2016), <http://www.newyorker.com/news/daily-comment/clarence-thomass-twenty-five-years-without-footprints> (arguing that Justice Thomas will lack any meaningful legacy, and that he "is not a conservative but, rather, a radical – one whose entire career on the Court has been devoted to undermining the rules of precedent in favor of his own idiosyncratic interpretation of the Constitution").

125. Adam Liptak, *Thomas Ends 10-Year Silence on the Bench*, N.Y. TIMES, Mar. 1, 2016, at A1 (reporting that Justice Thomas asked a series of questions in the oral argument of *Voisine v. United States*, 136 S. Ct. 2272 (2016)). A transcript of the hearing is available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/14-10154\\_5i36.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-10154_5i36.pdf).

126. See, e.g., Jeffrey Toobin, *Clarence Thomas's Disgraceful Silence*, THE NEW YORKER (Feb. 21, 2014), <http://www.newyorker.com/news/daily-comment/clarence-thomass-disgraceful-silence>; Adam Liptak, *It's Been 10 Years. Would Clarence Thomas Like to Add Anything?* N.Y. TIMES (Feb. 1, 2016), <http://www.nytimes.com/2016/02/02/us/politics/clarence-thomas-supreme-court.html?>; Adam Liptak, *Clarence Thomas, a Supreme Court Justice of Few Words, Some Not His Own*, N.Y. TIMES (Aug. 27, 2015), <http://www.nytimes.com/2015/08/28/us/justice-clarence-thomas-rulings-studies.html>.

127. Erin Fuchs, *It's Been Ten Years Since Clarence Thomas asked a Question – Here's Why He's So Silent on the Supreme Court Bench*, BUSINESS INSIDER (Feb. 23, 2016), <http://www.businessinsider.com/clarence-thomas-doesnt-ask-questions-2016> ("I don't see where [oral argument] advances anything. . . Maybe it's the Southerner in me. Maybe it's the introvert in me, I don't know. I think that when somebody's talking, somebody ought to listen").

128. Adam Liptak, *In Dissents, Sonia Sotomayor Takes On the Criminal Justice System*, N.Y. TIMES (July 4, 2016), <http://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html>.

First, there is a strong distrust of federal – rather than state – regulatory schemes. In all of the areas outlined above, he opposes encroachments of the executive or legislative branches into areas that he believes the Constitution intends to be controlled by either individuals or the states.

Second, he approaches legal problems with an originalist<sup>129</sup> and textualist<sup>130</sup> framework. He closely examines the language of the statutory or constitutional provision at issue by considering its plain words and their meaning in the context and history of the surrounding body of law into which it must be integrated.<sup>131</sup>

As will be explored in Part IV, Section B, *infra*, Justice Thomas' arbitration jurisprudence is framed by both his distrust of federal regulatory schemes as well as his close examination of statutory language. Although Justice Thomas receives the most attention for his votes on highly politicized cases, his iconoclastic views on arbitration are actually one of his most distinctive ideological contributions to the Court's procedural law.

#### B. *Justice Thomas and FAA Preemption*

The 2015 case of *DIRECTV, Inc. v. Imburgia*, *supra*, was hardly the first time that Justice Thomas voiced his disagreement with the application of the FAA. He has dissented in a total of six 'straight' preemption cases, when the majority found that state law impermissibly conflicted with the FAA. He also wrote an important concurring opinion in more a complex preemption case.

His first significant piece of writing on preemption came in the 1995 case *Allied-Bruce Terminix Cos. v. Dobson*.<sup>132</sup> His dissent, joined by Justice Scalia, began with a simple proclamation to which

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129. "Early originalist scholars saw it as their task to divine the intentions of the drafters of the Constitution. Later originalists shifted their focus to the understandings of the men who ratified it. Finally, textualist originalists attempt to discern the original public meaning of the document as adopted; that is, these textualists maintain that the Constitution ought to be understood as meaning what its original, intended audience understood it to mean." D.A. Jeremy Telman, *Originalism: A Thing Worth Doing*, 42 OHIO N.U. L. REV. 529, 537 (2016).

130. Textualists believe that "interpreters should not focus on the highly subjective issue of the intentions of the enacting legislators, but instead should assess what the ordinary reader of a statute would have understood the words to mean at the time of enactment to ascertain a statute's 'plain' meaning." Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 533–34 (1998).

131. *Id.* at 531–539.

132. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–97 (1995).

he would adhere for the next two decades: "In my view, the [FAA] does not apply in state courts."<sup>133</sup>

The story of *Allied-Bruce* begins with termites.<sup>134</sup> In 1987, a homeowner in Birmingham, Alabama named Steven Gwin purchased a lifetime "Termite Protection Plan" from a local office of Allied-Bruce Terminix Companies, a franchise of Terminix International Company. Allied-Bruce promised "to protect" Gwin's house "against the attack of subterranean termites," to re-inspect the house periodically, to provide any "further treatment found necessary," and to repair, up to \$100,000, damage caused by new termite infestations. The contract specified that any disputes between the parties would be settled exclusively by arbitration.

In 1991, Mr. Gwin decided to sell his home to the Dobson family, who had Allied-Bruce re-inspect it. Allied-Bruce gave the home a clean bill of health, and the Dobsons proceeded with the sale. However, soon after they moved in, the Dobsons found the house swarming with termites. Allied-Bruce attempted to treat the house, but the Dobsons found Allied-Bruce's efforts insufficient.

The Dobsons eventually sued the Gwins along with Allied-Bruce and Terminix in Alabama state court. Allied-Bruce and Terminix, preferring to arbitrate, asked the court to stay the litigation based on the arbitration clause of the contract with Gwin and Section 2 of the FAA. The court denied the stay. Allied-Bruce and Terminix appealed. The Alabama Supreme Court affirmed the denial of the stay on the basis of a state statute making pre-dispute arbitration agreements invalid and unenforceable.<sup>135</sup> That opinion acknowledged that "if an arbitration agreement is voluntarily entered into and is contained in a contract that involves interstate commerce, then the FAA preempts state law and renders the agreement enforceable." However, the Alabama Supreme Court held that the FAA did not apply in this case, because the parties entering the contract contemplated transactions that were primarily local and not substantially interstate.<sup>136</sup> The court reasoned that the FAA applies to a contract only if "at the time

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133. *Id.* at 285-97 (Thomas, J. dissenting).

134. All facts adopted from *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265-270 (1995).

135. ALA. CODE § 8-1-41 (1993) provided that "[a]n agreement to submit a controversy to arbitration" cannot be specifically enforced. The Alabama Supreme Court emphasized that "Predispute arbitration agreements are unenforceable under Alabama law." *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354, 355 (Ala. 1993), *rev'd*, 513 U.S. 265 (1995).

136. *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354, 355 (Ala. 1993), *rev'd*, 513 U.S. 265 (1995).

[the parties entered into the contract] and accepted the arbitration clause, they *contemplated* substantial interstate activity.”<sup>137</sup> Although there were arguably some interstate activities – for example, Allied-Bruce and Terminix are multistate entities and shipped treatment and repair materials from outside of Alabama – the court found that the parties never intended the transaction to have consequences outside of the state’s borders.

The Supreme Court granted certiorari to resolve an emerging conflict among the nation’s courts about the scope of the interstate commerce piece of Section 2 of the FAA. Many federal and state courts (including the Alabama Supreme Court) interpreted the FAA as requiring the parties to a contract to have “contemplated” a connection to interstate commerce. In contrast, several federal appellate courts interpreted the same language as reaching to the limits of Congress’s Commerce Clause power.<sup>138</sup>

In a 7-2 decision, the Court held that “the broader reading of the [federal] statute is the right one.”<sup>139</sup> Writing for the majority, Justice Breyer held that the FAA applies to all disputes involving commerce, and thus that the arbitration clause was valid and enforceable. He further reasoned that the word “involving” in Section 2 of the FAA signaled an intent to fully exercise Congress’s Commerce Clause power and the contract’s arbitration clause should be read broadly, requiring only that the “transaction” in fact “involves” interstate commerce, even if the parties did not contemplate an interstate commerce connection.<sup>140</sup>

Justice Thomas’ dissenting opinion (joined by Justice Scalia<sup>141</sup>) rejected the threshold question: whether the FAA should apply at all.

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137. *Id.* (emphasis in original) (quoting *Metro Indus. Painting Corp. v. Terminal Const. Co.*, 287 F.2d 382, 387 (2d Cir. 1961)).

138. Allied-Bruce was supported by an amicus brief from 20 state attorneys general, who asked the Supreme Court to permit Alabama to apply its anti-arbitration statute. The public policy effect of this brief would have been to allow individual states far more flexibility in determining their own arbitration laws without fear of FAA preemption.

139. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995).

140. *Id.* at 273.

141. Although Justice Scalia joined in Justice Thomas’ dissent, he also wrote separately. Justice Scalia stated that he would be willing to overturn *Southland Corp. v. Keating*, 465 U.S. 1 (1984), noting that “*Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes.” However, Justice Scalia declared that he “shall not in the future dissent from judgments that rest on *Southland*.” This stands in contrast to Justice Thomas, whose voice of dissent has continued with each subsequent decision based upon *Southland*.

The majority's entire view of the case – its interpretation of “involving” and “transaction” and “interstate commerce” – sprang from the assumption that the FAA should apply to this particular contract in the first instance. Justice Thomas argued that it should not, thus leaving Alabama's anti-arbitration statute to determine the case's outcome.<sup>142</sup>

Justice Thomas began his dissent with the uncontroversial statement that Section 1 of the FAA defines “commerce” to mean “commerce among the several States or with foreign nations.”<sup>143</sup> Outlining the FAA's history over the decades subsequent to its passage, he noted how absurd it would have been for legislators in the 1920s to think that the FAA would have applied to state court proceedings. At the time of the FAA's passage, “laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance, because they were directed solely to the mechanisms for resolving the underlying disputes.”<sup>144</sup>

The dissent points to then-Judge Benjamin N. Cardozo's decision in *Berkovitz v. Arbib & Houlberg, Inc.*, which noted that arbitration was purely procedural: “Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow.”<sup>145</sup> It would have been extraordinary, Justice Thomas wrote, “for Congress to attempt to prescribe procedural rules for *state* courts.”<sup>146</sup> Particularly in the pre-New Deal Era, states would have been highly unlikely to cede this degree of *substantive* authority over their own citizens' disputes to Washington.

To examine Congress's likely intent, Justice Thomas looked to specific provisions of the FAA. He observes that most sections, “plainly have no application in state courts, but rather prescribe rules either for federal courts or for arbitration proceedings themselves.”<sup>147</sup>

For example, Section 3, which allows a party to stay litigation when there is a valid arbitration clause, provides:

If any suit or proceeding be brought in **any of the courts of the United States** upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in

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

143. 9 U.S.C. § 1 (1947).

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

145. *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 270 (1921).

146. *Allied-Bruce*, 513 U.S. at 288 (Thomas, J. dissenting) (emphasis in original).

147. *Allied-Bruce*, 513 U.S. at 289 (Thomas, J. dissenting).

which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.<sup>148</sup>

Section 4 – which deals with a situation where a party breaches an arbitration agreement by refusing to submit to arbitration – provides:

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 which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties**, for an order directing that such arbitration proceed in the manner provided for in such agreement.<sup>149</sup>

Section 7, on witnesses and fees, provides:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. **The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts.** . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, **upon petition the United States district court for the district in which such arbitrators**, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend **in the courts of the United States.**<sup>150</sup>

Similar explicit references to “United States,” “district” or “federal” courts are found in Sections 10, 11, and 13. Justice Thomas, known for his close adherence to text (*see* Part IV, Section A, *supra*), views these as clear signals that Congress intended for the FAA to control in *federal* courts. There is absolutely no textual evidence in

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148. 9 U.S.C. § 3 (1947) (emphasis added).

149. 9 U.S.C. § 4 (1947) (emphasis added).

150. 9 U.S.C. § 7 (1947) (emphasis added).

the statute, he argues, to suggest that the FAA was meant to apply in *state* courts.

Moreover, even if the FAA were ambiguous on the inclusion of state courts, Justice Thomas reasoned this would not change the result: "To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather, we must be 'absolutely certain' that Congress intended such displacement before we give preemptive effect to a federal statute."<sup>151</sup> The "core principles of federalism", he wrote, dictate that Congress is not cavalier about removing power from the states.<sup>152</sup> Alabama's own judgment as to its public policy – that pre-dispute arbitration agreements are void and that an agreement to submit a dispute to arbitration cannot be specifically enforced<sup>153</sup> – should govern.

It did not take long for the issue of FAA preemption to once again reach the Court. In 1996, the year after *Allied-Bruce* was decided, Justice Thomas reiterated his views in a brief dissent in *Doctor's Associates, Inc. v. Casarotto*.<sup>154</sup>

Doctor's Associates was a Subway franchisor and Paul Casarotto was a franchisee. A disagreement emerged regarding the town in Montana where Casarotto could open his store. Doctor's Associates insisted on an elegant neighborhood; Casarotto alleged that he had been promised that he could open the store in a less expensive area. After Casarotto had already secured a loan, Doctor's Associates awarded the franchise to someone else. Casarotto sued Doctor's Associates, Inc. in Montana state court, alleging breach of contract and fraud. The state court stayed the lawsuit because of an arbitration clause in the standard form franchise agreement.

However, the Montana Supreme Court ultimately reversed, holding that the arbitration clause was unenforceable for failing to meet a state law requirement that "[n]otice that a contract is subject to arbitration . . . [be] typed in underlined capital letters on the first page of the contract."<sup>155</sup> The Montana Supreme Court did not agree that the

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151. *Allied-Bruce*, 513 U.S. at 291 (Thomas, J. dissenting) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991)).

152. *Id.* at 292.

153. See, e.g., *Wells v. Mobile County Bd. of Realtors*, 387 So. 2d 140, 144 (Ala. 1980). Specific enforcement in this context means that a court would compel parties to arbitrate (rather than litigate) if an arbitration clause is found to be valid. The FAA purposely makes agreement to arbitrate specifically enforceable, giving teeth to the arbitration process and preventing parties from escaping arbitration agreements without consequence.

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

155. MONT. CODE ANN. § 27-5-114(4) (1997).

FAA preempted the state statute merely by its declaration that written provisions for arbitration are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>156</sup>

While the Montana Supreme Court acknowledged the FAA’s presumption that arbitration agreements were enforceable, it held that Montana’s notice requirement did not undermine the FAA’s goals and policies. After all, the notice requirement passed by Montana’s legislature did not preclude arbitration agreements altogether; it simply ensured that arbitration agreements are entered into knowingly before they can be enforced.

The U.S. Supreme Court reversed the Montana Supreme Court in an 8-1 vote. In an opinion by Justice Ginsburg, the Court held that Montana’s statute was unconstitutional. The majority continued to build on the *Allied-Bruce* logic: “Courts may not,” Justice Ginsburg wrote, “invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. . . Congress precluded States from singling out arbitration provisions for suspect status.”<sup>157</sup> Thus, Montana’s statute “directly conflicts with § 2 of the FAA because the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act.” After all, the Court reasoned, the statute would result in the invalidation of the arbitration clause in the Subway franchisor agreement, in direct opposition to the policy goals of the FAA. “The State’s prescription is thus inconsonant with, and is therefore preempted by, the federal law,” Justice Ginsburg concluded.<sup>158</sup>

The fact that this pro-FAA decision was written by Justice Ginsburg – routinely hailed as a liberal lion – shows how support for FAA preemption eludes simplistic notions of ‘liberal’ and ‘conservative.’ Montana’s statute was, by all measures, a liberal statute meant to protect individuals like Paul Casarotto from contracts that would prevent them from having their day in court. By forcing the arbitration clauses to be highlighted and put onto the first page of the contract, Montana clearly sought to have an influence on contracting between private parties and tip the scales towards average citizens.

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156. 9 U.S.C. § 2 (1947).

157. *Doctor’s Assocs.*, 517 U.S. at 688.

158. *Id.*

And yet, Justice Ginsburg – along with every other traditionally ‘liberal’ member of the Court – held the statute unconstitutional for conflicting with the letter and spirit of the FAA.

Justice Thomas, the traditional ‘conservative,’ stuck to his vision of states’ rights, despite the fact that this would have led to a normatively ‘liberal’ result. His dissent was two sentences long: “For the reasons given in my dissent last Term in [*Allied-Bruce Terminix*], I remain of the view that § 2 of the Federal Arbitration Act, 9 U.S.C. § 2, does not apply to proceedings in state courts. Accordingly, I respectfully dissent.”<sup>159</sup>

Justice Thomas has held strong to his interpretation of the FAA. Not only did he dissent in *Allied-Bruce, Doctor’s Associates, Inc.*, and *DIRECTV*, but also in three other cases involving FAA preemption: (i) *Green Tree Financial Corp. v. Bazzle* (2003), (ii) *Buckeye Check Cashing, Inc. v. Cardegna* (2006), and (iii) *Preston v. Ferrer* (2008). In all of these cases, Justice Thomas’ position would actually benefit the party arguing for the enforcement of an objectively liberal state law.

First, in *Green Tree Financial Corp. v. Bazzle*, the Court considered whether the FAA permits class-wide arbitration.<sup>160</sup> Lynn and Burt Bazzle had entered into a contract for a home improvement loan with Green Tree Financial Corporation. The Bazzles sued Green Tree for neglecting to collect certain information from them at the time of their loan, as required by South Carolina law.<sup>161</sup> They then realized that other debtors were affected by Green Tree’s practices, and asked a South Carolina state court to certify a class of plaintiffs. Relying on an arbitration clause in the loan agreement, Green Tree moved to compel individual arbitration. Over Green Tree’s objections, the South Carolina court allowed both motions, permitting a class-wide arbitration. The arbitrator ultimately awarded the claimant class more than \$20 million in damages. When the state court confirmed the award, not shockingly, Green Tree appealed. Ultimately, the

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

160. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). For a more detailed analysis of the case’s background and implications, see Matthew Maggiasco, *The Savior of Aggregate Litigation: The Giving Green Tree*, 14 CARDOZO J. CONFLICT RESOL. 939 (2013).

161. S.C. Code Ann. § 37-10-102 requires that creditors obtaining loans that are “secured in whole or in part by a lien on real estate” must obtain the names of the debtor’s attorney and the insurance agent. This prompt was intended to protect borrowers by requiring credit applications to allow clear and prominent disclosure of the debtor’s choice of legal counsel and insurance agent.

South Carolina Supreme Court affirmed, noting that because the arbitration clause did not specifically prohibit class arbitration, the procedure was permissible under state law.

The U.S. Supreme Court vacated that decision, holding that an arbitrator, not a court, must decide whether the contract forbids class arbitration. “[W]e cannot automatically accept the South Carolina Supreme Court’s resolution of this contract-interpretation question,”<sup>162</sup> Justice Breyer wrote for the majority. “Under the terms of the parties’ contracts, the question – whether the agreement forbids class arbitration – is for the arbitrator to decide. The parties agreed to submit to the arbitrator ‘[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.’”<sup>163</sup> The decision was highly procedural, but the effect was simple: with a broad arbitration clause, the state court had no ability to decide arbitrability. Justice Breyer, one of the Court’s reliable liberals, thus invalidated the South Carolina Supreme Court’s decision, which likely would have benefited the consumers.

Justice Thomas’ dissent was three sentences. It reiterated his belief that the FAA does not apply in state courts, and therefore it “cannot be a ground for pre-empting a state court’s interpretation of a private arbitration agreement.”<sup>164</sup> In other words, the fact that the federal statute prefers that arbitrators decide issues of arbitrability cannot displace a state court’s interpretation of a contract. Justice Thomas believed that state law should govern, even when the result would benefit a class of plaintiffs against a large corporation.

Second, in *Buckeye Check Cashing, Inc. v. Cardegna*, the Court considered an appeal from the Florida Supreme Court on the question of whether a party could avoid arbitration if the contract containing the arbitration clause violated state law.<sup>165</sup> John Cardegna signed a contract for a loan from Buckeye Check Cashing, a payday lender. The agreement Cardegna contained an arbitration clause. When Cardegna sued in Florida state court, Buckeye moved to compel arbitration. Cardegna sought to avoid arbitration by arguing that

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162. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451 (2003).

163. *Id.*

164. *Id.* at 460 (Thomas, J., dissenting).

165. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (deciding 7-1, with Justice Thomas as the lone dissenter, that challenges to the legality of a contract as a whole must be argued before the arbitrator rather than a court).

Buckeye made illegal usurious loans. The Florida Supreme Court ultimately held that, because the contract was void under Florida law, the arbitration clause could not be enforced.<sup>166</sup>

The Supreme Court reversed, holding that “a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”<sup>167</sup> In a majority opinion by Justice Scalia, the Court found that the FAA required that the arbitrator must decide Cardegna’s arguments about the contract’s validity – not a state court applying state law.

Justice Thomas rejected this holding. In dissent, he argued that in state court proceedings, the FAA “cannot be the basis for displacing a state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law.”<sup>168</sup> Put differently, the FAA should not preempt Florida’s own view of contract validity – even though Florida’s policy would result in a more progressive, consumer-friendly outcome.

Third, and finally, in *Preston v. Ferrer*, the Court considered whether a contract dispute must to go arbitration despite a state law declaring that an administrative agency has exclusive jurisdiction over the disputed issue. Alex Ferrer, a television personality, had a dispute with his agent, Arnold Preston over commission payments. Their contract contained an arbitration clause. Preston demanded arbitration. But Ferrer petitioned the California Labor Commissioner, charging that the contract was invalid and unenforceable under California’s Talent Agencies Act (“TAA”) because Preston acted as a talent agent without a license, and that his unlicensed status rendered the entire contract, including the arbitration clause, void. The California Court of Appeal agreed that the TAA vests “exclusive original jurisdiction” over the dispute with the Labor Commissioner and stopped the arbitration.

When the California Supreme Court denied Preston’s petition for review, the U.S. Supreme Court granted certiorari to determine whether the FAA overrides state law vesting initial adjudicatory authority in an administrative agency. Not surprisingly, the Court

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166. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 863 (Fla. 2005) (distinguishing *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and noting that there, “the claim of fraud in the inducement, if true, would have rendered the underlying contract merely voidable [whereas here] the underlying contract. . . would be rendered void from the outset if it were determined that the contract indeed violated Florida’s usury laws”).

167. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006).

168. *Id.* at 449 (Thomas, J., dissenting).

found 8-1 that it did indeed override state law. In her majority opinion, Justice Ginsburg wrote that “when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.”<sup>169</sup> Thus, it was the role of the arbitrator, and not the state Labor Commission, to determine the legality of the management contract.

By now, the lone dissenter’s identity is no surprise. Justice Thomas’ dissent argued that in state court proceedings, the FAA “cannot displace a state law that delays arbitration until administrative proceedings are completed.”<sup>170</sup> While Justice Ginsburg allowed the FAA to override California’s progressive labor policy and statute, Justice Thomas would have allowed state law to govern.

Beyond these five cases on ‘straight’ FAA preemption of state law, Justice Thomas also penned an important concurring opinion on more complex preemption matter.<sup>171</sup> *AT&T Mobility L.L.C. v. Concepcion*<sup>172</sup> involved a class action brought by AT&T customers in a California federal district court. The customers alleged that the company defrauded them by promising free cell phones, when in fact they were charged \$30.22 in taxes and fees. AT&T moved to compel arbitration based on the arbitration clause contained within its service contract, but the district court denied the motion. On appeal, the Ninth Circuit agreed, holding that the arbitration clause was unconscionable and unenforceable under the “Discover Bank rule,” since few rational consumers would go through the hassle of pursuing a \$30.22 claim in bilateral arbitration. The Ninth Circuit further held that the FAA did not preempt California law on unconscionability.<sup>173</sup>

169. *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008).

170. *Id.* at 363(Thomas, J., dissenting).

171. In one other case involving the FAA’s intersection with state law – *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) – Justice Thomas concurred in judgment because the underlying contract specifically dictated that state law apply: “The agreement now before us provides that it ‘shall be construed and enforced in accordance with the laws of the State of New York.’ . . . Because the parties agreed to be bound by New York law [which allows arbitrators, not courts, to interpret a particular issue]. . . I would permit arbitrators to resolve the. . . issues that have arisen in this case, just as New York case law provides.”

172. *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011). See *supra*, note 3 on the so-called “Discovery Bank rule,” drawn from *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), which held most collective-arbitration waivers in consumer contracts as unconscionable under California law.

173. *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009) (finding that the “FAA does not impliedly preempt California unconscionability law”).

Perhaps not surprisingly, the Supreme Court reversed the Ninth Circuit, holding that the FAA does indeed preempt “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>174</sup> Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined Justice Scalia’s majority opinion.

While Justice Thomas “reluctantly join[ed]” that 5-4 majority, he also wrote “separately to explain how [he] would find [a] limit” on contract defenses permitted by Section 2 of the FAA.<sup>175</sup> In his concurring opinion, Justice Thomas argued that he believes that Section 4 of the FAA restricts Section 2’s “savings clause”<sup>176</sup> to defenses that relate to the “making” of the arbitration provision.<sup>177</sup> He reasoned that the savings clause of the FAA permits exceptions to the enforceability of arbitration agreements only for defenses “related to the making of the [arbitration] agreement.”<sup>178</sup> Because the “Discover Bank rule”<sup>179</sup> did not relate to the formation of the arbitration agreement within the meaning of Sections 2 and 4, Justice Thomas concluded that the FAA preempted it.

Justice Thomas’ analysis of the FAA’s text in *AT&T Mobility L.L.C.* is so markedly different from the majority that some have suggested that the decision was really a plurality opinion.<sup>180</sup> As at least two legal scholars have noticed, “Justice Thomas may have felt compelled to articulate his reading of the savings clause because, in past preemption cases, he dissented based on his view . . . that the FAA does not apply in state courts. Since this case came up through the

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174. *Id.* at 343.

175. *Id.* at 353 (Thomas, J., concurring).

176. The “savings clause” is contained in Section 2, and provides that arbitration agreements are “enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. This language seems to allow courts to rely on general contract defenses to decline enforcement of arbitration agreements. Such defenses include, for example, fraud, duress, or unconscionability. However, the Supreme Court has essentially eviscerated the savings clause by holding that even well-established contractual defenses are preempted whenever they “are applied in a fashion that disfavors arbitration” or “disproportionately impacts arbitration agreements.” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

177. For a detailed analysis of the Court’s jurisprudence around the unconscionability of arbitration clauses, see David Horton, *Unconscionability Wars*, 106 Nw. U.L. REV. Colloquy 13 (2011).

178. *AT&T Mobility L.L.C.* at 355.

179. *See supra*, note 3.

180. See Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 35 AM. J. TRIAL ADVOC. 87, 113–23 (2011) (“Justice Thomas reaches the same conclusion as the putative majority – that the *Discover Bank* rule is preempted by the FAA – but rejects every aspect of the putative majority’s opinion”).

federal courts, that basis of dissent did not apply.”<sup>181</sup> Nevertheless, he rejected California’s liberal state law without any hint of enthusiasm. The tone and substance of his concurrence seem clear that, if he could, he would have saved California’s law from federal preemption.

While Justice Thomas never couches his disagreement with the majority’s FAA jurisprudence in pro-consumer rhetoric, some commentators have noted that the post-*Southland* majority has severely harmed the ability of states to protect consumers. As Professor Margaret L. Moses has written:

The Court has, step by step, built a house of cards that has almost no resemblance to the structure envisioned by the original statute. Each card put in place by the Court builds on the prior flimsy court-created structure. The edifice we have today incorporates policies and practices that were never considered or developed by our legislative branch and in fact goes far beyond and even against what the 1925 Congress enacted. The consistent effect of the Court’s interpretation . . . is to diminish individual rights, to significantly reduce access to the courts and the right to a jury trial, and to favor strong economic interests.<sup>182</sup>

Justice Thomas’ dissents on FAA preemption never adopt this language – decrying a majority that purposefully harms progressive attempts to ensure individuals’ access to the courthouse. Instead, his focus is purely on the language of the FAA and his views of Congress’s original meaning within the federalist framework. In this way, his arbitration jurisprudence fits neatly into his broader jurisprudence, combining a healthy suspicion of federal legislative schemes with careful attention to original meaning and statutory text.

## V. CONCLUSION

Justice Thomas has served on the Supreme Court for more than a quarter-century. He is currently the lone voice of dissent on the applicability of the FAA in state courts, and the fiercest critic of federal preemption of state arbitration laws.

As noted, he is hardly the only justice whose views on FAA preemption have split with the majority. Justice Thomas was surely influenced by Justice O’Connor’s dissent in *Southland* and Justice

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181. Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 15 n.94 (2012).

182. See, e.g., Moses, *supra*, note 59 (arguing that the Court wrongly decided *Southland* and then doubled down on its error in the subsequent decades).

Scalia's dissent in *Allied-Bruce*.<sup>183</sup> Indeed, many scholars agree with

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183. Justice Scalia dissented in *Allied-Bruce*, but asserted that he would decide future cases under the majority view expressed in *Southland*. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284–85 (1995) (Scalia, J., dissenting) (“Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. . . [but] I shall not in the future dissent from judgments that rest on *Southland*. I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time, the course of future lawmaking seems unlikely to be affected by its existence”). Unlike Justice Thomas, Justice Scalia acknowledged *Southland* as binding in *Allied-Bruce*. His view on the FAA arguably shifted over the course of his tenure on the Court. While he initially seemed suspicious of the statute’s scope, he eventually became a leading champion of its expansion, particularly with respect to consumer claims and class actions.

Two recent articles offer a comprehensive review – and strong critique – of Justice Scalia’s broader legacy on arbitration: Jill I. Gross, *Justice Scalia’s Hat Trick and the Supreme Court’s Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOKLYN L. REV. 111 (2015) and David S. Schwartz, *Justice Scalia’s Jiggery-Pokery in Federal Arbitration Law*, 101 MINN. L. REV. HEADNOTES 75 (2016). Both examine the impact of three sequential majority opinions by Justice Scalia: *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011), *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

Arguing that the current Supreme Court appears oddly detached from modern-day arbitration practice, Professor Gross asserts that Justice Scalia’s opinions in these three cases “sharply reduced defenses available to parties to challenge the enforcement of arbitration agreements.” Gross at 125. Courts must now enforce arbitration agreements according to their precise terms “unless (1) there is an explicit contrary congressional command; (2) the arbitration agreement expressly strips one party of the substantive right to pursue a federal statutory claim; or (3) a state law contract defense invalidates the agreement, but only if that defense does not discriminate against arbitration and does not frustrate the purposes of the FAA.” *Id.* at 132. Courts will enforce pre-dispute arbitration agreements even “in the face of common law defenses to the enforcement of non-arbitration agreements.” *Id.* Justice Scalia’s decisions have resulted in “widespread criticism that large corporations now use arbitration as a mechanism to force consumers to give up their right to go to court and that arbitration agreements ferry consumers into a forum that is more hospitable to the repeat player, the large corporation.” *Id.*

Professor Schwartz’s piece was published by the *Minnesota Law Review* as part of a tribute to Justice Scalia following his death in February 2016. Like Professor Gross, Professor Schwartz argues that Justice Scalia’s arbitration opinions have established “a legal regime in which arbitration clauses can be used by corporate defendants to immunize themselves from class actions. . . [using] reasoning that casts aside both doctrinal fidelity and logic to reach a desired result.” Schwartz at 75. He also criticizes Justice Scalia for “abandon[ing] his much-touted federalism principles early on [after *Allied-Bruce*], and eventually [finding] in FAA cases an opportunity to transform arbitration agreements into” avenues for “allowing corporate defendants to immunize themselves” through enforceable arbitration clauses. *Id.* at 93.

these justices that the FAA's modern scope would be wholly unrecognizable to its drafters in the 1920s.<sup>184</sup> Regardless, FAA preemption is "now well-established."<sup>185</sup> State laws that attempt to restrict arbitration will be subjected to exacting scrutiny by the federal courts.

Some might view Justice Thomas' continuing dissents as futile, a wasted paragraph of ink annexed to each FAA-related opinion. But for several reasons, his steady voice on this issue remains worthy of attention.

First, his lone opposition reminds readers of the role of dissent in American law.<sup>186</sup> Dissents serve many functions, not the least of which is "the assistance of future judges in passing on identical or similar states of fact."<sup>187</sup> As Justice William Brennan explained, justices write dissents to point out "flaws . . . in the majority's legal analysis. . . in the hope that the court will mend the error of its ways in a later case."<sup>188</sup> Dissents can "influence the actions of judicial majorities twenty years from now or broaden the jurisprudential range . . . of the next generation."<sup>189</sup> In this way, Justice Thomas is using his dissents to ask future members of the Court to reverse the ever-expanding "talismatic" status of the FAA that allows it to eclipse state policy.<sup>190</sup>

Second, Justice Thomas' dissents remind even the most ardent supporters of our increasingly unified federal arbitration policy that such a system was never inevitable, nor is it necessarily good. Justice

184. See, e.g., Moses, *supra*, note 59; David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 541–42 (2005) (arguing that the FAA as construed by *Southland* is unconstitutional).

185. See, e.g., *Preston v. Ferrer*, 552 U.S. 346, 352, n.2 (2008) ("Adhering to precedent, we do not take up Ferrer's invitation to overrule *Southland*"); *Allied-Bruce*, 513 U.S. at 272 (refusing a request by 20 state attorneys general to overrule *Southland* because "private parties have likely written contracts relying upon *Southland* as authority").

186. For a broader discussion of the reasons that judges dissent, see Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011) (an empirical analysis of judicial dissents, including their costs and benefits for judges).

187. Books and Periodicals, *Dissenting Opinions*, 19 HARV. L. REV. 309, 310 (1906).

188. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

189. Lani Guinier, *Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 14 (2008).

190. David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS., Winter/Spring 2004, at 5 ("Despite its constant, talismatic repetition, the 'national policy favoring arbitration' is illusory and is highly dubious federalism").

Louis Brandeis famously praised state governments as the laboratories of democracy: “It is one of the happy incidents of the federal system,” he wrote, “that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>191</sup> There is surely a benefit to a federal arbitration procedure that is consistent across 50 states. But having states experiment with various new procedures, additional requirements, or heightened safeguards to the arbitration process could lead to improved dispute resolution mechanisms. The threat of federal preemption discourages such innovation. Justice Thomas never frames his critique of FAA jurisprudence in these public policy terms, of course. But he clearly believes that states should have the ability to engage in precisely this sort of local experimentation.

Finally, Justice Thomas’ ongoing dissents show that arbitration policy does not always exist along the cartoonish left-right divide that is often assumed to pervade each and every Supreme Court opinion. Among the most conservative justices of his generation, he often rises in defense of the rights of states to pass objectively liberal restrictions on arbitration. Meanwhile, some of the most liberal justices consistently support the preemption of objectively progressive state laws. Justice Thomas demonstrates and exemplifies the political nuance inherent in this complex area of procedural law.

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191. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation”).