Oklahoma Constitutional Law: The Future of the Fourth Amendment in Oklahoma High Schools

Melinda Wyatt Gilliam

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COMMENTS

Arbitration: Arbitration in the 21st Century: Where We've Been, Where We're Going

Introduction

In 1925, the U.S. Congress passed the Federal Arbitration Act (FAA).¹ The stated purpose of the Act was to create a procedural rule favoring the enforcement of arbitration agreements in federal courts.² Now, as we enter the 21st century, the scope of the FAA is expanding. Through "judicial revisionism," the Supreme Court has applied the FAA in a myriad of contexts.³

As the United States enters its third full century of existence, arbitration has been increasingly used in a variety of areas. From its beginnings as an internal dispute resolution mechanism used within various industries, to a common feature of many commercial contracts, businesspeople and legal professionals have both embraced and opposed arbitration. In recent years, many more questions arose with the expanded use of the FAA in various contexts. Both state and federal courts have broadly interpreted the FAA to govern many areas of contract law beyond Congress's intent; thus, it is now necessary for Congress to take a new look at the scope of the FAA.

Imagine that you have entered into a contract to purchase a business. In the purchase agreement, there is a clause that states that any claim or controversy arising out of the contract will be sent to arbitration. At the time of the agreement, this seems reasonable because you do not foresee any real problems with your takeover. However, in deciding whether to purchase the business, you relied upon the financial statements of the outgoing owners. Now, some time later it appears that these financial statements were altered to reflect a more solvent business than actually exists. Clearly, you could seek rescission on the basis of fraud and misrepresentation in the inducement of the contract. You may want to go to court, but the party with whom you had the purchase agreement will likely seek a court order compelling arbitration. You may ask yourself how the arbitration agreement could be valid, since it was a part of a contract that you feel was procured by fraud. Will the court force arbitration, or will the court decide the validity of the contract itself?

¹ Congress recodified the United States Arbitration Act in 1954, and renamed the Act the "Federal Arbitration Act" (hereinafter the FAA).
In another situation, as a condition of employment with your local securities dealer, you must become a member of NASDAQ. Embedded in your NASDAQ application is an agreement to arbitrate any claims arising out of your employment. After you have worked for several months, you are fired, you think, because of your race. You want to sue your employer, but, like the party mentioned above, you do not know whether the court will compel arbitration or decide your claim itself. The answer to this question is far from clear and will depend upon the jurisdiction in which you entered into the contract, the type of claim you are seeking, and whether you bring your claim in state or federal court. While the aforementioned factors affect virtually any cause of action, courts have given the FAA, and its state counterparts, a wide range of interpretations.

This comment retraces the evolution of arbitration procedures from their inception, the legislative history of the FAA, and both federal and state court interpretations of the scope of the Act. The purpose of this Comment is to trace the history of arbitration in the United States, as well as look to the future of arbitration in this country. Part I surveys the history of arbitration procedures from its beginnings to its current use in the United States. Part II looks at the legislative history of the FAA. Part III analyzes the various judicial interpretations of the scope and application of the FAA. Part IV analyzes the state of the law in Oklahoma courts. Finally, Part V considers options for revising the FAA.

I. The Historical Development of Arbitration

Arbitration is a process of dispute resolution in which a neutral third party renders a decision after a hearing at which both parties have an opportunity to be heard.⁴ Commercial arbitration has been used as an alternative to litigation for centuries.⁵ In European countries, trade associations and merchant guilds were the early supporters of arbitration⁶ and preferred the process to litigation for a variety of reasons.⁷ Many of these groups felt that arbitration expedited the process of dispute resolution and that courts were not knowledgeable enough about commercial practices to render adequate judgments regarding disputes.⁸ Additionally, these tradesmen preferred arbitration because of the unique remedies provided by the arbitration tribunals.⁹ These remedies often involved sanctions that were not available at common law.¹⁰

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⁶ See id. at 970.
⁷ See id. at 971.
⁸ See id. at 970.
⁹ See id. at 971.
¹⁰ See id.
In the United States, commercial arbitration predates the Revolutionary War.\textsuperscript{11} The process was originally used to resolve disputes within a particular industry.\textsuperscript{12} U.S. courts were originally hostile to agreements to arbitrate and routinely invalidated arbitration provisions, invoking the English common law doctrine of revocability.\textsuperscript{13} In Vynior's Case, the House of Lords originated the revocability doctrine.\textsuperscript{14} Lord Coke expressed the view that promises to arbitrate created a revocable agency relationship with the arbitrator.\textsuperscript{15} U.S. courts adopted this doctrine of revocability from the English common law courts.\textsuperscript{16} Additionally, early courts refused to enforce agreements to arbitrate because the courts felt that these agreements were against public policy, as these provisions overstepped the jurisdiction of the court.\textsuperscript{17}

In Vynior's Case, the King's Bench enforced a bond to ensure compliance with the agreement.\textsuperscript{18} Thus, the tradesmen who regularly used these bonds to ensure the performance of agreements effectively utilized this remedy. However, in 1697, Parliament enacted the Statute of Fines and Penalties, which forbade the use of penalty bonds as a remedy for breach of contract.\textsuperscript{19} The application of the statute resulted in English courts only awarding nominal damages for breach of arbitration agreements.\textsuperscript{20} This negative view toward arbitration agreements carried over into American courts in the 19th century. In 1874, the U.S. Supreme Court proclaimed that advance agreements to oust the courts of jurisdiction are illegal and void.\textsuperscript{21} This anti-arbitration view continued until the passage of the United States Arbitration Law (USAL) of 1925.

As a model for the federal legislation,\textsuperscript{22} the drafters of the USAL used the New York arbitration statute. Early supporters of the USAL maintained that Congress enacted the legislation based upon its Article III power to establish procedures for the federal courts.\textsuperscript{23} The Act provided that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for

\textsuperscript{12} See id.
\textsuperscript{13} See Huber & Trachte-Huber, supra note 2, at 7; see also Van Wetzel Stone, supra note 5, at 981.
\textsuperscript{14} See Vynior's Case, 77 Eng. Rep. 595 (K.B. 1609).
\textsuperscript{15} See id.
\textsuperscript{16} See Van Wetzel Stone, supra note 5, at 973.
\textsuperscript{17} Huber & Trachte-Huber, supra note 2, at 9.
\textsuperscript{20} See Van Wetzel Stone, supra note 5, at 974; see also Huber & Trachte-Huber, supra note 2, at 8.
\textsuperscript{22} Huber & Trachte-Huber, supra note 2, at 5.
\textsuperscript{23} See Van Wetzel Stone, supra note 5, at 944.
the revocation of any contract." The modern Federal Arbitration Act is almost unchanged from its original form.

Many legal scholars and practitioners argue that the FAA was originally intended to serve as a self-regulation vehicle between consenting parties within an industry. For example, the FAA has been invoked as the basis to enforce agreements to arbitrate all transactions. Before looking at the various interpretations the federal and state courts have given the FAA, it is important to look at the legislative intent in passing the Act. As a starting point, we will look at the American Bar Association Committee on Commerce’s report on the Act, and the comments of Julius Cohen, the president of the ABA at the time of the Act’s passage and one of drafters of the original United States Arbitration Law.

II. Overview of the Federal Arbitration Act

A. Scope of the Act

Congress enacted the FAA’s precursor, USAL, in 1925. The Committee on Commerce of the American Bar Association drafted the Act. With the combined support of the ABA and business organizations throughout the United States, Congress passed the Act through unanimous assent by both houses of Congress. The Act provided that written clauses providing for arbitration of future disputes contained in any contract relating to maritime transactions or interstate commerce shall be valid, irrevocable, and enforceable, except on the grounds for which any contract may be revoked. The authors of the Act specifically excepted from the statute contracts for employment of seamen, railroad employees, and other workers in foreign and interstate commerce. In addition to the declaration of the validity of arbitration agreements, the USAL gave federal courts jurisdiction to enforce agreements. As a matter of procedure, the federal courts were to enter an order compelling arbitration, provided that no questions existed as to the validity of the arbitration agreement. If a question arose as to the existence of an agreement to arbitrate, courts would adjudicate that question first, then decide whether to order the parties to submit to arbitration.

B. The Legal Justifications of the Act

The authors of the USAL stated that Congress relied upon its Article III power by which Congress is authorized to establish and control inferior federal courts. More clearly, the authors of the Act explicitly stated “a Federal statute providing for the enforcement of arbitration agreements does relate solely to

25. See Van Wetzel Stone, supra note 5, at 942.
27. See id.; see also 9 U.S.C.A. § 1 (West 1994).
28. See id.
29. See id.
30. See Committee on Commerce, supra note 26, at 154.
procedure of the federal courts.\textsuperscript{31} The answer to the oft-asked question of how the Act applies to the states is that the Act is no infringement upon the right of each state to decide for itself what contracts shall or shall not exist under its laws. Further, the drafters stated that whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made.\textsuperscript{32} Whether or not an arbitration clause is to be enforced is a question of procedure governed by the law of the particular jurisdiction.\textsuperscript{33} Many commentators, scholars, and practitioners have stated that Congress enacted the Act on the basis of its power to regulate commerce.\textsuperscript{34} However, this is not an accurate statement regarding the congressional powers relied upon in the passage of the Act.

Although many observers have interpreted these statements to mean that arbitration agreements are to be given summary judicial approval, this view is inconsistent with the drafters' intent, when considered with the judicial attitude extended to arbitration agreements.\textsuperscript{35} At the time of the passage of the Act, many courts were hostile to arbitration agreements. The authors of the Act noted two main reasons for the judicial hostility toward arbitration agreements. First, many judges expressed the view that they felt unable to enforce arbitration agreements, absent legislative consent. Second, many courts followed precedents, in which courts traditionally refused to enforce arbitration agreements.\textsuperscript{36} The source of this hostility is that historically many courts felt a real jealousy toward arbitration, seeing it as a threat to their jurisdiction. This negativity manifested itself in the form of many courts refusing to specifically enforce agreements to arbitrate.\textsuperscript{37} Thus, the Act does not declare the existence of arbitration agreements as a matter of substantive law.\textsuperscript{38} Instead, it simply declares the policy of recognizing and enforcing arbitration agreements in federal courts; it does not, however, encroach upon the province of the individual states. Nowhere do the authors of the Act state that the FAA was intended to force federal courts to uphold arbitration agreements under any circumstances. In fact, the drafters stated that arbitration is a remedy peculiarly suited to the disposition of questions of fact, such as quantity, quality, time of delivery, etc.\textsuperscript{39} From these statements, one can infer that the authors intended that questions of law, like fraud in inducement and the constitutionality of applying the Act, are best left to the courts. Indeed, questions with which arbitrators have no particular expertise are best left to the determination of judges with a background of legal experience and established systems of law.\textsuperscript{40}

\textsuperscript{31} Id.
\textsuperscript{32} See id. at 155.
\textsuperscript{33} See id.
\textsuperscript{34} See id.; see also Prima Paint Corp. v. Flood & Conklin, Mfg. Co., 388 U.S. 395, 405 (1967).
\textsuperscript{35} See Committee on Commerce, supra note 26, at 155.
\textsuperscript{36} See id.
\textsuperscript{37} See id.
\textsuperscript{38} See id. at 156.
\textsuperscript{40} See id.
C. Objectives of the Act

While the primary objective of the Act was to make arbitration agreements enforceable in federal courts, the drafters directed the Act at a number of "evils" that were viewed as barriers to efficient business practice. First, the drafters sought to eliminate the delay associated with litigation. In many instances, a party will be forced to wait several years before his claim is fully adjudicated. Second, arbitration is far less expensive than the litigation process. Last, the drafters stated that litigation often results in a decision that is not viewed as just by the measures of the business world. This is supported by the contention that arbitrators are able to fashion unique remedies; further, arbitrators are not bound by rigid rules, which ultimately will affect the disposition of cases.

D. Proposed Operation of the Statute

In situations where both parties are willing to arbitrate, the FAA ensures that there will be no legal interference to arbitration. On the other hand, if a party simply refuses to submit to the agreed upon arbitration, the FAA provides the other party a remedy formerly denied him. As stated before, many courts refused to specifically enforce arbitration agreements, in part due to the fact that in most common law jurisdictions specific performance was not an attainable remedy, except in limited circumstances. Another possible scenario for which the Act provides a remedy is a situation where a party refuses to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or the party believes that the agreement to arbitrate is not applicable to the controversy. One instance of a "good faith" belief that a contract does not apply would be where a party alleges that the agreement was induced by fraud. Additionally, an agreement to arbitrate may not apply to a controversy in which Congress has statutorily created a right guaranteeing access to the courts. For example, in various discrimination statutes for which Congress has given individuals the right to bring suit in federal courts, the Act requires the court to examine the merits of such a claim. Thus, it would appear that if a party is alleging fraud in the inducement of a contract containing an arbitration clause, or where statutory rights are involved, the drafters of the Act did not intend for these disputes to be decided by arbitrators.

E. Procedure for Enforcement of the FAA

The procedure for enforcing arbitration agreements is simple. A party seeking enforcement of an arbitration provision makes a motion in the district court. The

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41. Committee on Commerce, supra note 26, at 155.
42. See id.
43. See id.
44. See id.
45. See id.
46. See id.
47. See id.
48. See id.
Act provides that the opposing party be given reasonable notice of this motion. If the parties agree that the arbitration provision applies, the court will decide the motion based upon affidavits and exhibits presented to the court. This procedure eliminates the need for excessive delay in the disposition of disputes.49 After a few days, the court will enter an order compelling arbitration. If the agreement fails to provide for the arbitrators, the court will appoint them. Following this procedure, the arbitration is to proceed without any further interference from the court.50 Within the arbitration itself, the arbitrators are given the power to call witnesses and to require the production of papers and other exhibits.51 Once the arbitrators have made their decision, the prevailing party seeks to enforce the judgment in the district court.52 The judgment enforcement procedure should take only a few days, barring opposition by the adverse party.53 In the event that the adverse party opposes the judgment, the Act provides that the court will nevertheless enforce the judgment, except in a few specific instances. However, under no circumstances does the Act allow the court to vacate the award upon a technical ground.54 In fact, the drafters expressed that the courts are bound to accept the judgment of the arbitrators unless "as a matter of common morality, it ought not to be enforced."55

Such instances include corruption, fraud, or misconduct, or situations where the arbitrators exceed their authority.56 The Act also limits grounds for appeal to modification, vacation, or correcting an award. Thus, in most situations, the Act mandates that the courts will uphold the validity of an arbitration award.57

Basically, the drafters of the USAL sought to create an adjudication procedure that is faster, simpler, and less expensive than litigation. The text of the Act and the statements of the drafters appear to indicate that the Act does provide the procedural remedy that both Congress and the drafters intended. However, the U.S. Supreme Court has vastly expanded the original purpose of the Act. In some instances, the Court has extended the scope of the Act to cover situations that the drafters neither intended nor anticipated. The following cases illustrate the various rationales the Court has used to justify its application of the Act.

III. The Supreme Court's Expanded Interpretation of the Federal Arbitration Act

Originally, the stated purpose of the FAA was to make agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."58 However, the Supreme Court, and many lower federal courts, have overlooked the framers' intent and have created a

49. See id.
50. See id. at 272.
51. See id.
52. See id.
53. See id.
54. See id. at 273.
55. Id.
56. See id.
57. See id.
body of substantive federal law to govern arbitration agreements. How did this happen? We must look at the development of this body of Supreme Court jurisprudence in order to answer the question.

A. Arbitrability of Claims Alleging Fraud in the Inducement of Contracts: Prima Paint Corp. v. Flood & Conklin

The problem begins with the creation of the separability or severability doctrine. Simply stated, this doctrine means that in a contract containing an arbitration clause, the contract itself, and the agreement to arbitrate are to be considered separate from each other. The seminal case advocating the separability doctrine is Robert H. Lawrence Co. v. Devonshire Fabrics, Inc. In order to fully understand the two different views on the separability doctrine, it is important to closely examine the first instance in which the Supreme Court recognized the doctrine, Prima Paint Corp. v. Flood & Conklin.

In Prima Paint, the Court first fashioned its own federal substantive law regarding arbitrability. The Prima Paint Court held that a federal court may only consider issues relating to the formation of the agreement to arbitrate. Once a federal court has determined that the making of the actual arbitration clause is not in issue, the court is instructed to send the matter to the agreed upon arbitration. Thus, the Court mandated that even if a party alleged fraud in the inducement of a contract, the matter will go to arbitration, unless that party alleges fraud in the inducement of the arbitration clause itself.

In Prima Paint, the plaintiff purchased a paint business from Flood & Conklin Manufacturing Company (F & C). Originally, the contract was for consulting services to be provided by Prima Paint to F & C. This contract was soon followed by the execution of a purchase agreement, in which Prima Paint purchased F & C. The agreement included various provisions, one of which was a covenant not to compete, which provided that F & C would not compete with Prima Paint for the duration of the contract. The agreement called for Prima Paint to make regular payments to F & C over the six-year life of the contract. The parties added a clause that took into account the possibility of financial problems for Prima Paint. There was no such provision regarding F & C. Finally, the contract included an arbitration clause, which purported to cover any claim or controversy arising out of the contract or the breach thereof.

When the time came for Prima Paint to make its first payment to F & C, Prima Paint refused to make the scheduled payment. Several days later, Prima Paint made the payment, but into an escrow account. Prima Paint notified F & C that it had

61. 271 F.2d 402 (10th Cir. 1959).
63. See id. at 403.
64. See id. at 404.
65. See id.
breached both the consulting and purchase agreements, and further alleged that F & C misrepresented itself when F & C represented that it was solvent and able to perform its contractual obligations. Prima Paint sought to rescind the consulting agreement on the basis of fraudulent inducement in the formation of the contract. At the same time Prima Paint filed the complaint in the district court, it also sought injunctive relief to enjoin F & C from proceeding with arbitration. F & C responded with a cross-motion to stay the legal action until completion of the arbitration proceeding. F & C contended that the question of whether there was fraud in the inducement of the contract was a question for arbitration, while Prima Paint alleged that questions of fraud in inducement were for the courts to decide.

The district court granted F & C's motion and held that the broad arbitration clause covered a charge of fraud in the inducement of a contract. The Second Circuit Court of Appeals dismissed Prima Paint's appeal, agreeing that a claim of fraud in the inducement of the contract itself is a question for the arbitrators to decide.66 This holding meant that even in the face of a conflicting state law, the federal law was controlling. The Supreme Court granted certiorari to consider whether the federal court or an arbitrator is to resolve a claim of fraud in the inducement of a contract governed by the FAA.67

The *Prima Paint* Court looked at the different views of the circuit courts to determine the question of severability.68 In earlier proceedings of this case, the Second Circuit had held that, as a matter of federal law, arbitration clauses are separable from the contract in which they are embedded.69 Further, the Second Circuit contended that where no claim of fraud is made as to the arbitration clause itself, the question of the general contract validity is to be determined by the arbitrator.70 This is the infamous 'separability' doctrine. Conversely, the First Circuit has held that the question of severability is a question for state law and where a state views an arbitration clause as inseparable from the contract itself, the court must adjudicate a claim of fraud.71 Thus, the Supreme Court faced the task of resolving inconsistent decisions in the circuit courts.

Having determined that the contract in *Prima Paint* was a contract involving commerce, and therefore within the scope of the FAA, the Court next turned its focus to deciding whether to apply the separability doctrine. The *Prima Paint* Court looked to section 4 of the FAA to answer this question and stated that the language of the statute does not permit a federal court to consider claims of fraud in the contract generally.72 Further, the Court proclaimed that the federal court may only consider allegations of fraud where those allegations are directed at the arbitration

66. See id. at 400.
67. See id. at 396.
68. See id. at 402-03.
69. See id. at 402.
70. See id.
71. See id. at 403 (citing Lummus Co. v. Commonwealth Oil Ref. Co., 280 F. 2d 915, 923 (1st Cir. 1960), cert. denied, 364 U.S. 911 (1960)).
72. See id. at 404.
clause itself. This curious interpretation raises a serious question: How can a provision of an allegedly fraudulently induced contract be enforced when the contract as a whole is possibly void altogether? Again, the Court seems to ignore this question entirely.

Without providing any solid reasoning, the Court simply disposes of Prima Paint by pointing to the 'unmistakably clear' language of section 4 of the FAA. In his dissent, Justice Black, rejects the separability doctrine and provides a different analysis for determining the question posed to the Court. Justice Black, with whom Justices Stewart and Douglas join, disagreed with the majority for three main reasons. First, the legislative history of the FAA clearly indicates that Congress never intended to create a sweeping body of federal substantive law. Second, the avowed purpose of the Act was to place arbitration agreements on the same footing as other contracts, and the majority's reading of the FAA results in arbitration agreements being placed on stronger grounds than other contracts. Third, the majority's holding creates a body of federal substantive law that state courts are required to apply. For these reasons, many commentators and state courts have adopted Justice Black's view as the correct interpretation and application of the FAA.

First, the legislative history of the FAA clearly indicates that Congress never intended to create a body of federal substantive law that the state courts are compelled to apply. At the time of passing the FAA, Congress assumed that state and federal law recognized arbitration agreements as valid. The courts would give damages for the breach of an agreement, but refused to specifically enforce the agreements. Thus, the FAA was Congress's manifestation of its intent to provide a party to an arbitration agreement a remedy formerly denied him. Justice Black pointed out that Mr. Cohen, the author of the original USAL, stated that the FAA "does not encroach upon the province of the individual states." Next, Justice Black stated that the majority's holding places agreements to arbitrate on stronger footing than other contracts. The separability rule that the Court applied to arbitration clauses frustrates the intent of the authors of the FAA. The separability doctrine allows a party to seek rescission of "tidbits" of a contract, and not the contract as a whole. Justice Black stated that parties that seek to rescind a contract seek rescission of the contract as a whole, not in pieces. Prima Paint would not have agreed to the covenant not to compete, the consulting

73. See id.; see also 9 U.S.C.A. § 4 (West 1994).
74. See Prima Paint, 388 U.S. at 404.
75. See id. at 423.
76. See id.
77. See id. at 424.
78. See id. at 423.
79. See id.
80. Id.; see also Cohen & Dayton, supra note 39, at 277.
81. See Prima Paint, 388 U.S. at 423.
82. See id.
83. See id.
agreement, or the arbitration clause but for F & C's fraudulent promise that it would remain solvent. How could any court hold that the arbitration agreement is separable from the whole contract, when no court would hold that the covenant not to compete and the consulting agreement were separable?\textsuperscript{94} The Court established the test for determining whether a number of promises constitute one inseparable contract in \textit{United States v. Bethlehem Steel Corp.}\textsuperscript{85} The test is whether the parties assented to all the promises as a single whole, so that there would have been no bargain if any promise or set of promises were set out.\textsuperscript{85} "Under this test, all of Prima Paint's promises were part of one inseparable contract."\textsuperscript{87}

Finally, Justice Black stated that had this identical contract dispute been litigated in New York courts under its arbitration act, Prima Paint would not be forced to submit to arbitration if the state rule of nonseparability applies.\textsuperscript{88} Under the majority's holding, the Act would supply not only a remedy of enforcement, but also a body of federal doctrines to determine the validity of an arbitration agreement.\textsuperscript{89} Under the majority's application of the FAA, the failure to make the Act applicable to state courts would result in forum shopping and an unconstitutional discrimination that both \textit{Erie} and \textit{Bernhardt} were designed to eliminate.\textsuperscript{90} These problems would be greatly reduced if the Act is given its proper scope: the mere enforcement in federal courts of valid arbitration agreements.\textsuperscript{91} Justice Black further disagreed with the majority's reading of the language of the FAA.\textsuperscript{92} By reaching its conclusion, the majority would leave legal issues of contractual validity to be determined by arbitrators, who in many cases, are not qualified to make this judgment.\textsuperscript{93} Justice Black argues that both Congress and the framers of the Act never intended nonlawyers to be given the province to determine legal issues regarding the enforcement of arbitration agreements.\textsuperscript{94} This is very important in our analysis of the Court's reading and application of the FAA. For, if the majority relies upon the drafters' intent in reaching its decision and that intent is inapposite to the clear intent of these framers, then some other explanation is necessary to resolve this issue.

Justice Black asserted that the contract in \textit{Prima Paint} is not even governed by the FAA,\textsuperscript{95} contending that Congress intended this Act to have limited application to contracts between merchants for the interstate shipment of goods.\textsuperscript{96} In the Senate hearings for the Subcommittee of the Senate Committee on the Judiciary, nearly all

\textsuperscript{84} \textit{See id.} at 424.
\textsuperscript{85} \textit{315 U.S.} 289, 298 (1942).
\textsuperscript{86} \textit{See id.}
\textsuperscript{87} \textit{Prima Paint}, 388 U.S. at 424.
\textsuperscript{88} \textit{See id.}
\textsuperscript{89} \textit{See id.}
\textsuperscript{90} \textit{See id. at 425.}
\textsuperscript{91} \textit{See id.} Whether the separability doctrine is constitutional as a matter of federal substantive law after \textit{Erie} is beyond the scope of this Comment.
\textsuperscript{92} \textit{See id. at 407.}
\textsuperscript{93} \textit{See id. at 408.}
\textsuperscript{94} \textit{See id.}
\textsuperscript{95} \textit{See id. at 410.}
\textsuperscript{96} \textit{See id. at 409.}
who testified before the committee expressed the view that the FAA was designed to cover agreements between people in different states who bought, sold, produced, or shipped commodities. Clearly, the consulting agreement in Prima Paint is not a contract for the interstate sale of commodities. The majority expands the legislative intent by reading the words "involving commerce" to mean agreements affecting commerce. This is an important distinction. As Justice Black points out, the courts have always made careful inquiry to assure that the meaning of the word "commerce" will not be expanded or contracted. In many other statutes in which Congress purports to exert its powers over commerce, Congress uses the language "affecting commerce" when defining the scope of an act of legislation. Justice Black points out that the language of the FAA is clearly an example of limiting language, designed to ensure that courts will not expand the scope of the act to contracts outside of the intended scope of the FAA. Indeed, when Congress wishes to exert its full power over commerce, it uses the language "affecting commerce" in legislation. Thus, the failure of Congress to use this "magic language," coupled with the legislative history of the FAA, convinces Justice Black that the FAA was not intended to cover the consulting agreement in Prima Paint.

Next, Justice Black looks at the issue of separability. The majority holds that under section 4 of the FAA, agreements to arbitrate are separable from the main body of a contract. Specifically, section 4 states that the court must order arbitration if it is "satisfied that the making of the agreement for arbitration is not in issue." Justice Black disagrees with the majority holding that this language clearly intended that courts would look at contracts and agreements to arbitrate separately. In Prima Paint both lower courts recognized that under New York law, the consulting agreement and the agreement to arbitrate would be considered inseparable. Thus, in holding that the FAA commands that arbitration agreements and contracts be viewed separately in determining the question of fraud in inducement, the majority supplants state substantive law with its own federal substantive law.

Where does the Court find the authority to do so? The majority's answer is that the FAA gives the courts the power to fashion a federal rule to make arbitration

97. See id.; see also Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 3, 7, 9, 10 (1923) [hereinafter Hearing].
98. Prima Paint, 388 U.S. at 409-10.
99. Id. See generally Van Wetzel Stone, supra note 5.
100. See Prima Paint, 388 U.S. at 410.
101. See id.
102. See id.
103. See id.
104. See id.
106. See Prima Paint, 388 U.S. at 403.
107. See id. at 410-11.
108. See id.
clauses separate and valid.\textsuperscript{109} What about \textit{Erie}?\textsuperscript{110} The majority's adoption of the severability doctrine in \textit{Prima Paint} arises from Judge Medina's opinion in \textit{Robert H. Lawrence Co. v Devonshire Fabrics, Inc.}\textsuperscript{111} Justice Black attacks the majority's reliance on the \textit{Lawrence} holding. Under the \textit{Erie} doctrine, federal courts are bound to apply state substantive law in diversity cases.\textsuperscript{112} However, the \textit{Lawrence} court recognized that applying state law would amount to a rejection of the separability doctrine in those states that viewed arbitration agreements as nonseparable.\textsuperscript{113} Thus, as Justice Black states, the result of the \textit{Lawrence} decision, and the subsequent affirmation of this doctrine in \textit{Prima Paint}, is that the advocates of the separability doctrine ignore the clear language of the FAA as well as the federalism concerns underlying the \textit{Erie} doctrine.\textsuperscript{114} To hold that Congress merely intended the Act to apply to federal courts would result in a very narrow application of the Act.

Next, Justice Black questions how the majority concludes that Congress conferred these rights to the courts.\textsuperscript{115} The majority begins and ends this query by stating that the FAA is based upon Congress's power over commerce.\textsuperscript{116} Thus, according to the majority, Congress has given the courts the power to create federal contract law. This holding is contrary to the stated purpose of the FAA. In fact, the drafters of the Act, the American Bar Association, proclaimed that the FAA provides a procedural remedy for the federal courts.\textsuperscript{117} Further, the framers of the FAA maintain that the issue of whether a contract exists should be resolved by looking at the substantive law of the jurisdiction where the contract was made.\textsuperscript{118} This means simply that the framers of the FAA intended questions of contractual validity to be resolved by looking at state law governing contracts, not substantive law fashioned by federal judges.\textsuperscript{119}

The state of the federal courts' treatment of arbitration clauses after \textit{Prima Paint} is that notwithstanding a state rule to the contrary, a claim of fraud in the inducement of a contract is for the arbitrators, and not the court.\textsuperscript{120} However, the Supreme Court did not stop the expansion of the FAA. In 1983, the Court decided \textit{Southland Corp. v. Keating.}\textsuperscript{121} The \textit{Southland} Court reversed the California Supreme Court holding that Congress created a body of federal substantive law that is applicable in state as well as federal courts.\textsuperscript{122}

\textsuperscript{109} See id.
\textsuperscript{110} See \textit{Erie R.R. Co. v Tompkins}, 304 U.S. 64 (1938).
\textsuperscript{111} 271 F.2d 402 (2d Cir. 1959).
\textsuperscript{112} See \textit{Erie}, 304 U.S. at 64.
\textsuperscript{113} See \textit{Prima Paint}, 388 U.S. at 417.
\textsuperscript{114} See id.
\textsuperscript{115} See id.
\textsuperscript{116} See id.
\textsuperscript{117} See Committee on Commerce, \textit{supra} note 26, at 155.
\textsuperscript{118} See id. at 154.
\textsuperscript{119} See \textit{Prima Paint}, 388 U.S. at 421.
\textsuperscript{120} See id. at 400.
\textsuperscript{121} 465 U.S. 1 (1984).
\textsuperscript{122} See id. at 2.
In Southland, the plaintiffs brought individual and class actions against Southland Corporation alleging fraud, breach of contract, and violation of disclosure requirements under the California Franchise Investment Law (CFIL). The California Supreme Court reversed the Court of Appeals ruling, holding that the CFIL renders void any provision that purports to bind a franchisee to waive compliance with any provision of the CFIL. The Supreme Court granted certiorari to consider, among other things, whether a state law that appears to conflict with the FAA violates the Supremacy Clause of the U.S. Constitution.

The Southland Court reasoned that the CFIL directly conflicts with the FAA in that Congress mandated the enforcement of arbitration agreements by passing the FAA. The Court found only two limitations on the scope of the FAA. First, for the FAA to apply, an arbitration provision must be part of a written maritime contract or a contract evidencing a transaction involving commerce. Second, such clauses may be revoked upon grounds that exist at law or in equity for the revocation of any contract. Further, the Court noted that nothing in the language of the Act indicates that the FAA is subject to any additional limitations under state law.

The Southland Court reaffirmed its holding in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., which held that the FAA creates a body of federal substantive law applicable in state and federal court. Again, the Supreme Court disregards the clear legislative history of the FAA. The majority looked to the House Report to find that Congress clearly intended the FAA to apply in state as well as federal courts; however, the Court ignored the massive amount of testimony to the contrary. Indeed, as stated supra, the framers intended the FAA to be a procedural rule for the federal courts. Thus, again it would appear that the majority in Southland clearly ignores the intentions of the framers of the FAA.

Justice Stevens concurred in part and dissented in part with the majority in Southland. Justice Stevens' main point of contention with the majority is that he was not persuaded that Congress intended the FAA to have such an unyielding preemptive effect. Section 2 of the FAA provides for certain exceptions in which an arbitration agreement may be revoked. Justice Stevens argues that

123. See id. at 1.
124. See id.
125. See id. at 2.
126. See id.; see also U.S. CONST. art. I, § 1.
128. See id. at 11.
129. See id.; see also 9 U.S.C.A. § 2 (West 1994).
134. See Committee on Commerce, supra note 26, at 156.
these exceptions leave room for the implementation of substantive state policies that would be undermined by the blanket enforcement of certain categories of arbitration clauses.\textsuperscript{137} He noted that the exercise of state authority in a field traditionally occupied by state law will not be deemed preempted absent the clear and manifest purpose of Congress.\textsuperscript{138} Further, Justice Stevens noted that even where a federal law preempts state policy, this preemption supplants these state policies only so far as necessary.\textsuperscript{139} There is no language in the FAA that would lead the Court to believe that Congress intended the FAA to preempt state substantive law.

As we have seen, the framers of the FAA never intended the Act to be anything more than a procedural rule for the federal courts. The result is that the Supreme Court has determined that arbitration clauses that would likely be deemed invalid under state law will be valid in order for the courts to encourage arbitration. But, the result is that parties are bound to an arbitration clause even though these parties allege that the entire contract was procured by fraud.

In her dissent from the \textit{Southland} majority, Justice O'Connor vigorously disagrees with the majority's holding. She emphasized two points of contention: the incorrect interpretation of the FAA, and the Court's mandate that state courts apply the FAA principles in the same manner in which a federal court would apply them. She states that the Court utterly fails to recognize the clear congressional intent underlying the FAA.\textsuperscript{140} Justice O'Connor opined, based upon her reading of the legislative history of the FAA, that Congress intended to require federal, not state, courts to respect arbitration agreements.\textsuperscript{141} Her interpretation of the legislative history of the FAA raises similar points to those raised by Justice Black in his dissent in \textit{Prima Paint}, and to Justice Stevens' dissent in \textit{Southland}. Most notably, Justice O'Connor points out that both the drafters of the Act and the early commentators all "flatly stated the Act was intended to affect only federal court proceedings."

Next, Justice O'Connor states that the scope of the FAA can be recognized by the powers Congress relied on in passing the Act. The majority states that Congress passed the FAA relying upon its power to govern interstate commerce.\textsuperscript{142} However, the dissent points to numerous statements by the drafters of the bill that the FAA was intended only to be a procedural rule in federal courts.\textsuperscript{143} The majority opinion cites an excerpt from the House Report to support its holding.\textsuperscript{144} However, as Justice O'Connor notes, this is the only sentence in the entire report upon which the majority could rely to support its reading of the FAA's legislative

\textsuperscript{137} See \textit{Southland}, 465 U.S. at 18.
\textsuperscript{138} See id; see also \textit{Ray v. Atlantic Richfield Co.}, 435 U.S. 151, 157 (1978).
\textsuperscript{140} See \textit{Southland}, 465 U.S. at 22-23.
\textsuperscript{141} See id. at 23.
\textsuperscript{142} Id. at 26; see also \textit{Hearing, supra note 97}, at 39-40.
\textsuperscript{143} See \textit{Southland}, 465 U.S. at 28.
\textsuperscript{144} See id.
\textsuperscript{145} See id. at 13; see also \textit{H.R. Rep. No. 96, 68th Cong., 1st Sess.} 1 (1924).
history. Additionally, the majority's decision in *Southland* ignores the clear holding of *Erie*. *Erie* denied the federal government the power to create substantive law to be applied in diversity cases.

Justice O'Connor noted that in *Bernhardt v. Polygraphic Co.*, the Court held that the duty to arbitrate a contract dispute is outcome-determinative. Thus, applying the *Erie* doctrine to the arbitration context, enforcement of arbitration clauses is a matter normally governed by state law in federal diversity cases, and the FAA should be read with these limitations in mind.

Next, Justice O'Connor pointed out that in *Prima Paint*, the Court limited its holding to say only that the FAA could be constitutionally applied in diversity cases. The FAA covers only contracts involving interstate commerce, and Congress clearly has the authority to legislate in that area. The Court was careful, however, not to hold that the FAA's substantive policies were to be applied to all contracts within its scope, whether sued in state or federal court. Until *Southland*, the Supreme Court had never had the opportunity to decide the applicability of the FAA in state courts. In fact, both *Prima Paint* and *Cone* involved federal litigation. Thus, it appears that the majority's holding in *Southland* is not supported by either legislative intent, or judicial precedent. As Justice O'Connor painstakingly explains, there is simply no reason for the Court to read the FAA to create a federal right to be enforced in both state and federal forums. Nothing in the language of the FAA should lead the Court to its decision. The decision of the majority gives the FAA a far broader reach than Congress intended.

The question arises: why would the majority proclaim that state courts must apply the FAA in their proceedings? The *Southland* Court states that applying the FAA in federal, and not state, courts would allow parties to choose their own applicable law through forum shopping. Justice O'Connor flatly rejects this reasoning. In controversies involving incomplete diversity of citizenship, there is no possibility of forum shopping, as there is no access to federal courts. And, in controversies with complete diversity, the FAA grants both parties access to the federal courts. The result is that no party can gain any advantage through forum shopping.

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146. See *Southland*, 465 U.S. at 18.
147. See *id.*
149. See *Southland*, 465 U.S. at 23.
150. See *id.*
153. See *id.* at 30.
154. See *id.*
155. See *id.*
156. See *id.* at 33-34.
157. See *id.* at 34.
158. See *id.*
159. See *id.*

The employment context is another area in which the Court has applied the FAA. Section 1 of the FAA states, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Thus, a fair reading of Section 1 would indicate that Congress did not intend the FAA to apply to employment contracts. Indeed, the chairman of the ABA committee that drafted the Act stated before Congress, that the bill "is not intended to be an act referring to labor disputes, at all." However, in another curious line of cases, the Supreme Court expanded the FAA to cover contracts that Congress explicitly stated the Act would not encompass — contracts of employment.

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that an Age Discrimination in Employment Act (ADEA) claim can be subjected to compulsory arbitration under the FAA. In *Gilmer*, Petitioner brought suit against his employer alleging that his termination was in violation of the ADEA. His employer sought to compel arbitration of the ADEA claims on the basis of an agreement to arbitrate in Gilmer's registration application with the New York Stock Exchange (NYSE). This registration application contained a clause that provided for arbitration of any controversy arising out of a registered representative's employment or termination of employment. Gilmer challenged the motion on three grounds. First, Gilmer contended that statutory claims should not be subject to arbitration, as these procedures frustrate the intent of the ADEA. Second, the NYSE arbitration proceedings are inadequate to provide the relief sought by Gilmer. Third, Gilmer claimed that the arbitration agreement was the product of unequal bargaining power between himself and his employer.

In deciding whether the ADEA claims are covered by the FAA, the *Gilmer* Court looked to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* The *Mitsubishi* Court ruled that statutory claims may be submitted to binding arbitration if they are part of a bargained for contract. The *Gilmer* Court affirmed the *Mitsubishi* holding, noting that because Gilmer made the bargain to arbitrate, he should be held to it, unless the ADEA explicitly precludes the arbitration of ADEA claims. With regard to Gilmer's attack on the adequacy of arbitration proceedings provided for by the NYSE, the Court quickly disposed of this argument. Gilmer contended that the limited discovery allowed in arbitration proceedings would make it difficult to prove discrimination. The Court rejected this

163. See id. at 20.
165. See *Mitsubishi*, 473 U.S. at 628; see also *Gilmer*, 500 U.S. at 20.
166. See *Gilmer*, 500 U.S. at 26.
167. See id. at 21.
reasoning, noting that Racketeering Influence and Corrupt Organization Act (RICO) and Sherman Antitrust claims are surely as complex as ADEA claims.163 And, the Mitsubishi Court held that RICO and Sherman Antitrust claims can be subject to binding arbitration.169

Next, Gilmer claimed that the development of the law will be stifled because the arbitrators do not issue written opinions.170 Gilmer argued this would result in a lack of public knowledge about discriminatory practices.171 However, the Gilmer Court emphasized that the NYSE rules require written opinions of the arbitrators, which are available to the public.172 The Court emphasized that it will not speculate as to the competency of arbitration panels, when both the FAA and the NYSE rules protect against biased panels.173

Finally, Gilmer contended that an arbitration panel does not have the power to fashion equitable relief, a common remedy of discrimination claims.174 In rejecting this argument, the Court stated that NYSE rules do not restrict the type of relief that may be awarded by an arbitrator. Additionally, the Court noted that arbitration agreements do not preclude the Equal Employment Opportunity Commission (EEOC) itself from seeking class-wide and equitable relief.175 The Court's reasoning with respect to the adequacy of and public accessibility to arbitration awards makes sense; however, the Court's statement that the EEOC can seek equitable relief raises an important question. What about private class action suits? The holding in Gilmer closes the door on the possibility of a class-action suit; instead, the parties are forced to submit to arbitration and then hope that the EEOC chooses to seek equitable relief.

Gilmer claimed that he had no choice but to agree to the arbitration clause, because the arbitration agreement was a part of the requisite application for membership with the NYSE.176 The Gilmer Court, without examining the merits of Gilmer's claim of inequality, stated simply that mere inequality of bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.177

In choosing to apply the FAA to the employment contract, the Court completely disregards both the unambiguous language of section 1 of the FAA and the legislative history of the FAA. Indeed, Justice Stevens, in his dissent, stated that the arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA.178 The majority declined to address this issue in

168. See id.
169. See Mitsubishi, 473 U.S. at 615.
170. See Gilmer, 500 U.S. at 21.
171. See id.
172. See id.
173. See id.
174. See id.
175. See id. at 22.
176. See id. at 32.
177. See id. at 33.
178. See id. at 36.
Gilmer, noting that Gilmer failed to raise this issue on appeal. However, the Court has reviewed waived issues sua sponte on many occasions. In fact, in the same Term in which the Court decided Gilmer, the Court decided other cases on grounds not argued in any of the courts below or in petitions for certiorari. In Arcadia v. Ohio Power Co., the Court decided the case on issues not raised in proceedings below. Justice Stevens stated that the considerations in favor of reaching an issue not presented below are more compelling in Gilmer, than in the cases noted. In fact, the issue of the applicability was raised by the amici in support of Gilmer. Thus, in following precedent cited in support of his contentions, Justice Stevens noted that the question of whether the FAA is applicable in employment disputes is clearly antecedent and ultimately dispositive of the Gilmer case. Common sense tells us that deciding whether the FAA extends to employment contracts is clearly the first step in deciding how to apply the FAA in employment contracts.

The majority, in dicta, stated that the arbitration agreement was not part of an employment agreement, as the clause was included in the application for membership with the NYSE. However, this circumvention of the language of the FAA fails to recognize the spirit of section 1 of the FAA. The authors of the FAA intended labor disputes to be outside the scope of the FAA. In the Senate hearing before the passage of the original FAA, Senator Walsh stated that terms in contracts for employment are often offered on a take it or leave it basis. Clearly, the authors of the bill did not intend employment disputes to be within the scope of the FAA, and the judicial expansion of the Act does not comport with the intentions of the drafters of the Act. Even if, as here, the arbitration clause was not a part of the employment agreement, the arbitration clause was part of a requisite application for membership into another body.

Thus, the Court's interpretation of the scope of the FAA would allow an employer to condition employment upon an employee's assent to arbitrate employment disputes in an agreement that is not actually an employment agreement. This would have the effect of allowing employers to avoid statutory prohibition of these arbitration provisions in the employment context. Justice Stevens points to several Circuit Court of Appeals cases in which the courts decided that the FAA's employment contract exclusion provision referred not only to individual employment contracts, but also to collective bargaining agreements. Collective bargaining

179. See id. at 25.
180. See id. at 37.
181. See id.
183. See id. at 77; see also McClesky v. Zant, 499 U.S. 467 (1991) (in which the Court decided a case on a question which it did not appear that the party had anticipated).
184. See Gilmer, 300 U.S. at 39.
185. See id.
186. See id.
188. See Gilmer, 300 U.S. at 40; see also Lincoln Mills v. Textile Workers Union, 230 F.2d 81 (5th
agreements, like the NYSE membership application, are not technically contracts for employment, yet these courts have applied the FAA to exclude these agreements.\textsuperscript{189} Although the Supreme Court enforced the arbitration clauses in \textit{Textile Workers Union v. Lincoln Mills}\textsuperscript{190} by noting the references to the Labor Management Relations Act contained within the collective bargaining agreements, the Court refused to overrule the decisions of the Courts of Appeals.\textsuperscript{191} In his \textit{Lincoln Mills} dissent, Justice Frankfurter saw an implicit rejection of the availability of the FAA in collective bargaining agreements.\textsuperscript{192} Justice Frankfurter inferred this rejection from the Court's silent treatment given to the FAA in the \textit{Lincoln Mills} majority opinion. His reading of the FAA is that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts.\textsuperscript{193}

Finally, Justice Stevens noted that the purpose of the ADEA is frustrated by compulsory arbitration of employment discrimination claims.\textsuperscript{194} In support of this contention, Justice Stevens stated that the court's power to issue broad injunctive relief is the cornerstone of eliminating discrimination in society.\textsuperscript{195} It is plain to see that the purpose of the ADEA, and similar legislation, is to eliminate discrimination in the workplace. Therefore, by refusing to let parties seek class-based relief in the courts in favor of compulsory arbitration of claims on an individual basis, the Court's holding in \textit{Gilmer} clearly cripples the Court's quest for equality. The strongest argument in favor of excluding employment disputes from the scope of the FAA is the simplest. Section 1 of the FAA explicitly excludes contracts for employment from coverage of the Act.\textsuperscript{196} Absent any congressional intent to the contrary, the language of the FAA should be given a fair reading, and not be the subject of judicial revision.

Recently, the Ninth Circuit Court of Appeals chose not to compel arbitration of an employment dispute in \textit{Duffield v. Robertson Stephens & Co.}\textsuperscript{197} In \textit{Duffield}, a securities dealer sued her employer, alleging breach of contract, sexual discrimination, and sexual harassment under Title VII and California's Fair Employment and Housing Act. Further, the plaintiff sought a declaration that securities industry employees could not be compelled to arbitrate employment disputes.\textsuperscript{198} The issue before the court was whether employers may require that all

\textsuperscript{189} See \textit{Gilmer}, 500 U.S. at 41.
\textsuperscript{190} 353 U.S. 550 (1957).
\textsuperscript{191} See \textit{Gilmer}, 500 U.S. at 40.
\textsuperscript{192} \textit{See id.; see also Lincoln Mills}, 353 U.S. at 466.
\textsuperscript{193} See \textit{Gilmer}, 500 U.S. at 41.
\textsuperscript{194} \textit{See id.}
\textsuperscript{195} \textit{See id.; see also Albemarle Paper Co. v. Moody}, 422 U.S. 405, 415 (1975).
\textsuperscript{196} 9 U.S.C.A. § 1 (West 1994).
\textsuperscript{197} 144 F.3d 1182, 1187 (9th Cir. 1998).
\textsuperscript{198} \textit{See id.}
employees waive their right to adjudicate Title VII and other statutory and nonstatutory claims in favor of arbitration as a condition of employment.\textsuperscript{199}

The \textit{Duffield} court held that under the Civil Rights Act of 1991, employers may not compel employees to waive their right to a judicial forum as a condition precedent to employment.\textsuperscript{200} After discussing the evolution of arbitration of employment disputes, the \textit{Duffield} court reasoned that in passing Title VII, Congress manifested its belief that arbitration is unable to pay sufficient attention to the transcendental public interest in the enforcement of Title VII.\textsuperscript{201} However, the court noted that after \textit{Gilmer}, if courts are to hold that an act precludes arbitration of claims to which it gives rise, more than the mere mentioning of the right to a jury trial in the statute is required to preclude arbitration.\textsuperscript{202} The court stated that in order for a statute to be interpreted as precluding arbitration of its claims, courts must inquire into the congressional intent surrounding the particular legislation.\textsuperscript{203} In \textit{Duffield}, the court reasoned that the language of Title VII reveals Congress's intent to preclude Title VII claims from compulsory arbitration.\textsuperscript{204} By enacting The Civil Rights Act of 1991, which encourages arbitration "where appropriate and to the extent authorized by law," Congress intended to codify its position that compulsory arbitration was not authorized by law, and that compelling employees to forego their rights to litigate Title VII claims was not appropriate.\textsuperscript{205} This means that the FAA does \textit{not} make arbitration clauses in many employment contexts valid as a matter of law. Courts may look at a particular statute to determine whether Congress intended for statutory claims to be arbitrable. Although this holding does not conclusively state the intent of the drafters of the FAA, it is a step toward the proper interpretation of the FAA.

\textbf{IV. Arbitration in Oklahoma Courts}

Oklahoma courts take a vastly different view regarding the enforceability of arbitration agreements. In 1996, the Oklahoma Supreme Court rejected the separability doctrine in \textit{Shaffer v. Jeffery}.\textsuperscript{206} The plaintiffs in \textit{Shaffer} were six couples who each sought to adopt a child.\textsuperscript{207} Hoping to find children to adopt, the plaintiffs entered into contracts with the defendant who promised to find prospective adoptees for the couples.\textsuperscript{208} Each contract with the defendant contained an arbitration clause.\textsuperscript{209} The defendant, an attorney, collected fees from the prospective parents, but breached the contract by failing to locate children for the couples

\footnotesize{\textsuperscript{199} See \textit{id.} at 1185.  
\textsuperscript{200} See \textit{id.} at 1199.  
\textsuperscript{201} See \textit{id.} at 1188.  
\textsuperscript{202} See \textit{id.} at 1190.  
\textsuperscript{203} See \textit{id.} at 1193.  
\textsuperscript{204} See \textit{id.}  
\textsuperscript{205} \textit{Id.} at 1194.  
\textsuperscript{206} 915 P.2d 910 (Okla. 1996).  
\textsuperscript{207} See \textit{id.} at 912.  
\textsuperscript{208} See \textit{id.}  
\textsuperscript{209} See \textit{id.}
to adopt.\textsuperscript{210} In fact, the defendant provided the would-be parents with fictitious pregnancy status reports and promises from non-existent mothers.\textsuperscript{211} When it became evident to the plaintiffs that there were no children to adopt, the plaintiffs filed suit in state court.\textsuperscript{212} The plaintiffs sought rescission of the fee agreements, damages for breach of contract, conversion, the tort of outrage, fraud, and legal malpractice.\textsuperscript{213}

The defendant successfully moved the trial court to dismiss the claims against him because the attorney-client contract contained a clause that future disputes would be decided by arbitration.\textsuperscript{214} The Oklahoma Court of Civil Appeals affirmed the trial court's motion, and entered orders compelling arbitration. The issue before the Oklahoma Supreme Court was whether a showing of fraud in the inducement of the attorney-client contract defeated the enforcement of the arbitration clause in the contract.\textsuperscript{215} Although this issue is almost identical to the issue in \textit{Prima Paint}, the Oklahoma Supreme Court came to a different conclusion regarding the enforcement of the arbitration agreements.\textsuperscript{216}

Arbitration agreements are statutorily allowed by Oklahoma's Uniform Arbitration Act (OUAA).\textsuperscript{217} The OUAA is virtually identical to the FAA. Like the FAA, the OUAA provides that arbitration agreements will be enforced, except on grounds that exist at law or equity for the revocation of any contract.\textsuperscript{218} Recall that the U.S. Supreme Court views contracts, and their underlying arbitration clauses, as separable with respect to fraud.\textsuperscript{219} Thus, if fraud is alleged in federal court, arbitrators must resolve the question of whether the contract is valid.\textsuperscript{220} However, if fraud is alleged in the inducement of the arbitration clause itself, federal courts will determine that question first, before deciding whether or not to compel arbitration. The Oklahoma Supreme Court does not share this view, however. The \textit{Shaffer} court explicitly stated that an allegation of fraud in the inducement of a contract generally is an issue for the courts to decide.\textsuperscript{221}

The gravamen of \textit{Shaffer} was whether Oklahoma courts should give the OUAA the same construction as given to the FAA by the Supreme Court in \textit{Prima Paint}.\textsuperscript{222} The \textit{Shaffer} court noted that courts in Louisiana, Minnesota, and Tennessee have declined to adopt the separability doctrine.\textsuperscript{223} The majority in

\begin{itemize}
  \item \textsuperscript{210} See id.
  \item \textsuperscript{211} See id.
  \item \textsuperscript{212} See id.
  \item \textsuperscript{213} See id.
  \item \textsuperscript{214} See id.
  \item \textsuperscript{215} See id. at 914.
  \item \textsuperscript{216} See id.
  \item \textsuperscript{217} 15 OKLA. STAT. §§ 801-822 (1991).
  \item \textsuperscript{218} See id. § 802(A).
  \item \textsuperscript{220} See id.
  \item \textsuperscript{221} \textit{Shaffer}, 910 P.2d at 918.
  \item \textsuperscript{222} See id. at 916.
  \item \textsuperscript{223} See id.; see also George Engine Co., Inc. v. Southern Shipbuilding Corp., 350 So. 2d 881, 886 (La. 1977); Fouquette v. First Am. Nat'l Sec., Inc., 464 N.W.2d 760, 762 (Minn. Ct. App. 1991); City
Shaffer pointed to Justice Black's dissent in Prima Paint for guidance. As mentioned previously in Prima Paint, Justice Black dissented from the majority and expressed the view that if the contract was procured by fraud, there is no contract and, subsequently, nothing to arbitrate. Additionally, Justice Black stated that courts have far more expertise resolving legal issues that go to the validity of a contract than do arbitrators. The Louisiana Supreme Court agreed with this rationale, and rejected the separability doctrine in George Engine Co. The Minnesota Supreme Court rejected the separability doctrine by concluding that, as a matter of state contract law, an arbitration agreement cannot be severed from other contractual provisions contained in a contract. The Shaffer court stated that the Minnesota, Louisiana, and Tennessee approaches made more sense than Prima Paint's separability doctrine. This view is clearly the minority view in the United States and has been criticized by commentators. Although the decision in Shaffer could be viewed as anti-arbitration, the Shaffer court carefully pointed out that requiring state courts to resolve questions of fraud by those best suited to perform the task will only enhance the process of dispute resolution.

The Shaffer holding simply means that in Oklahoma courts if a party alleges fraud in the inducement of the arbitration clause or the contract containing the clause, that agreement is voidable by the party alleging fraud, if that party can prove fraud. It is important here to point out that even in Oklahoma, if a contract involves interstate commerce, a court is forced to apply the principles of the separability doctrine from Prima Paint and Southland. This inconsistency is precisely the reason for legislative revision of the FAA. Absent clear congressional guidance, the interpretation of the FAA will be subject to change, depending upon the makeup of the Supreme Court. This judicial legislation appears inconsistent with the power of Congress to regulate commerce.

V. Analysis

The U.S. Congress intended the FAA to be a procedure applied by the federal courts, not a basis for the implementation of federal substantive law in diversity cases involving commerce. Thus, the Lawrence decision and the majority decision in Prima Paint resulted in a redrafting of the FAA of 1925. The U.S. Constitution places the lawmaking power clearly within the province of Congress; however, by stating that the language of the statute advocates the separability doctrine, the Court avoids problems with constitutionality.

224. See Shaffer, 910 P.2d at 916.
226. See id.
227. See George Engine Co., 350 So. 2d at 881.
228. See Atacs v. Credit Clearing Corp. of Am., 197 N.W.2d 448 (1972).
229. See Shaffer, 910 P.2d at 917.
230. See Stiner, supra note 60, at 243.
231. See Shaffer, 910 P.2d at 918.
Under the current application of the FAA, the Court has frustrated the intent of the drafters of the original USAL. This interpretation of the FAA has resulted in its application in a variety of contexts that Congress did not foresee. First, arbitration agreements are now actually on better footing than other contracts. This is evidenced by the Court's treatment of arbitration agreements in the fraud context. Second, under the current application of the FAA, complex questions of law are now left in the hands of arbitrators who, in many cases, are nonlawyers, and are not bound to apply the law. Finally, the FAA is now applied to contracts for employment and statutory claims, two contexts that the drafters of the FAA excluded from the scope of the FAA, yet the courts have included in their interpretation of the Act.

The U.S. Supreme Court has now made arbitration provisions stronger than other contractual provisions. The Prima Paint Court held that a claim of fraud in inducement of the entire contract was for arbitrators to decide under an arbitration clause contained within the contract.232 As Justice Black stated in his dissent from Prima Paint, the avowed purpose of the Act was to place arbitration agreements upon the same footing as other contracts.233 The Prima Paint holding creates a situation in which arbitration agreements are upheld in situations where a court would likely void the entire contract due to a finding of fraud in the inducement of the contract. Basically, the Prima Paint Court ruled that in federal court, the only way for a party to challenge the validity of a contract containing an arbitration clause would be to allege fraud in the inducement of the arbitration provision itself. This includes situations such as those in Prima Paint, where a party claims that it would not have entered any agreement with another party, but for the fraudulent claims and promises of that party. Thus, an arbitration provision in a contract is specifically enforced by the court, despite the fact that an arbitrator may later find that the entire contract is void.

The result is that parties are allowed to seek rescission of certain contractual provisions while other provisions, such as arbitration agreements, are given full validity. Without clearly saying so, the Court has made arbitration agreements nonrescindable, unless a party alleges fraud in the inducement of the arbitration agreement. In Prima Paint, would the Court have upheld the covenant not to compete and not enforce the sales agreement because Prima Paint did not allege fraud in the inducement of the sales agreement? Although we can never know for sure, it is safe to assume that had the Court found fraud in the inducement of the entire contract, the Prima Paint Court would have voided the entire contract, not just certain provisions. However, the result of the Prima Paint doctrine is that courts now enforce "tidbits" of a contract. The problem with this view is that courts are losing sight of what arbitration agreements really represent. Certainly, an arbitration agreement is a form of a forum-selection clause, and, considering the fact that many courts' dockets are continually full, it is wise to seek an expeditious dispute resolution forum for certain situations.

233. See id. at 423.
Arbitration clauses are contractual provisions that should be governed by the same rules and doctrines as other contractual provisions. If a party alleges fraud in the inducement of a contract, individual provisions of that contract should not be enforced until the court resolves the question of fraud.

The next problem with the Court's reading of the FAA is that complex questions of law are now left to arbitrators. In many situations, arbitrators are not trained in the law, and, furthermore, arbitrators are not bound to follow the law. Thus, courts now compel parties to submit their claims to arbitrators who are not qualified to decide complicated issues of substantive law. This is simply not what the drafters of the FAA intended. The authors of the Act stated that arbitration is particularly suited to the disposition of questions of fact, such as quantity, quality, time of delivery, etc.234 From these statements, it is safe to infer that the drafters of the FAA intended questions of law to be decided by the courts, and questions of fact to be decided by arbitrators. This interpretation seems closer to Congress's original intent. Additionally, this view would result in a lighter case load for many courts. Yet, after Prima Paint, any question, whether law or fact, is to be decided by arbitrators if a contract contains an agreement to arbitrate. Thus, the Court would force a party to submit their question of a contract's validity to a dispute resolution body, rather than decide the claim itself. This is simply unjust. If a party willingly submits to arbitration, then he has willfully taken the risk that an arbitrator will not render a decision completely in line with substantive law. However, denying a party his right to a jury trial, and then forcing him to arbitrate his claims in a forum not bound, or unqualified, to apply the law may very well deny a party's right to due process of law. 235

Last, the Supreme Court's interpretation of the FAA results in the FAA's application in cases that the drafters of the Act never intended. First, the Court's decision in Gilmer expands the coverage of the FAA to employment contracts, an area expressly excluded from coverage by Congress.236 Section 1 of the FAA reads, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."237 Despite this language, the Gilmer Court held that the FAA applies to contracts for employment, and forced the petitioner to submit his discrimination claims to arbitration.238 The result of this holding is that employers are now able to force employees to assent to arbitration provisions as a prerequisite to employment. Thus, employees who sign contracts containing agreements to arbitrate lose their right to bring suit against their employers in court. Again, this application of the FAA raises serious questions about due process. For, if individuals are not allowed to exercise their right of access to the courts, these individuals are denied their Constitutional right of due process.

234. See Committee on Commerce, supra note 26, at 155.
235. See Prima Paint, 388 U.S. at 408.
238. See Gilmer, 500 U.S. at 35.
Another context in which the Court has applied the FAA is statutorily created causes of action. These include discrimination and class action claims. As we saw in both Gilmer and Southland, the Court has decided that these areas of law are covered by the FAA. The result is that courts apply USAL to issues of law that did not even exist at the time of its enactment. The problem is that arbitrators simply do not have the power to issue the proper remedy in these situations. Arbitrators do not have the power to issue broad injunctive relief to an aggrieved party. Broad injunctive relief is necessary to eliminate discrimination, and the power to issue class-wide relief is essential to the adjudication of class action claims. Arbitrators do not have the authority that the courts enjoy to fashion equitable remedies.

Additionally, compulsory arbitration within the context of statutory rights conflicts with the congressional purpose in creating such rights. When Congress enacts a law that creates a cause of action for individuals within a protected class, it gives individuals the right to sue where they otherwise would not have the right. Thus, applying the FAA to these situations practically vitiates the statutorily created cause of action. In effect, parties are allowed to force a waiver of an individual's right to trial by placing an arbitration clause in a contract. This interpretation of the FAA is not consistent with the original intent of the drafters of the FAA. Finally, when a party seeks equitable relief, such as one compelling arbitration, equity requires the party to come before the court with clean hands. In the aforementioned situations, this ancient equity doctrine is ignored, because if a party fraudulently induces a contract, or forces a waiver of rights through compulsory arbitration, then that party seeking arbitration does not have clean hands.

VI. Suggested Revisions of the FAA

As the preceding cases illustrate, the U.S. Supreme Court has greatly expanded the FAA. This expansion has resulted in confusion and uncertainty. In response to the Court's expansion of the FAA, what action should Congress take now? As the United States enters the next century, it is time for Congress to revise the FAA in order to ensure that the FAA is applied in a manner consistent with the drafters' original intent. The drafters of the FAA sought to create legislation that would declare the validity of arbitration agreements in federal courts. This is not to say that the original intent of drafters of the Act was to make arbitration agreements summarily valid under any circumstance.

In fact, federal judges were to enter an order compelling arbitration, provided that no questions arose as to the validity of the arbitration agreement.239 Further, the drafters sought to create a procedure whereby courts would consider questions of validity of arbitration agreements first, then the courts would decide whether to compel arbitration.240 For whatever reason, the Supreme Court has ignored the original intent of the FAA. This is not due to a vaguely written statute; the fact is that courts simply like arbitration. Judges would rather see a case go to arbitration.

239. See Committee on Commerce, supra note 26, at 156.
240. See id.
than fit the case into their overcrowded docket. Indeed, arbitration in many cases is more expedient and less costly than litigation. In certain situations, arbitration makes sense for simple factual disputes. However, nowhere in the legislative history of the Act do the drafters of the FAA indicate that they desired an arbitration law as inclusive as the FAA.\footnote{See generally id.} Thus, the time is ripe for congressional revision of the FAA.

First, individuals who are qualified to decide complicated legal issues should decide those issues. This means that Congress should limit the types of disputes that qualify for compelled arbitration. This is not a suggestion that Congress should limit the scope of the subject matter for willing participants in arbitration. Indeed, the drafters of the FAA would likely not object to willing participants being allowed to arbitrate virtually any claim they wished. These suggestions are aimed at situations in which one party is in breach, and the validity of a contract containing an arbitration provision is in question. This would include allegations of fraud, duress, or coercion. By adding a provision such as this, Congress would avoid \textit{Prima Paint}-like problems in the future. A potential line of demarcation for deciding whether or not a claim is arbitrable would be whether the claim is essentially a factual or legal dispute. For instance, questions regarding the validity of the contract would be decided by a court, and if that court found the arbitration clause to be legally valid, the case would be submitted to arbitration. This procedure could be similar to class certification procedures for class action claims. A party seeking court-ordered arbitration pursuant to a contract would have to respond to any objections to the validity of the contract prior to the court compelling the opposing party to go through arbitration. If the court found that a valid contract exists, the judge would compel arbitration; if not, the judge would hear the case herself without arbitration.

Although it may seem that this certification process would allow individuals to get to court by simply alleging fraud, Rule 9 of the Federal Rules of Civil Procedure already contains a provision requiring that fraud must be pleaded with particularity.\footnote{See Fed. R. Civ. P. 9(b).} Parties alleging fraud would have to do more than simply make allegations, thus assuring that frivolous claims of fraud will not be the basis for avoiding arbitration. Rule 9 would be read in conjunction with Rule 11 of the Federal Rules of Civil Procedure, which allows judges to sanction attorneys who sign false or misleading pleadings.\footnote{See Fed. R. Civ. P. 11.} Admittedly, this is not a perfect solution, as many claims involve both complex factual and legal issues. However, this revision would be the basis for a system in which parties are ensured that their disputes will be resolved by those individuals who are the most qualified to decide their claims.

Next, Congress should require that arbitration panels follow the law of the forum state. This provision would simply ensure that claims would be decided according to the law, and not a layman opinion of how the law is to be interpreted. Again, it should be pointed out that these suggestions are within the context of compelled

\footnotesize
\begin{enumerate}
\item[241] See generally id.
\item[242] See Fed. R. Civ. P. 9(b).
\end{enumerate}
arbitration, not willing submission to arbitration. Additionally, the FAA should not be interpreted as a declaration of federal substantive law. Federal decisions should not infringe upon individual states' power to interpret the law of their respective states. This suggestion would eliminate the *Erie* problems that exist under the current application of the FAA.

Finally, Congress should address the issue of whether statutory rights would be subject to arbitration. A fair reading of the legislative history would lead many to conclude that these claims should not be subject to arbitration. Indeed, considering this problem within the *Gilmer*-ADEA context, it would seem that arbitrating statutorily created rights would frustrate the purpose of creating a statute like the ADEA. When Congress creates a cause of action by statute, it has decided that a certain protected class needs to have a basis for claims other than those that already exist. Additionally, these statutes create a right to access the courts for new causes of action, and by compelling arbitration of these claims, the courts are simply undercutting the strength of the statutes.

Understandably, these suggestions do not create a perfect system of arbitration. However, this discussion is important to illustrate ways in which Congress could curb the judicial expansion of the FAA. This judicial expansion appears vastly inconsistent with the original intent of the drafters of the original USAL. Therefore, in order that the intent of the original drafters of the FAA be followed, it is now time for Congress to revise the FAA.

*Todd Baker*