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THE LIFE OF ARBITRATION LAW HAS BEEN EXPERIENCE, NOT LOGIC: GORSUCH, KAVANAUGH, AND THE FEDERAL ARBITRATION ACT

William F. Fox & Ylli Dautaj***

ABSTRACT

Over the past 50 years, the international business community has settled on the device of international commercial arbitration to resolve the overwhelming number of disputes that arise in their commercial agreements. One reason is that many business people are suspicious of the domestic courts of many host countries and have always sought the comfort of a neutral forum. Arbitration is neutral (i.e., not tied directly to any particular domestic legal system), efficient and confidential. Much of this evolution has been triggered by events in the United States—in particular a long series of United States Supreme Court decisions that ended the courts' traditional hostility to arbitration, and established, firmly and with virtually no reservations, the legitimacy of arbitration. But this line of decisions was not pre-ordained. The fundamental law, the United States Arbitration Act, usually referred to as the Federal Arbitration Act (FAA), is cryptic and skeletal in its language and the United States Congress has not seen fit to alter it in any substantial form since it was first enacted in 1925. Virtually all the arbitral innovations and pro-arbitration developments in the United States have grown out of a now-long line of court decisions—essentially a kind of common law development—that has moved a great distance away from the nearly-deceptive simplicity of the FAA. All these developments in the United States have fostered similar pro-arbitration innovations around the world. The U.S. view of arbitration has now become the international norm.

But just recently, after the appointment of two new Supreme Court Justices, Neil Gorsuch and Brett Kavanaugh, and the an-

* Distinguished Visiting Professor (part-time), School of Transnational Law, Peking University, Shenzhen Graduate Campus.

** Senior Research Associate, O.P. Jindal Global University, Jindal Global Law School, Sonipat (NRC Delhi), India. PhD Candidate, Edinburgh University, Edinburgh Law School.

nouncement of two Supreme Court decisions—New Prime Inc. v. Oliveira, and Henry Schein v. Archer & White Sales—we have seen a great deal of concern and apprehension within the arbitration community. Gorsuch and Kavanaugh are two justices who believe in "originalism" and "textualism" as interpretative techniques. While these techniques are respectable, they do not work in the context of arbitration law. While both techniques urge an interpretation that relies almost exclusively on the express language of statutes and the "original" meaning of those statutes, the fact that the FAA was enacted in 1925, has not been significantly amended, and is a mere skeleton of principles of arbitration law and procedure make them poor vehicles for principled decisions that preserve and protect arbitration. If arbitration must go back to what it was in 1925, all these years of positive pro-arbitration evolution will be lost, and the arbitration process will be damaged irreparably. At the same time, we do not wish to be too apocalyptic. These are only two cases and not all Supreme Court justices abide by the Gorsuch-Kavanaugh interpretative principles. After an exhaustive analysis of the two cases in light of all the modern, judicially-created pro-arbitration innovations, we urge the arbitration community to adopt a kind of "watchful waiting" posture. This is not the end of arbitration as we know it, but we are all justified in our concerns for the future.

I. INTRODUCTION

The U.S. Supreme Court (hereinafter the "Supreme Court" or the "Court") is the main architect for developing the arbitration doctrine in the United States. Many of the Court's decisions have been so doctrinally powerful that it has had a major impact on international arbitration as well. Put a bit differently, it is no understatement to say that the doctrine and practice of arbitration has thrived because of the Court's willingness to re-evaluate and reformulate the law on arbitration. While an extremely important statute, the Federal Arbitration Act (FAA)[1] provides mainly a framework, indeed only a skeleton for arbitration practice. The Court has effectively re-written the content of the FAA in its decisional law. It has done so in order to accommodate policy objec-

[1] Federal Arbitration Act, 9 U.S.C. §§1-16 (1947) (also known as The U.S. Arbitration Act of 1925. The Federal Arbitration Act ("FAA") consists of three separate chapters: (1) §§ 1-16; (2) the New York Convention on Recognition and Enforcement of Arbitration Awards (which is a misnomer, as it also regulates recognition and enforcement of arbitral agreements); and (3) the Inter-American Arbitration Convention).

tives and redress political concerns that the Act, on its face, simply does not address. Therefore, the understanding of the FAA is buried in decisional law and arbitration doctrine is centered on purpose-oriented pragmatism. Rather than anchoring their decisions in analytical and logical statutory interpretation, the Court gives arbitration-related cases a reading, and subsequently a decision, in light of a "strong federal policy favoring arbitration."[2] These days, the FAA is mainly effectuated through judicial opinions and not legislative changes.

However, the Court's consistent favoring of arbitration in its decisions does not meet with the approval of all scholars, lawyers, judges, and courts. There have, of course, been some relatively unsuccessful challenges to this line of cases. There have always been adversaries of arbitration who eagerly await any opportunity to dismantle arbitration in favor of judicial recourse: either by limiting the arbitral tribunal's jurisdictional powers at the front-end of the procedure, by pushing the court to elaborate a doctrine on *in*arbitrability that excludes, among other things, statutory and regulatory matters, and by eliminating the "hands-off" judicial deference at the back-end of the procedure. Any opening will be enough to a wage war on arbitration, which has already been in the making—intentionally and unintentionally—for several years now. Therefore, it is important that the United States Supreme Court gives arbitration its unconditional and unqualified support, which, thus far, it has. The already-settled arbitration issues enjoy a large degree of immunity due to *stare decisis*, and should therefore, in principle, be irreversible and irrevocable.[3]

However, as the Supreme Court bench changes, we must reevaluate the main policy objectives and political concerns of the "new court" in order to develop some predictive techniques for anticipating subsequent decisions. There are a number of unsettled issues that may be in the danger-zone. Further, the Court might

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[2] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (The FAA signals a congressional policy favoring arbitration agreements notwithstanding any state policies to the contrary); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (arbitration clauses in international commercial agreements must be honored and enforced); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (applying the *Mitsubishi* principle to domestic contracts involving the rights of purchasers of shares of stock. *Mitsubishi*, 473 U.S. 614 (1985)).

[3] What we mean here is any discussion with respect to commercial arbitration ("between merchants"), international and domestic. We hope and believe that the Court will come down strongly in opposition to the enforcement of arbitration clauses in consumer contracts of adhesion.

decide to pour new wine in old bottles and *totally* re-evaluate even settled issues. Up until today, arbitration has been *relatively* free from ideological battles, and perhaps still is. But certain considerations of social engineering may steer the Court toward comprehensive "judicial consistency" in order to push their main agenda. Any departure from a strong, pragmatic interpretation of the FAA will be seized upon by the adversaries of arbitration. Justice Gorsuch and Justice Kavanaugh's constitutional agenda, wrapped in "consistency" clothing, will inevitably lead to an "originalist" interpretation (wrapped in "textualism") that can lead to results that are absolutely unwelcomed in the arbitration community. Thus far, the Court has been *against* judicial recourse as opposed to *for* arbitration, primarily motivated by *deeply rooted legal need*.[4]

The constitutional landscape in the United States is facing significant disruption due to methodological differences in constitutional and statutory interpretation—primarily motivated by differences in ideology. These spill-over burdens will likely affect statutory interpretation in various settings. We will be justly-criticized, indeed idle, bystanders if we silently accept the methodological approach to crucial federal legislation that has defined, promoted, enabled, and fostered commerce, trade, and investment—including arbitration law. It is our duty, as scholars and citizens of the world, to make the case that ideologically motivated dogma cannot and must not define the destiny of a twenty-first century citizenry.

In *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010), the late Justice Antonin Scalia, writing for the majority, criticized "judge-made" law with respect to the applicability of extraterritoriality in §10(b) of the Securities Exchange Act 1934. In *Morrison*, the Court elaborated on a new doctrine anchored in originalism but sold as textualism.[5] Justices Stevens' concurring opinion pointed out that Scalia's criticism of applying judge-made rules is misplaced and that Congress had in fact invited an expansive role for judicial elaboration in the open-ended statute.[6] The Court elaborated a doctrine with the tacit approval of Congress but the lack of "permissive" language paved the way for a new future for §10(b). The fundamental question we pose in this article is, what disruption to the normal order of things Justices Gorsuch and

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[4] *See* THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF UNITED STATES ARBITRATION, at xxviii (6th. ed. 2018) [hereinafter "*The law and Practice of U.S. Arbitration*"].

[5] *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

[6] *Id.* at 276 (Stevens, J., concurring).

Kavanaugh will risk in order to engineer their new ideas into the fabric of Supreme Court jurisprudence? Constitutional agendas aside, will their deep philosophical convictions, that clearly shape their approach to statutory interpretation, affect U.S. arbitration law?

We worry that they may have such an impact. We see *New Prime Inc. v. Oliveira*[7] and *Henry Schein v. Archer & White Sales*[8] as striking illustrations of a Court either surreptitiously or unintentionally reintroducing judicial hostility towards arbitration in the name of methodological consistency. Both cases are pro-arbitration in nature, but only as the decisions deal with the low-hanging fruit of arbitration doctrine. The two holdings standing alone will not significantly harm the current scope and understanding of the FAA, but both cases include language and reasoning that potentially can be used by adversaries of arbitration to cause serious and long-term damage to U.S. arbitration law. Both cases represent a possible doctrinal basis for striking down a substantial amount of the judge-made law that has grown out of arbitration law and practice.

In *New Prime*, the Court (re)introduced an "intent-based" and "actual language" approach to the reading of the FAA. In *Schein*, the Court downsized its own role in elaborating upon the content of the Act. In the hands of arbitration's adversaries, who would like to dismantle much of our current arbitration jurisprudence, the pragmatic, purpose-oriented approach of these two cases could grow into outright hostility toward arbitration. It appears clear to the authors that the Court, in both *New Prime* and *Henry Schein*, focused on the text, precedent, history, and architecture of the FAA (and much less so the accompanying decisional law). But the decisions did not rely on ethics or prudence. It is probably in the latter two aspects that purposivism or consequentialism has grown. The "strong federal policy favoring arbitration" is anchored in the latter approach to statutory interpretation. The judicial policy favoring arbitration has long been the sole canon of interpretation with respect to the FAA. Perhaps a better approach would be to recognize this proposition formally.[9] This very likely does not re-

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[7] *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

[8] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

[9] Frank H. Easterbrook, *forward* to ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (West. Eds., 2012) (may prove to be a living doctrine and expand to include this canon, or alternatively expose "intent-based" or "actual language" approaches as a "falsity" when confronted with arbitration law, in general, and in particular the FAA. This is very unlikely, not only because Antonin Scalia tragically passed away

present the view of the entire Court, but the remaining justices may find their hands tied by this new constitutional agenda. This approach plays right into the hands of those who wish to reinstate the judicial supremacy (or hegemony) of the courts. In other words, the reasoning in these cases may well lead us into a fatal misunderstanding of U.S. arbitration law.

It can be alleged that arbitrators are empowered with *de facto* law—making capacity without public responsibility or accountability. We concede that this argument has substance. It stands on a base of logic and reason and has captured the attention of many. The criticism has had such an impact that even proponents of arbitration are of the opinion that arbitration should be "judicialized,"[10] partly due to the exponential growth in subject-matter arbitrability. A number of different schools of thought have emerged in both the domestic and international arbitration community.[11] One school of thought gives arbitrators a quasi-judge like role. Similarly, many argue with deep conviction that the default "arbitral trial" must include, among other things, pre-trial discovery, cross-examination, and back-end scrutiny.[12] The war on arbitration can be full-blown, piece-meal, creeping, or unintentional.

Sometimes, the answers to contemporary debates are to be found in old wisdom; as Justice Holmes said, the life of law has not been logic, but experience.[13] Many answers lie in the hidden truths

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[with an overall remarkable legacy and to be remembered in particular for a great sense of humor, eloquent writing, legal finesse, and an almost unconditional and unqualified adherence to *stare decisis*], but because originalism has survived).

10 "Judicialization" can mean slightly different things. In this respect, the authors mean: (a) procedural intricacies and formality in the arbitral procedure—essentially turning it into a bastardized form of litigation and (b) virtually unfettered judicial intervention by national courts—prior, during, and after the arbitration itself. For a good discussion on the judicialization of arbitration *see e.g.* Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized", or Harmonized?*, (2003) 19(1) OHIO ST J DISP RESOL 35; Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* (2010) U ILL L REV 1; and William W. Park, *Arbitrators and Accuracy*, (2010) 1 J. OF INT'L DISP. SETTLEMENT 25–42.

11 *E.g.*, "contractual school of thought" and the "status school of thought."

12 Thus, the "second-look" doctrine. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

13 The role of scholars is crucial in addressing primarily the piecemeal, creeping, and unintentional war on arbitration. They do so by constantly pointing out the history and evolution of arbitration and disseminating ideas on how to improve the system without turning it into a playground for American trial lawyers or to the court's pre-trial procedure (like mediation). Four arbitration scholars have helped shape the opinions of the authors of this article: Thomas E. Carbonneau, Kaj Hobér, Emmanuel Gaillard, and Jan Paulsson. Professor Carbonneau in all of his writings takes a philosophical, economic, historical, psychological, and legal approach to human conflict and dispute resolution. This makes his work meaningful in a myriad of ways.

of judicial and arbitral evolution and history. They all culminate in the same thing: a deeply rooted legal need and an aspiration for adjudicatory efficiency and effectiveness. History has taught us that functionality can be perfection in and of itself. The bottom line is this: The U.S. law on arbitration has evolved to recognize the superior role of the judicial decisions, in particular those of the Supreme Court and the much less important role of the FAA text. In the absence of continued legislative modification, the FAA has become a "living statute" through the work of the federal courts.[14]

II. The Evolution of United States Arbitration Law—Case Law Has Rewritten the Federal Arbitration Act

The evolution of U.S. law on arbitration can best be described by human and legal experience, in general, and by pragmatic thinking, in particular. As we earlier quoted, Justice Oliver Wendall Holmes has written: "The life of the law has not been logic; it has been experience . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[15] Arbitration is not perfect. It does not promote justice and fairness in the same manner that (supposedly) litigation within the judicial system does. But experience tells us that, because arbitration is workable, it is still needed. Continuing in echoing Holmes, one could say that, "practicality is the primary reason for creation of law; the observance and application of logical proposi-

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Professor Hobér has a profound understanding of international dispute resolution that has helped the authors understand and approximate the vast difference between domestic arbitration, international commercial arbitration, and investment treaty arbitration. *See, e.g.*, Kaj Hober, International Commercial Arbitration in Sweden (2011); Emmanuel Gaillard, Legal Theory of International Arbitration (2010); Jan Paulsson, The Idea of Arbitration (2013).

14 The United States Congress has been totally derelict in its obligations in the area of arbitration. The 1925 statute was enacted without much thought and without much sophistication. This may be justified given that era's general lack of interest in arbitration. There have been sporadic attempts since 1925 to amend the FAA. However, such attempts have not met with success. One possible answer to this inaction is simply that Congress has not owned up to its responsibilities. But another—and the likely more probable explanation—is that Congress is not unhappy with the way the Supreme Court and the lower federal courts have modernized U.S. arbitration law through case law. This would not be the first time in our history when Congress simply decided to "let the courts handle it."

15 Oliver Wendell Holmes, The Common Law 1 (Boston, Little, Brown & Co. 1881).

tions should not prevent the application of functional legal rules for the regulation of social conduct."[16] Briefly stated, the Court's logic and analytical reasoning in support of arbitration is often based on flawed reasoning and serious shortcomings in its justifications. The bottom line is this: arbitration experience rests, in fact, on a sound method that justifies "legal madness,"—a method nonetheless anchored in policy objectives and political concerns.[17]

The federal law on arbitration—commonly referred to as the Federal Arbitration Act ("FAA")—was enacted in 1925.[18] It was "special interest legislation" enacted to promote consistent determinations between state and federal courts. At the time the FAA was enacted, the courts were hostile towards arbitration. The hostility rendered the procedure a less desired venue for redressing commercial grievances.

It is true that the FAA is archaic and perhaps in need of updating; despite the fact that the U.S. law of arbitration is not fully visible in the FAA's text and that it is the oldest arbitration statute, it is still functioning because judges have elaborated on its scope and meaning.[19] In fact, the act itself is not as "favorable" to arbitration as it has sometimes been made out to be. This was understood by the Court subsequent to the Act's inception. Initially, the Court was more hostile and rendered a series of cases that were adverse to a pro-arbitration doctrine.[20]

However, the early hostility began to change about fifty years ago. The FAA's continuing legitimacy and landmark status lies at the feet of the U.S. Supreme Court, not of Congress. The legislative history of the FAA and the historical context in which it was enacted stands in stark contrast to the current U.S. law on arbitration. The Court has indeed transformed the content and purpose of the statute. One of us described this evolution:

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16 THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 166 (4th ed. 2017).

17 For a more general discussion on dispute resolution as such and the history of alternative dispute resolution, in particular, *see* MICHAEL L. MOFFITT & ROBERT C. BORDONE, THE HANDBOOK OF DISPUTE RESOLUTION (2005) and JEROME T. BARRETT & JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION, THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT (2004).

18 *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 645-47 (2nd ed. 2014) (providing a short outline of the FAA).

19 *See* Ylli Dautaj, *The Act Is Not the Entire Story: How to Make Sense of the U.S. Arbitration Act*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (Apr. 4, 2018), http://arbitrationblog.kluwerarbitration.com/2018/04/04/act-not-entire-story-make-sense-u-s-arbitration-act/.

20 *See, e.g.*, *McDonald v. West Branch*, 466 U.S. 284 (1984); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Wilko v. Swan*, 346 U.S. 427 (1953); *Am. Safety Corp. v. J.P. Maguire & Co., Inc.*, 391 F.2d 821 (2d Cir. 1968).

> Simply reciting the act's provisions conceals many of the major contributions made by the statute to the arbitration process in general. First, note that the statute was enacted in 1924, long before the alternative dispute bandwagon began rolling. Second, it minimizes—at least in theory—the manner in which a court may interrupt or interfere with the arbitration process.[21]

The Supreme Court's "interruption" or "interference" with the original intent or actual language of the FAA has caused the pendulum in the U.S. law of arbitration to swing to maximum apogee from the initial position of hostility.[22] Through its decisional law, the Court has effectively rewritten the content of the FAA to accommodate policy objectives, political concerns, and global commercial realities. Statutory methodology and ideological convictions have been cast aside. There is now a well-settled judicial doctrine on arbitration. The Court is superior, and the text is inferior. Functionally, civil dispute resolution has trumped deeply rooted issues of pride, ego, and philosophical convictions. The currency and standing of arbitration are at an all-time high. In particular, the role arbitration plays in promoting, fostering, and enabling trans-border commerce, trade, and investments makes it a vital mechanism transnationally as well. Arbitration has taken on an almost religious standing in both domestic and international applications. So far there has been no legal fundamentalism in the Court's case law on arbitration. The ideological battle has been manifested elsewhere but not in the area of arbitration. The Court has filled the necessary gaps of the legislation in order to foster an adjudicatory framework that responds to the constitutional need of access to justice.

The Supreme Court has emphasized that it has had congressional approval (at least by way of Congress' silence and inaction) in establishing the doctrinal framework of arbitration. The Court can ground almost any case favoring arbitration in an analysis of the core objectives of the FAA that grow out of Section 2 of the Act. But a great deal of the Supreme Court's arbitration jurisprudence has gone well beyond Section 2's express language. Through the Court's liberal reading of the FAA, the justices have unquestionably reformulated and effectively re-written the FAA.[23]

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21 WILLIAM F. FOX, INTERNATIONAL COMMERCIAL AGREEMENTS AND ELECTRONIC COMMERCE 309 (6th ed. 2018).

22 *See* PEDRO J. MARTINEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION: DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS 2-5 (2013).

23 *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 87 S.Ct. 1801 (1976).

Thus, the application of the FAA reads differently than its content. Put a bit differently, the presumption of validity of arbitration agreements and arbitral awards is rooted less in statutory language and more in pragmatic reasoning. This is the better approach and the Court is to be commended for its sensitive approach to the immediate needs of the business community. At least in this area of its case law, the Court has not genuflected toward philosophical convictions or ideological preferences. Instead it has provided almost total judicial deference prior to, during, and subsequent to the arbitral procedure.[24] Judicial intervention in the arbitral procedure is now very rare, with only a few "common law exceptions." But even so, to a certain extent arbitral procedure is becoming "judicialized" (or as is sometimes discussed in the context of international commercial arbitration, it is becoming "Americanized"). We believe this represents a major danger to arbitral autonomy, in particular, and to functional, effective civil dispute resolution, in general.

Perhaps the most significant judge-made contribution to U.S. arbitration law has been what is normally referred to as "federalization." The concept grows out of the Supreme Court's articulation of the now-virtually unquestioned "strong federal policy favoring arbitration." The policy has served as the bedrock of current understanding and interpretation of the FAA. Federalization made the FAA *de facto* the only law on arbitration in the United States. Federalism has allowed the Court to eradicate any opposition to the pro-arbitration policy. The policy is emphatic, unequivocal, and clear. Born described the work of the Court in the following manner:

> The U.S. Supreme Court has held that the domestic FAA "contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." At the same time, the Court has also repeatedly declared that the FAA creates a body of substantive federal rules relating to arbitration: in enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." As a consequence, it is well settled that U.S. state law rules which single out and purport to render inter-state and international arbitration agreements invalid, illegal, or revocable are preempted by

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24 *See, e.g.*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *First Options of Chicago, Inc., v. Kaplan*, 514 U.S. 938 (1995).

> the FAA. As noted above, it is also settled, in both domestic and international contexts, that the FAA and federal law establish the presumptive separability of the arbitration agreement, provide the exclusive standards for interpreting arbitration agreements and for confirming and vacating arbitral awards.[25]

Grounded in freedom of contract, arbitration is promoted as an effective, efficient procedure used to remedy private grievances through a privatized system of justice. Individual liberty is at the core of American identity, and is perhaps the reason why arbitration, clothed in contractual freedom, has resonated so well with political groups, the business community, and the American citizenry in general. Freedom of contract paves the way for a liberal and positive understanding of arbitration, allowing the courts to construe the FAA liberally which in turn adds important content to the Act. But examined closely, there are other motivations to be found at the intermediate level of arbitration. For example, one major accomplishment of arbitration has been to develop a functional, workable, and effective system of dispute resolution domestically and internationally. Most importantly, it is an adjudicatory system that is not hampered by backlog. Quite the opposite, it assists overly burdened courts so that litigants in judicial recourse can enjoy constitutional guarantees. The integration of freedom of contract into the framework of arbitration jurisprudence requires the lower courts to give unqualified and unconditional judicial deference to arbitration. The Courts need to embrace a "hands-off" approach.[26] Thus, we have the coming together of three separate concepts: (a) the evolution of a concept of freedom of contract that favors private justice; (b) policy objectives that promote the idea of arbitration; and (c) important political concerns. This is the basis for the Supreme Court's crafting the "strong federal policy favoring arbitration." The policy has allowed the Court to elaborate a doctrine on adjudication that rewrites the litigation landscape in the United States. All of this is done with Congress' tacit approval. The deference applied by all courts is so unqualified and uncondi-

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25 BORN, *supra* note 18, at 160-61 (citations omitted).

26 Freedom of Contract "absolute." *See, e.g.*, *Hall Street Associates, LLC*, 552 U.S. 576 (2008) (where the Supreme Court found that a court's only supervisory power over an arbitral award is found in §§9-11 of the FAA and that the parties cannot contract for judicial recourse to review the merits of the award.). At the end of the day this is a weird and unusual battle between freedom of contract and pro-arbitration sentiments—i.e. doctrine vs. policy. *See also* TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION, A TRANSNATIONAL PERSPECTIVE 809-20 (6th ed. 2009).

tioned that the policy could be rebranded as an "emphatic deferral policy favoring arbitration."

Prior to the FAA and the Court's liberal, purpose-oriented and pragmatic approach to its vague language, a judge would be hostile toward the arbitral procedure. For example, "a judge would not issue an injunction ordering a party to proceed with arbitration and appoint an arbitrator or arbitrators in good faith, on penalty of being found in contempt of court."[27] The pro-arbitration policy goes beyond merely redressing judicial bias or hostility. It is now more compelling than merely fulfilling a statutory duty. When the Court confronts the FAA, the policy favoring arbitration is now an interpretative tool in and of itself. The doctrine can be comfortably used as a canon of construction: in comes an arbitration-related dispute and out goes a pro-arbitration decision that is anchored in policy rather than in analytical and logical statutory interpretation. In resolving cases, the courts should ask themselves one simple and direct question: Do the facts and circumstances of this case resonate with the "strong federal policy favoring arbitration?"

III. *NEW PRIME INC. V. OLIVEIRA*

At the outset, the Supreme Court was asked to determine whether the FAA's "transportation workers" exception in § 1 also excluded independent contractors. In deciding the issue of exclusion, the Court encountered the secondary question of whether a court or an arbitral tribunal should make that threshold determination. The basic question is whether the courts should leave all these issues to the arbitral tribunal or whether there remains a role for the courts in interpreting an important federal statute. The Court dealt with two fundamental questions: (1) should a court or the arbitral tribunal determine threshold arbitrability matters pursuant to a delegation clause—in the case at hand, whether the § 1 exclusion to the FAA applies; and (2) whether the exclusion applies to independent contractors?

The decision was unanimous and announced on January 15, 2019. Justice Gorsuch delivered the opinion of the Court, in which all other members joined, except Justice Kavanaugh who took no

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[27] VÁRADY, *supra* note 26, at 57.

part in the case, and Justice Ginsburg who filed a concurring opinion.

The Petitioner, New Prime, is an interstate trucking company that engages the services of drivers as "independent contractors" through an "operating agreement" ("the Agreement"). The Agreement included both an arbitration clause and a jurisdictional delegation clause (i.e. a "Kaplan Clause") which delegates to the arbitral tribunal the authority to decide questions of the tribunal's own jurisdiction.[28] One of their drivers, Mr. Oliveira filed a class action in federal court against *New Prime* for an alleged failure to pay the drivers a minimum wage pursuant to state laws. Not surprisingly, *New Prime* filed a motion to compel arbitration pursuant to § 4 of the FAA. In response Mr. Oliveira argued that § 1 of the FAA expressly excludes contracts of employment for transportation workers. New Prime further argued that "any question about § 1's applicability belonged to the arbitrator alone to resolve."[29] The FAA § 1 "employment contract exclusion" is debatable in scope and meaning. This presented the Court with an opportunity to take an emphatic stance to redress the controversy.

The District Court, as well as the Circuit Court, held that the threshold question of arbitrability, even in the face of the jurisdictional delegation clause, does not include matters of statutory interpretation, such as whether the exclusion applies to independent contractors. Both courts determined that it was within the court's ambit to determine this narrow threshold matter. Each court then proceeded to answer the subsequent question relating to exclusion of independent contractors. The District Court held that the exclusion does not apply to independent contractors, but the Circuit Court disagreed and held that the exclusion applies to independent contractors by way of assessing what was meant with "employment" in 1925 when the FAA was drafted and enacted. Therefore, the Court lacked authority to compel arbitration. The Supreme Court granted certiorari.

In deciding the case, the Supreme Court first opined that a court does not have "limitless" powers to compel arbitration, notwithstanding FAA §§ 3-4 and a contractual jurisdictional delegation clause. FAA § 2 limits such powers to arbitration agreements involving commerce and maritime transactions. FAA § 2 is informed by § 1. Thus, the threshold question is this whether the contract—i.e. the Agreement—is subject to the FAA, and there-

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[28] *See infra* notes 108-23 (for a longer discussion on the Kapan Clause).

[29] *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 534 (2019).

fore to the court's jurisdictional duty to compel arbitration. The Court analyzed the language in § 1 in light of the time in which the FAA was adopted. It reasoned that: "By the time it adopted the Arbitration Act in 1925, Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers. And it seems Congress 'did not wish to unsettle' those arrangements in favor of whatever arbitration procedures the parties' private contracts might happen to contemplate."[30] (citations omitted)

But, in fact, this is not the first question a court ought to address. The jurisdictional delegation clause confers competence (usually stated as the doctrine of *kompetenz-kompetenz*) on the Tribunal to determine threshold matters. Put a little differently: Is it the court or the tribunal that is empowered to determine whether an independent contractor falls under the FAA § 1 exclusion? We believe that the Court should have emphatically held that it is within the arbitrator's jurisdiction if there is a valid delegation clause of the same. Instead, the Court held that "[g]iven the statute's terms and sequencing [the Court] agree[s] with the First Circuit that a court should decide for itself whether § 1's 'contract of employment' exclusion applies before ordering arbitration."[31] Accordingly, the court should "determine[ ] that the contract in question is within the coverage of the Arbitration Act."[32]

This reasoning is grounded in a highly questionable understanding of the interplay between FAA §§ 1, 2, 3, and 4. The better approach would have been to recognize the delegation clause's full effect in giving the tribunal authority to decide threshold questions subject to arbitration.[33] The Court's pronouncements on this crucial issue trouble us because adversaries of arbitration will claim that there is no longer a deferential review to arbitration agreements with a clear and unmistakable jurisdictional delegation clause. The Court should henceforth determine threshold matters itself, e.g. whether the agreement was procured through duress or mistake. It will be motivated on a fair reading of the savings clause. We believe that an approach that is far healthier for arbitration would have been to leave the determination to the tribunal and not, at this point in the controversy, reach the second question.

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30 *Id.* at 537.

31 *Id.*

32 *Id.* at 538 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395, 402 (1967)).

33 *Id.* (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U. S. 63, 68-69 (2010)).

The second issue addressed by the Court went to whether the Agreement and New Prime's independent contractors fall under the FAA § 1 exception. As the Court posed the question:

> What does the term "contract of employment" mean? If it refers only to contracts that reflect an employer-employee relationship, then § 1's exception is irrelevant and a court is free to order arbitration, just as New Prime urges. But if the term *also* encompasses contracts that require an independent contractor to perform work, then the exception takes hold and a court lacks authority under the Act to order arbitration, exactly as Mr. Oliveira argues.[34]

The short answer is that the Court agreed with the independent contractor, Mr. Oliveira. The Court reasoned that "[w]hen the Congress enacted the [FAA] in 1925, the term "contracts of employment" referred to agreements to perform work . . . Accordingly, his agreement with New Prime falls within § 1's exception . . . ."[35] Thus, the Court lacked authority to order arbitration.

However, while taking up this question, the Court emphasized that "[it is] a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.' "[36] As the Court suggested, the issue is: "[I]f judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands. We would risk, too, upsetting reliance interests in the settled meaning of a statute. [omitted]."

We believe that the Court overemphasized the actual language and the original intent of the FAA, in general, and the meaning of contracts of employment, in particular. The Court reasoned that no one "has . . . suggested any other appropriate reason that might allow [the Court] to depart from the original meaning of the statute at hand."[37] But going all the way back to 1925 to resolve a question under the FAA does not take into consideration either the evolution of the U.S. law on arbitration or the contemporary approaches to interpreting the statute. The Court focused on the text of the FAA, the precedent, the history, and the architecture of the statutory language, but failed to acknowledge and build into its

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34 *Id.* at 539.

35 *New Prime*, 139 S. Ct. at 543-44.

36 *Id.* at 535 (citations omitted).

37 *Id.* at 539.

opinion the "strong federal policy of arbitration" that has developed since 1925. The Court made it clear that the policy has limits and that the Court is bound to respect such. In a word, the appropriate reason for departing from the "original meaning"[38] is the U.S. law on arbitration itself.

Following his standard approach emphasizing "originalism," Justice Gorsuch engaged heavily with the term's supposed meaning at the time the FAA was adopted. The evidence to support that "contract of employment" meant "an agreement to perform work" at the time the FAA was enacted, the Court reasoned, turns on the fact that "contract of employment" was "[not] defined in any of the (many) popular or legal dictionaries the parties cited . . . ."[39] In short, dictionaries in 1925 treated employment as a synonym for work. Finally, the Court reasoned that case law confirms what the dictionaries suggest.

Up to this point in the opinion, the Court worked mainly with the concepts: actual language and original intent. This level of analysis automatically gets into a logical and analytical reading of the text, accompanying case law, and history. But the Court then moved to a kind of architectural approach emphasizing sequencing and structure. The Court stated:

> More confirmation yet comes from a neighboring term in the statutory text. Recall that the Act excludes from its coverage "contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce." Notice Congress didn't use the word "employees" or "servants," the natural choices if the term "contracts of employment" addressed them alone. Instead, Congress spoke of "workers," a term that everyone agrees easily embraces independent contractors. That word choice may not mean everything, but it does supply further evidence still that Congress used the term "contracts of employment" in a broad sense to capture any contract for the performance of *work* by *workers*.[40]

The Court outlined the parties' stances—i.e. the "etymological debate"—on the words "employee" and "employment" and concluded that the only matter truly at issue was the meaning of the term "contracts of *employment*" in 1925 when the FAA was enacted.[41] Interestingly, the Court opined that "New Prime's effort

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[38] *Id.* (It appears that "original meaning" is used as a catchphrase for "actual language" and "original intent.").

[39] *Id.*

[40] *Id.* at 540-41 (citations omitted).

[41] *New Prime*, 139 S. Ct. at 536.

to explain away the statute's *suggestive* use of the term 'worker' proves no more compelling."[42] The emphasis of shutting down the Court's power to elaborate upon "suggestive" language seems to call for only "permissive" language. This is the approach taken by late Justice Scalia in *Morrison v. National Bank of Australia*.[43]

In trying to persuade the Court to compel arbitration, New Prime also invoked the "strong federal policy favoring arbitration" in its efforts to explain that the FAA is to be interpreted liberally and that one of its main purposes was to counteract judicial hostility to arbitration. The Court disagreed and instead commented:

> If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to "tak[e] . . . account of" legislative compromises essential to a law's passage and, in that way, thwart rather than honor "the effectuation of congressional intent." By respecting the qualifications of §1 today, we "respect the limits up to which Congress was prepared" to go when adopting the Arbitration Act.[44]

Finally, New Prime invited the Court to take a position favoring alternative dispute resolution that would help remedy a deeply rooted legal need in U.S. civil adjudication. The Court posited—and then clearly rejected—an opportunity to "tangle" with an even broader argument suggested by New Prime. To the contrary, the Court stated:

> Finally, and stretching in a different direction entirely, New Prime invites us to look beyond the Act. Even if the statute doesn't supply judges with the power to compel arbitration in this case, the company says we should order it anyway because courts always enjoy the inherent authority to stay litigation in favor of an alternative dispute resolution mechanism of the parties' choosing. That, though, is an argument we decline to tangle with.[45]

So, ultimately, the Court refused to take a stance that would have furthered a strong policy favoring arbitration. Instead, the Court concluded:

> When Congress enacted the Arbitration Act in 1925, the term "contracts of employment" referred to agreements to perform work. No less than those who came before him, Mr. Oliveira is

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42 *Id.* at 542.

43 *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

44 *Id.* at 543 (citations omitted).

45 *Id.*

> entitled to the benefit of that same understanding today. Accordingly, his agreement with New Prime falls within §1's exception, the court of appeals was correct that it lacked authority under the Act to order arbitration . . . .[46]

Writing separately, Justice Ginsburg concurred in the opinion and agreed that words should be interpreted according to their meaning at the time a statute is enacted. On this basic point, there is little disagreement, but looking at the broader picture the question is rather, one of scope, degree, nuance, and context. Later in her opinion, she gets closer to our position: "Congress, however, may design legislation to govern changing times and circumstances."[47] In citing other contexts and legislation, she concedes that some statutes (not all) "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes."[48] And this, in fact, is the Supreme Court's arbitration doctrine as evolved over these many years. The Court has enlarged the text in light of modern policy objectives and political concerns. Due to deeply rooted legal need, the Court gives every arbitration case a reading in light of the "strong federal policy favoring arbitration." Ginsburg concluded by quoting *West v. Gibson*:[49] "As these illustrations suggest, sometimes, '[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic.'"[50]

Actually, the interpretation of FAA § 1's "employment contract exclusion" had earlier been subject to an intent-based analysis. In *Circuit City Stores, Inc., v. Adams*,[51] the Court construed the exclusion narrowly by, among other things, reasoning that "[the Court] believe[s] this interpretation comports with the *actual language* of the statute and the *apparent intent* of the Congress which enacted it."[52] The focus on actual language and apparent intent seems, however, to have been primarily motivated in narrowing the exception itself in order to further promote the strong federal pol-

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46 *Id.* at 543-44.

47 *Id.* at 544.

48 *New Prime*, 139 S. Ct. at 544 (Ginsburg, J., concurring) (citations omitted).

49 *Id.* (Ginsburg, J., concurring) (quoting *West v. Gibson*, 527 U. S. 212, 218 (1999)).

50 *Id.* (citations omitted).

51 *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (in reversing the *Craft* Doctrine, the Court held that the exclusion in FAA § 1 applies *only* to employment contracts of *interstate* transportation workers).

52 *Rojas v. TK Comme'ns, Inc.*, 87 F.3d 745, 740 (5th Cir. 1996) (quoting *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995)).

icy favoring arbitration. *Circuit City* is consistent with other precedent that narrows the exclusion and stands in contrast to the Ninth Circuit's contention that the FAA is simply not applicable to labor nor employment contracts.[53] Professor Thomas Carbonneau has perhaps the most cogent analysis of *Adams*. He believes:

> [The Court] refused to examine the common meaning of the words "involving commerce" at the time the FAA was enacted. . . . The Court asserted that it would be unreasonable to "deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment." Additionally, the Court stated that it need only "construe the 'engaged in commerce' language in the FAA with reference to the statutory context in which it is found and in a manner consistent with the FAA's purpose." . . . The Court concluded that "the text of the FAA forecloses. . .a construction which would exclude all employment contracts from the FAA." While it conceded that the historical arguments advocating for the analysis of Congress' understanding of its commerce power in 1925 were not "insubstantial," the Court stated that these arguments were insufficient to give it a basis for adopting a construction of the statute that "goes beyond the meaning of the words Congress used."[54]

In *New Prime*, the Court (and the lower Court of Appeals) seems to have relied so heavily on precedent that it misstated the underlying methodology, and also disregarded the true purpose and consequence of its holding. The ultimate outcome of *New Prime* (an outcome we find frightening) may permanently undercut the long-term legitimacy of arbitration and establish a gateway for a war on arbitration. If too much weight is placed on the Gorsuch approach in *New Prime* (an excessive focus on the mere language of the statute, coupled with a questionable understanding of precedent, historical context, and architecture) the employment contract exclusion may evolve into the version given to us by the Ninth Circuit: "Based on the wording of [FAA] § 2, the pre-New Deal understanding of the Commerce Clause, the legislative history of the FAA, and the suggestions gleaned from [precedent and case law], we hold that the FAA does not apply to labor [n]or employment contracts."[55]

Eventually, the dissent in that opinion became the law. Because not much of the text is clear *per se*, it seems to mean that the

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[53] *See generally Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Craft v. Campbell Soup. Co.*, 161 F.3d 1199 (9th Cir. 1998).

[54] CARBONNEAU, *supra* note 4, at 99-100.

[55] *Craft*, 161 F.3d at 1206.

Court can decide what is clear in light of a strong federal policy favoring arbitration—which comports to §§ 2 and 3 powers. When it does so, the historical context as well as the legislative history is null and void. Conservative as well as liberal legal methodological preferences are substituted for functionality.[56] The life and experience of arbitration has been purpose-oriented and consequence-awareness. Pragmatism takes center-stage.

IV. HENRY SCHEIN V. ARCHER & WHITE SALES

The decision in *Schein* was unanimous and delivered on January 8, 2019 by Justice Kavanaugh. In the petition for certiorari, the Court was asked to decide whether there is a wholly groundless exception to the jurisdictional delegation clause. In this regard, the central question was whether the court or an arbitral tribunal should determine *all* threshold matters where the jurisdictional delegation clause is "clear and unmistakable."

Archer and White ("A&W"), a small business that distributes dental equipment, entered into a contract with Pelton and Crane, a dental equipment manufacturer, to distribute their equipment. A&W sued the manufacturer's successor-in-interest and Henry Schein Inc ("Schein") for alleged antitrust violations. A&W sought both money damages and injunctive relief.

A&W brought its action in federal court at which point Schein invoked the FAA to compel arbitration in accordance with the arbitration clause in the underlying contract. The arbitration clause expressly excluded from arbitration claims for injunctive relief. A&W resisted arbitration by claiming that the request for injunctive relief barred the parties' pursuing arbitration, even if sought only in part. In granting the writ of certiorari, the Supreme Court directed the parties to address the single question: "Who decides whether the antitrust dispute is subject to arbitration?"[57] In many cases, this question may be simply and quickly answered, but in A&W and Schein's contract the arbitration clause expressly referred to the American Arbitration Association Rules ("AAA Rules"). Schein contended that the incorporation of the AAA

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[56] *See Circuit City Stores, Inc., v. Adams*, 532 U.S. 105 (2001) (for an example where the court refused to engage in an historical context analysis. It is our opinion that the Court did what needed to be done to read the FAA in light of the strong federal policy favoring arbitration).

[57] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019).

Rules gives to the arbitrator the power to determine threshold issues of arbitrability. A&W's response was succinct: "[W]here the defendant's argument for arbitration is wholly groundless . . . the District Court itself may resolve the threshold question of arbitrability."[58] The district court agreed with A&W relying on circuit court precedent which had elaborated a wholly groundless exception. The central question posed by the Supreme Court is simply stated: "In light of disagreement in the Courts of Appeals over whether the 'wholly groundless' exception is consistent with the Federal Arbitration Act, we granted certiorari."[59]

The Supreme Court held—in line with its pro-arbitration policy—that courts should respect the arbitration agreement, including the jurisdictional delegation clause. The Court held that: "The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes."[60] Further, it held that the "wholly groundless" exception is inconsistent with the FAA and that the Court is "not at liberty to rewrite the statute passed by Congress and signed by the President."[61]

The Court, however declined to address whether the delegation clause at hand was clear and unmistakable. This failure to address an issue of great importance undercuts much of the relevance and impact of the decision. We need more clarity on whether incorporating arbitration rules (which include a *kompetenz-kompetenz* clause or "positive" *kompetenz-kompetenz* clause) satisfies the contractual jurisdictional delegation as developed in *First Options* (the "Kaplan Clause") also with respect to "negative" *kompetenz-kompetenz*.[62] The Court's holding raises no major concerns *per se*, but what it did *not* hold, and the reasoning justifying what it actually held, is worrisome.

The Court's opinion requires more parsing and closer analysis. A&W attempted to "overcome the statutory text and this Court's cases" by advancing four main arguments.[63] The Court said that

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58 *Id.*

59 *Id.* (referring to the split in the federal courts of appeals: *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F. 3d 522 (4th Cir. 2017); *Douglas v. Regions Bank*, 757 F. 3d 460 (5th Cir.2014); *Turi v. Main Street Adoption Servs., LLP*, 633 F. 3d 496 (6th Cir. 2011); *Qualcomm, Inc. v. Nokia Corp*., 466 F. 3d 1366 (Fed. Cir. 2006); *Belnap v. Iasis Healthcare*, 844 F. 3d 1272 (10th Cir. 2017); *Jones v. Waffle House, Inc.*, 866 F. 3d 1257 (11th Cir.2017)).

60 *Id*. at 527.

61 *Id.* at 528.

62 *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995).

63 *Henry Schein, Inc.*, 139 S. Ct. 524 at 530-31.

"none is persuasive."[64] We believe that each should be addressed separately.

First, that FAA §§ 3 and 4 essentially compels arbitrability questions to initially be decided by a court of law. However, as the Court pointed out: "[T]hat ship has sailed."[65] In *First Options* the Court discussed a contractual jurisdictional delegation clause. The Kaplan analysis is simple and straightforward.[66] A court determines if a valid arbitration agreement exists:"[I]f a valid arbitration agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court *may not* decide the arbitrability issue."[67] This reasoning and justification captures the proper position for a court to take on an arbitration clause. Of course, one defect of *Schein* is the Court's failure to squarely address the delegation issue. The Court had ample opportunity to not only address the negative-effect doctrine and to elaborate an approach that would not only align with its previous reliance on contractual freedom and general deference but build it stronger and showcase the pro-arbitration approach to the ICA community.

Second, A&W argued that FAA § 10 provides for back-end judicial review, and thus by reverse logic, the courts "at the front end should also be able to say that the underlying issue is not arbitrable."[68] The Court reasoned that: "Congress designed the Act in a specific way, and it is not [the Court's] proper role to redesign the statute."[69] We agree that the rejection of A&W's second argument is correct, but the Court's reasoning totally sidesteps the historical evolution of § 10. On occasion, the federal courts have used common law concepts in reviewing vacatur and rounds in the vacatur procedure, and have justified a court's providing "clarification" of arbitral awards. The *Schein* Court could have reasoned that front-end and back-end supervisory powers would have completely judicialized the arbitral procedure, made it costly, formal, time-consuming, and cumbersome. Essentially, the Court could have elaborated a pro-arbitration doctrine of negative *kompetenz-kompetenz*. The Court should have held, unequivocally, that in cases of delegation, a court's only function is at the back end of the procedure and only if the parties have not agreed otherwise. This

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64 *Id.* at 530.

65 *Id.*

66 *See First Options,* 514 U.S. 938.

67 *Henry Schein, Inc.*, 139 S. Ct. at 530 (emphasis added).

68 *Id*. at 530.

69 *Id*.

further distinguishes the U.S. emphasis on contractual freedom for the whole of the arbitral procedure (which stands in stark contrast to other jurisdictions such as Germany). Moreover, even at the back end of the procedure there ought to be some deference to the decision of the arbitrator. However, that is a debate about at what stage—if at any—the court should review the jurisdictional decision of the arbitrators if jurisdictional matters have been delegated. Whatever the approach, the Court should have articulated this scope of concern much more clearly.

The Court should have held that parties can delegate *all* issues of arbitrability, substantive as well as procedural. The Court should have held that party autonomy limits judicial intervention at the front-end as well as the back end. This analysis would have left the Court with one question left to decide: Is the incorporation of institutional rules "clear and unmistakable" evidence that the parties intended for the arbitrator to finally decide all matters of arbitrability, and thus for the Court to refrain from judicial review at the back-end as well? The answer should have been based not on fairness and procedural guarantees, but on arbitral efficacy—i.e. the very reason motivating the pro-arbitration policy. In doing so, the Court should have emphasized the role of strengthened arbitral authority in a pro-arbitration jurisdiction by remaining consistent with the history of shielding the system from judicial scrutiny and echoed the gravamen of a self-regulatory and autonomous arbitral procedures. This would have reconfirmed the authority of arbitrators to interpret the arbitration agreement and been in line with a long line of authority such as *Howsam v. Dean Witter Reynolds, Inc*;[70] *Green Tree. Fin. Corp. v. Bazzle*;[71] *Oxford Health Plan, LLC v. Sutter*;[72] and *BG Group, PLC v. Republic of Argentina*.[73] Moreover, double exequatur reintroduces judicial hostility. The FAA's main achievement has been to nearly eliminate judicial hostility to arbitration practices. The purpose of elaborating a "strong federal policy favoring arbitration" would have been in vain. That would, indeed, have been a better approach than to tackle the dull argument presented by A&W.

Third, A&W contended that it would be a waste of time and money to send frivolous arbitrability matters to the arbitrator. The arbitrator "will inevitably conclude that the dispute is not arbitra-

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70 *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

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

72 *Oxford Health Plan, LLC v. Sutter*, 569 U.S. 564 (2013).

73 *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014).

ble and then send the case back to the district court."[74] There are countless ways in which the Court could have declared this argument meritless. The Court did not do an adequate job on this issue, but we agree with two aspects of the Court's reasoning. The Court was correct in pointing out that the "exception would inevitably spark collateral litigation . . . over whether a seemingly unmeritorious argument for arbitration is wholly groundless, as opposed to groundless."[75] There is, as the Court put it, " no reason to create such time-consuming sideshow."[76] In addition, the Court properly commented that one should not assume that arbitrators would inevitably reject cases where a judge might rule differently.[77] We appreciate that the Court recognized that arbitration is not supposed to be perfect, but rather is only expected to be workable and reasonably fair. It opined that "[i]t is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way."[78] However, the Court reasoned that "the Act contains no 'wholly groundless' exception," and that the Court "may not engraft [their] own exceptions onto the statutory text."[79] This comment ignores the scores of cases in which the federal courts have used common law techniques to amplify and expand the arbitrator's authority and the creation of judge-made exceptions within the purview of the FAA's statutory language. The scope and understanding of the FAA are enriched by decisional law.

A&W's fourth argument was that the wholly groundless exception is necessary to deter frivolous motions to compel arbitration.[80] The Court properly noted that A&W "overstates the problem" and that "arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable."[81] Moreover, arbitrators can impose fee-shifting and cost-shifting sanctions to "deter and remedy frivolous motions to compel."[82] Finally, the Court noted spot-on that they "are not aware that frivolous motions to compel arbitration have caused a substantial

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74 *Henry Schein, Inc.*, 139 S. Ct. at 524.

75 *Id.*at 531.

76 *Id*.

77 *Id*.

78 *Id*.

79 *Id.* at 530 (citing *Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 556-557 (2005)).

80 *Henry Schein, Inc.*, 139 S. Ct. at 531.

81 *Id.*

82 *Id.*

problem in those Circuits that have not recognized a 'wholly groundless' exception."[83] In this otherwise excellent reasoning, the Court unfortunately also re-emphasized for no good reason, the incorrect premise that the court "may not rewrite the statute simply to accommodate that policy concern."[84] We hope the words "simply" and "that" were added with the awareness that the Court has—and still can— interpret the statute broadly to accommodate policy objectives and political concerns.

Accordingly, the Court held that the "wholly groundless" exception that had been developed in the courts of appeals decisional law (primarily the Fifth Circuit) was inconsistent with the FAA. The Court reinforced the jurisdictional supremacy of the arbitral tribunal when empowered to hear threshold questions of arbitrability. In an interesting analogy (citing *AT&T Technologies Inc. v. Communications Workers*), the Court held that it cannot interfere with the merits of an arbitral award "even if it appears to the court to be frivolous," and thus neither can it interfere with the "'gateway' questions of arbitrability, such as whether the parties have agreed to arbitrate or whether the their agreement covers a particular controversy."[85] This follows naturally from the jurisdictional delegation clause developed in *First Options of Chicago, Inc. v. Kaplan*.[86] In that case, the Court confirmed freedom to contract unequivocally by implicitly recognizing judicial deference to arbitrators as the bedrock concept. Citing *Rent-A-Center*, the Court emphatically held that "[u]nder the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms."[87] For these reasons, the arbitral tribunal determines what has "clearly and unmistakably" been delegated to them. For these reasons, there is no such exception as "wholly groundless."

But there were some missed opportunities in A&W. Here, the Court could have clarified the jurisdictional issue once and for all. This would have, simultaneously, aligned United States arbitration law with commonly established practice and doctrine in other pro-arbitration jurisdictions. The better approach—contrary to what Professor Bermann stated in his amicus brief—would be for the Court to hold emphatically that the incorporation of arbitration

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83 *Id.*

84 *Id.*

85 *Id.* at 529 (citing *AT&T Tech. Inc. v. Commc'n Workers*, 475 U.S. 643, 649-50 (1986)).

86 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

87 *Henry Schein, Inc.*, 139 S. Ct. at 529 (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)).

rules with a *kompetenz-kompetenz* clause clearly and unmistakably delegates *all* the threshold jurisdictional matters to the tribunal with finality or at least the presumption of deference at both the front and back end.[88] It is true that these clauses generally refer to positive *kompetenz-kompetenz*, but it is equally true that the Court has repeatedly shed light on what the U.S. law on arbitration should and could be—*de lege ferenda*—, not only what it supposedly "is." The Court could have opined in *obiter dictum* that the distinction between procedural and substantive arbitrability, on one hand, and between negative and positive *kompetenz-kompetenz*, on the other, are both artificial in nature. We disagree, however, and Barceló has articulated that "potentially biased decision makers on the jurisdictional issue will have the final word most of the time."[89] This sentence alone undercuts the foundation of arbitral and judicial co-existence—i.e. trust and responsible merchants.[90] Whatever the case may be, the Court was sleeping on their *Kompeten-zzz* under the strong federal policy favoring arbitration. The Court could have cleared-up some of the question marks in this respect. While sleeping, the world was watching—including the adversaries to the procedure.

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[88] He is not the only prominent professor of this opinion. *See also* John J. Barceló III, *Kompetenz-Kompetenz and Its Negative Effect—A Comparative View*, CORNELL L. SCH. LEGAL STUD. RES. PAPERS SERIES (Sept. 7, 2017). The author has been a leading authority on this matter for many years. For example, sixteen years ago he published *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND J TRANSNAT'L L. 1115 (2003). We respectfully disagree, however, with both scholars' approaches to this issue. Our disagreement is not so much with their overall arbitration philosophy in general and opinions on arbitrability in particular, but more in scope, nuance, and degree on the particular aspect of negative *kompetenz-kompetenz*. Albeit at the outset, we must admit and recognize that the logical and analytical approach of the two scholars might be more "sound" in isolation of historical context and the deeply rooted legal need for arbitration and contract freedom. The disagreement is underpinned—as can be seen generally throughout this paper—by the life of arbitration as mandated by its growing importance and role in the world legal order. The disagreement is best explained by the emphatic title of this paper: *The Life of Arbitration Law Has Been Experience, not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act*. Make no mistake, the main battle is one of jurisdictional standing: the debate centers around supposed fairness and procedural guarantees *versus* arbitral efficacy (mainly judicial economy and workability). The main concern of your authors is that the adversaries of the arbitral system will find any way they can to judicialize the arbitral procedure and eventually turn it into what it was actually escaping and in fact providing an alternative to.

[89] John J. Barceló, *Kompetenz-Kompetenz and Its Negative Effect—A Comparative View*, CORNELL L. SCH. LEGAL STUD. RES. PAPER SERIES (Sept. 7, 2017).

[90] The caveat being that we are talking essentially about commercial undertakings in which an arbitration agreement is negotiated and drafted. The context, and thus the outcome, changes significantly when and if the setting is a consumer contract of adhesion.

Moreover, a better approach would have been for the Court to announce that the "wholly groundless" exception does not block frivolous attempts to transfer disputes from the court system to arbitration. The Court could have reasoned that engrafting such a common law exception into the statute would "judicialize" the arbitral procedure and mandate. This would conflict with the "strong federal policy favoring arbitration." Instead however, the Court concluded "that the 'wholly groundless' exception is inconsistent with the text of the Act and with our precedent."[91] In fact, the Act as written does not represent the U.S. law on arbitration, and the decisional law does not clearly settle this issue. The exception should be stricken from arbitration law on the basis of policy objectives and political concerns—not on supposed intrinsic logic and analysis. The Court opined that it "must interpret the Act as written, and the Act in turn requires that [the Court] interpret the contract as written."[92] The reasoning provides for mere lip-service to the history and evolution on the U.S. law of arbitration. It represents the supremacy of freedom of contract, but at the same time strips the Court of its elaborative powers and refuses to answer the only real issue with respect to threshold arbitrability questions. The Court has a duty to enforce the arbitration agreement as written, the meaning of which must be read in light of contract freedom and the "right to arbitrate." In other words, the evolution of the U.S. law on arbitration has sought to empathically do justice to the political concerns motivating the rise of the policy objectives underpinning arbitration.

From a pro-arbitration standpoint, the Court's approach to "wholly groundless" might be applauded, but the Court's reasoning is fatally wrong. The Court grasped for low hanging fruit. It failed to see the bigger picture implications in its reasoning and failed to address *all* of the issues presented by the case. Decisional law can indeed create exceptions; for example, the Court has elaborated common law grounds for judicial review of arbitral awards. This is an honored tradition in U.S. arbitration law and simply cannot be ignored.

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91 *Henry Schein, Inc.*, 586 U.S. at 529.

92 *Id.*

V. United States Arbitration Law: Where Does It Go From Here?

The United States Supreme Court has now decided the second of a trilogy of cases that will likely define U.S. law on arbitration for the next century. Up to this point, arbitration law at the Supreme Court has not been terribly ideological: liberals and conservatives seem to be in general agreement on most issues. It certainly does not have the emotional baggage of abortion, civil rights or other touchy issues. Illustrative of this is that Justice Breyer is perhaps the biggest proponent of the procedure.[93] Also, arbitration has been nearly immune from competing concepts of statutory interpretation. Because of this, we assumed that the Gorsuch and Kavanaugh originalist approach would have minimal impact—that things would go on as per usual.

But Justice Gorsuch in *New Prime* focused extensively (as an originalist or strict textualist would do) on the original intent and actual language of the FAA.[94] Moreover, Justice Kavanaugh's reasoning in *Henry Schein* presents several misconceptions of the inferior role of the text and the superior role of the Court. A great deal of this has bypassed the attention of the arbitration community. The question is now whether the adversarial position, sometimes manifested as judicial resistance, will find roots in the Supreme Court by way consistently applying the FAA as written and understood at the time it was enacted. The traditional approach has been described by Mark Kantor:

> [T]he US Federal courts have for many decades strayed from the exact text of the FAA in the course of developing US federal arbitration law. Instead, the Federal courts have developed a sort of 'common law' of arbitration, building on their notions of how to fill legislative gaps or to find modern interpretations to effectuate the FAA's purposes.
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> These different approaches toward divining legislative meaning are part of the basic legal philosophy differences between the conservative and liberal wings of the Supreme Court. Those dif-

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93 With an exception for his consistent stance against "adhesive arbitration," perhaps best articulated in his, Stevens', and Ginsburgs' dissent in *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105 (2001). The "adhesive arbitration" debate is one where ideological battles have taken center stage even in arbitration law.

94 Justice Breyer cited this approach in his dissenting opinion in *Jam v. Int'l Fin. Corp*., 139 S. Ct. 759 (2019) (Breyer. J., dissenting). This goes to show that the approach will not slip the attention of the other justices and probably not the Circuit and District courts either.

> ferences will play out in many areas of US law but, in light of *New Prime*, one of them now may be the interpretation of the FAA.[95]

At best, originalism makes sense in constitutional interpretation, but that is a matter of methodological preference. It may, in many instances, have the virtues of clarity, foreseeability, and strengthening democratic input in social engineering. But, as we see it, that approach applied to arbitration law and policy (developed over many, many years) would have disastrous implications.

Of course, we do not for a minute object to doctrinal changes over time that reflect new realities. We concede that judges may properly consider changes in doctrine that promote desirable socio-economic outcomes. We further recognize that the Supreme Court has had a dramatic impact on law outside the borders of the United States. Much of this is synthesized in the insightful commentary of Professor Mark Van Hoecke who has written:

> A hypothesis about the exact meaning of a legal concept, rule, principle and the like, does not only refer to finding out what their authors had in mind. The normative context today and the socially desirable result also co-determine that meaning. Hence, this meaning is evolving and may change in the course of the years, without any change in the texts. A unanimity today as to the meaning of a legal text does not prevent scholars in the future wording new hypotheses as to a slightly or even completely different meaning.[96]

We believe, based on past decisions and practices, that the Supreme Court has had an obligation to re-enact the FAA in order to turn it into a modern law of arbitration. So far, they have done it with merit. In the subsections that follow, we will briefly illustrate and discuss certain instances where the Supreme Court has created a federal common law of arbitration that goes well beyond the skeletal language of the FAA itself. In fact, Justice Breyer's methodological approach on statutory interpretation seem most in sync with the strong federal policy favoring arbitration. His approach goes as follows: "Purposes, derived from context, informed by history, and tested by recognition of related consequences, will more often lead us to legally sound, workable interpretations—as they have consistently done in the past."[97]

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[95] Young-OGEMID post (01/21-2019). Quoted with the permission of Mark Kantor.

[96] MARK VAN HOECKE, METHODOLOGIES OF LEGAL RESEARCH: WHICH KIND OF METHOD FOR WHAT KIND OF DISCIPLINE? 14 (2011).

[97] *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 781 (2019) (Breyer, J., dissenting).

We will also highlight how the outcome could have been far different if an originalist/textualist interpretation of the FAA had been applied. Our list—(i) federalization; (ii) separability and *kompetenz-kompetenz*; (iii) clarification and vacatur; and (iv) subject-matter arbitrability—is illustrative, not exclusive.[98]

A. *Federalization*

The Court developed the doctrine of preemption. In a word this means that the FAA essentially supersedes state arbitration law by constantly and repeatedly emphasizing the "*federal* policy favoring arbitration." On its face, the FAA nowhere requires state courts to defer to the FAA.[99] The act does not refer to a federal preemption, nor does it refer to federalization or applying on the basis of federal question. The question of "federalization" in the arbitration context has its roots in the larger constitutional debate on "federalism" in the United States political system. Justices such as Antonin Scalia, Clarence Thomas, and Sandra Day O'Connor have objected to this development. Justice O'Connor "emphasized that the U.S. Congress in 1925 did not *intend* the FAA to be binding on states and state courts. In her view, the Court had, over time and numerous decisions, rewritten the FAA and converted it into an 'edifice' of law 'of its own making' . . . ."[100] Surely this evolution was motivated by policy objectives and political concerns, but it can be alleged that such is not enough to trump the democratic order of separation of powers as evidenced by the constitution. It is true, of course, that in many instances, for example the *Erie* Doctrine (federal courts sitting in diversity actions must apply substantive state law) unequivocally held that state courts must be controlling as a matter of constitutional law.[101] "The only means of circumventing the *Erie* limitations was to argue that the

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[98] Other interesting issues that should probably be researched include: whether arbitrators can include "non-signatory" parties pursuant to the FAA; whether a court should enforce consumer arbitration agreements; whether a "superior-party" should be able to waive class-action arbitrations (in short, "the class-action waiver dilemma"); whether "opt-in" provisions are legally sound creations of contract freedom; whether "manifest disregard" is still a common law ground for vacatur, and if it is, to what extend; whether courts can impose sanctions for frivolous vacatur actions; whether the court or arbitrator should determine whether the contract was procured through corruption and whether the arbitrator has a duty to disclose to relevant authority; etc.

[99] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

[100] CARBONNEAU, *supra* note 16, at 80.

[101] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

FAA actually creates substantive federal rights and, therefore, a 'type' or 'ersatz' firm of federal question jurisdiction."[102] The broader discussion of federalism per se is beyond the scope of this paper but cannot be ignored by scholars inside or outside the United States.

The Court has elaborated a "federal preemption doctrine" in a line of decisions stretching back a number of years.[103] The doctrine reinforced federalization and confirmed the juridical power of the FAA. A "federalism trilogy" "demonstrated that the court was convinced that a fundamental congressional policy was embedded in the FAA: To establish an effective national legal regulation of arbitration and thereby remedy the dysfunctionality if U.S. civil litigation."[104] Thus, the FAA became binding on the states and has become, in essence, the only law of arbitration in the United States.

Under the preemption doctrine, the Court moved toward a right to arbitrate almost any matter under the FAA.[105] There is no express language in the FAA articulating this, although it may plausibly be argued that these concepts are *implied* in the scope and meaning of the FAA. But, however developed, federal courts now almost uniformly compel arbitration of all issues when an arbitration clause is found in an agreement.

Through the fundamental objectives in FAA § 2 the Court has elaborated a "strong policy favoring arbitration" and all the subsequent case law favoring arbitration due to the policy. The FAA is the law on arbitration and federal case law provides the sole interpretative base for the Act. The Gorsuch and Kavanaugh approach to the FAA might severely undercut the preemption principle or else lay the framework for waging a war on the scope and meaning of the FAA. The latter will eventually and inevitably undercut the principle.

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102 CARBONNEAU, supra note 16, at 185.

103 *See, e.g.*, *Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. 17 (2012); *Oxford Health Plan LLC v. Sutter*, 569 U.S. 563 (2013); *Preston v. Ferrer*, 552 U.S. 346 (2011); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); and *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

104 CARBONNEAU, *supra* note 4, at 292. *See also* "the trilogy": *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *See also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Volt Info. Scis., Inc. v. Leland Stanford Univ.*, 489 U.S. 468 (1989).

105 *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (the Court essentially held that if the parties' agreed to arbitrate, they should arbitrate).

B. *Kompetenz-Kompetenz*

Kompetenz-Kompetenz is a generally recognized doctrine in arbitration that in essence provides that it is the arbitral tribunal that must resolve any questions of the tribunal's jurisdiction. There is no role for courts in making this determination.[106] But as with so much else in arbitration law, the FAA is totally silent on the issue. Instead, it can now be included on a contractual basis through a so-called "Kaplan jurisdictional delegation clause,"[107] by stating "clearly and unmistakably" that the arbitrators can determine their own jurisdiction.[108] By incorporating a "Kaplan clause," the arbitrators have, in and of themselves, the juridical competence to determine the contract's validity and whether the dispute is covered by the arbitration agreement (e.g. whether the Tribunal has gap-filling powers).[109] It should be mentioned briefly that both the leading cases—i.e. *Kaplan* and later *Howsam*—concerned domestic arbitration.[110] However, in *BG Group plc v. Republic of Argen-*

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[106] *Kompetenz-Kompetenz* is intimately linked with the doctrine of separability. The United States Supreme Court has declared the doctrine as an integral part of the U.S. law on arbitration. *E.g.*, *Prima Paint Corp.*, 388 U.S. 395 ("except where the parties otherwise intend—arbitration clauses . . . are 'separable' from the contracts in which they are embedded"). *See also Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006).

[107] For the purposes of this paper, it does not matter whether we refer to the delegation of arbitrability matters as "threshold," "jurisdictional," or "gateway" matters/issues. Moreover, it does not matter if we call the delegation of jurisdiction a "delegation clause," "jurisdictional delegation clause," and a "Kaplan clause." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) marked a new phrase, as a "delegation" clause.

[108] Named after the case in which it was held that parties are permitted to incorporate a clause that allows arbitrators to determine threshold questions of arbitrability instead of the court—e.g. whether a contract is valid, whether the subject-matter is arbitrable, whether the arbitrators have mandate to hear the dispute, etc. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S.938 (1995).

[109] The reader may find a more nuanced debate on the threshold powers, he or she should read about a possible "common law" framework for the same; that is, instead of the contractual basis established in *First Options*. *See Oxford Health Plans LLC v. Sutter*, 568 U.S. 1065 (2013); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). Moreover, it should be said that arbitral agreements are generally considered "valid, irrevocable, and enforceable;" the contract defenses under state law (e.g. formation, duress, unconscionability, etc.) are unlikely to be successful due to the Supreme Court having elaborated clear pro-arbitration FAA § 2 objectives.

[110] *Howsam v. Dean Witter Reynolds, Inc*, 537 U.S. 79 (2002); *First Options*, 514 U.S. 938. These cases clearly establish that the presumption is that the arbitrator decides threshold issues of arbitrability, e.g. allegations of waiver, delay, or a defense. The general consensus however seems to be that the Kaplan jurisdictional clause applies also to international arbitration; *See, e.g.*, *China Minmetals Materials Imp. and Exp. Co., Ltd v. Chi Mei Corp.*, 334 F.3d 274 (3d Cir. 2003). In *Howsam* the Court established the difference between "substantive arbitrability" (existence, validity, and scope) and "procedural arbitrability" (e.g. waivers, pre-arbitration obligations, etc.). The rule for procedural arbitrability is laxed in comparison with substantive

tina, the Court unmistakably articulated that this now governs also in international arbitration matters.[111]

The FAA predates what is now collectively referred to as "the U.S. law on arbitration." The 1925 perception is just unrealistic, and Congress has been unwilling—and unable to—enact a new law and has instead given tacit approval for the Court to elaborate a doctrine on arbitration. The judicial legislation is pragmatic, policy-oriented, and underpinned by a purposive interpretation. This is a striking development because if we look either at the express language of the FAA or even if we try to examine the intent of the FAA, it would be hard—if not impossible—to reach the conclusion that the FAA gives private parties the power to strip courts of significant threshold powers. The significantly different views of freedom of contract that prevailed in 1925 (during the infamous Lochner Era) would probably not mandate such an interpretation. The Court elaborated a broad concept of freedom of contract to preserve the federal policy favoring arbitration even though this may have trampled on some earlier ideas of proper statutory interpretation. The later Court decisions uphold the Kaplan doctrine on a pragmatic basis—one that grows from the purpose of the FAA.

The Kaplan doctrine is a landmark decision in establishing the arbitral jurisdictional supremacy through, on the one hand, contractual freedom and, on the other hand, reiterating the unwavering Court deference and continuous empowerment of the arbitral procedure. Without the U.S. Supreme Court elaborating a contractual basis for the doctrine in its decision in *First Options*,[112] the autonomy of arbitrators would be limited. This would significantly undermine the arbitral autonomy, but more importantly, would markedly weaken, possibly even destroy, the legitimacy and effectiveness of the procedure. Moreover, once the arbitrator determines its validity, the court's deference is substantial.

Establishing a contractual basis for *kompetenz-kompetenz*, the parties eliminated the courts from the front-end of the arbitration.

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arbitrability; i.e. there is a presumption in favor of arbitral autonomy to determine the "who decides" questions with respect to procedural issues. In civil law jurisdictions, procedural arbitrability issues would probably be called "issues of admissibility."

111 *BG Group PLC v. Republic of Argentina*, 572 U.S. 25 (2014); *Kobe Properties Sarl v. Checkpoint Systems, Inc.*, 134 S. Ct. 1198 (2014). Albeit, the Court did elaborate on yet another distinction with respect to arbitral autonomy in "who decides issues." The distinction lies between substantive and procedural arbitrability.

112 *First Options*, 514 U.S. at 943 ("arbitration is simply a matter of contract between the parties").

The Court filled a gap in the FAA in order to align the Court with modern arbitration statutes in other pro-arbitration jurisdictions.[113] In so doing, the Court has created perhaps an even broader gap-filling role for both the Court and for parties through freedom of contract. This is a powerful corrective to any misuse of the FAA—i.e., the Court can align the vague (and sometimes non-existent) language in the FAA by adding content or rebranding the meaning and understanding of the current text by interpreting it in light of the strong federal policy favoring arbitration. Moreover, the invocation of the delegation doctrine, in general, and the arbitration doctrine, in particular, demands enormous deference by the courts to the acts of the parties and the determinations of the arbitrators.[114] This makes the parties the masters of their procedure—a result virtually everyone has welcomed.

However, even though *kompetenz-kompetenz* is accepted and welcomed as a positive concept, there is another aspect to the doctrine that requires analysis. The question is whether and to what extent the delegation clause can limit courts from intervening to determine jurisdictional questions, and, if courts can indeed intervene, at what stage should the courts do so—i.e. (negative) *kompetenz-kompetenz*. Some of these as yet unresolved issues regarding the doctrine generate much confusion. For example: What constitutes clear and unmistakable evidence that the parties did contractually delegate the jurisdictional threshold matters to the arbitrator? Are there or should there be limits on what cannot be delegated? How does one delegate as a matter of contract language? Is it enough to incorporate institutional arbitral rules that include a *kompetenz-kompetenz* clause in order to delegate jurisdictional questions?[115] When and how much should a Court intervene in order to determine whether the arbitrator(s) have jurisdiction? Is there really a need for front-end and back end supervision? Can both be eliminated; i.e. could parties agree to delegate all matters finally and exclusively to the arbitrator(s)? What is the standard for review by courts—prima facie test of arbitrability or a full de novo review? If the court proceeding comes first, *prima facie* or *de novo*? Is the incorporation of institutional rules clear and unmistakable evidence that the parties intended to dele-

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113 *See also BG Group PLC*, 572 U.S. at 134 (where the Court emphatically reinstated the almost unconditional jurisdictional delegation to the arbitrators by incorporating a "Kaplan Clause.").

114 For a more recent case, s*ee, e.g.*, *Oxford Health Plan, LLC*, 569 U.S. 564.

115 *See* VÁRADY, *supra* note 26, at 141, and the "reverse presumption" dilemma.

gate finally the jurisdictional decision? Are general *kompetenz-kompetenz* clauses in major institutional rules "positive" *kompetenz-kompetenz* clauses only and, therefore, to be distinguished from "negative" ones?

As mentioned, the general reference to *kompetenz-kompetenz* refers to the arbitrator's own competence to determine her jurisdiction. For academic purposes, this has been described as "positive *kompetenz-kompetenz.*" The reverse—i.e. "circumstances under which a national court will stay its own proceedings . . . and refer the parties to arbitration" in order to determine issues of arbitrability is coined "negative" *kompetenz-kompetenz*.[116] The dilemma as to whether and to what extent a court should intervene rests on two competing policy objectives: arbitral efficacy, on one hand, and supposed fairness and procedural guarantees, on the other.[117] This distinction has to be understood with some caution. It presupposes that judicial recourse offers significant fairness and procedural guarantees and efficacy.[118] That is not always the case and differs significantly from one jurisdiction to another. In fact, the entire motivation underlying arbitration is motivated, among other things, by court congestion and lack of expertise in specific commercial matters. Nonetheless, we need to have a reference point for purposes of comparison and arguing based on pros and cons. Therefore, with hesitation we accept this generalization as a true thesis.

However, let us elaborate on a pro-arbitration stance in this respect. If the parties have included a jurisdictional delegation clause, a modern pro-arbitration approach should: (1) remove the court from a *de novo* review of jurisdiction at the front-end, at best reviewing *prima facie*; (2) if the arbitration is on-going or tribunal established, refuse to review altogether at the front-end; (3) review with deference at the back-end;[119] and (4) allow contractual freedom to delegate the final competence to the arbitrator, i.e. no re-

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116 Barceló, *supra* note 88, at 1.

117 *Id.* at 2.

118 Procedural efficacy refers, among other things, to the fact that a court will perform a *de novo* review at the back-end anyways, so why not save time and costs. This was tried by the respondent in Schein but failed plat on its face—the Court emphatically held that "that ship has sailed." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

119 *See BG Group PLC V. Republic of Argentina*, 572 U.S 25 (2014) (With this case in mind, the Court could attribute substantive arbitrability issues with the same general deference as portrayed with respect to procedural arbitrability issues. In doing so, the Court would limit review of jurisdictional manners in the same manner as it limits the review of facts and law in the arbitral award.).

view whatsoever and instead recognize full arbitral autonomy as authorized by the parties pursuant to freedom of contract. However, that does not resolve what constitutes evidence of such delegation in a clear and unmistakable manner. That is, indeed, another matter altogether and an appropriate standard has to be formulated by either the legislative branch or the Court.

Our strong support for a pro-arbitration stance and our utmost respect for arbitral autonomy and freedom of contract can be traced back to the gravamen of arbitration and commercial dealings. Arbitral success rests on the edifice of freedom of contract, court deference (with the caveat of light-touch supervision, particularly at the back-end), and heightened arbitral autonomy. If parties opt for arbitration, especially if the seat is in France, Switzerland, or the United States, they opt *de facto* for heightened standing of arbitral autonomy. Sophisticated merchants should know this. If jurisdictions get into the habit of striking down final delegation clauses, they will no longer be considered arbitration-friendly and will fall short in the competition for arbitration business. Courts should be cautious not to fall into the seductive trap of power by way of reclaiming jurisdictional supremacy and hegemony.

In this respect, the Court has more work to do, and in both *New Prime* and *Schein*, Justices Gorsuch and Kavanaugh failed to further the doctrine to align it with a modern pro-arbitration understanding.[120] Not only could they bring clarity to *status quo* in domestic matters, but the Court could actually—considering especially the silence in the New York Arbitration Convention and the UNCITRAL Model Law—reclaim its fame and its position as the main architect in elaborating a pro-arbitration policy on ICA. The Court should cherish, preserve and extend that which makes their

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120 *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019); *Henry Schein*, 139 S. Ct. 524 (2019). France has taken a liberal approach and refuses the courts of jurisdiction once a tribunal has been established and if the respondent approaches the court prior, the court is instructed to conduct a *prima facie test* only. France would review only at the back-end, albeit *de novo*. Germany, on the other hand, conducts a full *de novo* review. At the end of the day, however, the preferred approach is a policy choice. Your authors are more in favor of the French and Swiss philosophy of arbitration as articulated by, among other authors, Carbonneau (albeit American), Fouchard, Gaillard, Goldman, and Kaufman-Kohler. The U.S. approach differ from both and have the potential to further the more arbitral friendly French approach even further. This would continue to pave the way for the U.S. as the most favorable seat for arbitration. If not, the arbitration evolution will continue the trend of making "lawyers laugh and legal philosophers weep." *Guru Nanak Found. v. Rattan Singh & Sons*, (1981) 4 SCC 634 (India).

approach especially business and arbitration friendly—"the strong role the U.S. Supreme Court accords to party autonomy."[121]

The bottom line is this, the Gorsuch/Kavanaugh approach may well undercut *kompetenz-kompetenz* by expanding the powers of the reviewing courts. If the Court were to further advance the original intent and actual language approach, it might be impossible to avoid interpreting FAA § 4 to mean that a federal court should review *de novo* any jurisdictional challenge.

C. *Grounds for Setting-Aside or Refusing Enforcement of an Arbitral Award (Vacatur) and Action to Clarify an Arbitral Award*

1. Vacatur

The grounds for vacating an arbitral award in FAA § 10 are, briefly stated: (1) award procured by corruption or fraud; (2) award made with "evident partiality"; (3) arbitrators guilty of misconduct; (4) arbitrators exceeded their powers. While it is not entirely clear from the statute's text that this is an exclusive or exhaustive list, there is no language in § 10 that appears to permit a court to review the merits of the award or any findings of fact that accompany the award. In examining § 10 we need to keep in mind that it was enacted in 1925, when arbitration was much less respected, and courts were far less deferential. It is hard to imagine that a 1925 Congress intended courts to defer, generally and with respect to merits, review particularly with regard to matters which were, then, not considered proper subjects of arbitration such as antitrust and securities disputes.[122]

Over time, the federal courts created common law grounds of vacatur into the content of the provision such as (a) manifest disregard of the law; (b) capricious, arbitrary, or irrational arbitrator determinations; and (c) determinations that violate a statutory public policy. In theory, this limits judicial deference, but in practice it has had no substantial effect.[123] As we stated above, giving the court the power to make arbitration law by common law meth-

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121 Barceló, *supra* note 88, at 25.

122 This skepticism also played out in the elaboration of the "second-look" doctrine, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

123 Moreover, it is believed that some or all of these grounds originates from cases dealing with labor arbitration. For a discussion on review of the merits and manifest disregard in particular, *see* VÁRADY, *supra* note 26, at 943-60.

ods and thus giving less significance to the text of the FAA has both positive and negative consequences—or as we have said—for better or for worse. Evolution of arbitration law through common law methods lacks support in the statutory language but does align with the policy favoring arbitration. Allowing courts to inquire into the merits through judicial review undermines arbitral autonomy, the respect for parties' contracts, and the policy objectives and political concerns shaping the rationale of deference to arbitration. With the benefit of hindsight, it becomes apparent that the common law grounds have also been interpreted in light of a "strong federal policy favoring arbitration," and thus have had a limited practical effect. We do not favor broadening vacatur powers (permitting long delays and costly vacatur procedures) because such a development may well disrupt the current favored position of arbitration in the legal system. It may be necessary for courts to become far more aggressive in assessing sanctions and penalties for frivolous attempts at vacatur.

However, current experience tells us, that the actual *vacatur* of arbitral awards remain a very rare exception rather than the norm. This is the preferred approach and must be applauded as the courts continue to honor the "strong federal policy favoring arbitration."[124] We urge great caution in any court moving toward any shift in the doctrines of review that permit the courts to give broader meaning and application to, for example, the words 'undue process,' 'evident partiality,' 'misconduct,' or 'imperfect execution of powers'.[125] The FAA § 10 lays out the grounds in which the relevant district court may order to vacate an award. The ground in subsection 2 reads: "where there was evident partiality or corruption in the arbitrators, or either of them." This is an area that is not settled yet and where the Gorsuch and Kavanaugh approach might undercut the pragmatic, purposivist oriented interpretation of the FAA.

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[124] But with so much else, this is a likely prediction of the future but not an absolute one. A "better approach" is not equal to the "only approach." In fact, it seems that the federal courts of appeals have once again received a bit of a habit to vacate arbitral awards. We should not draw too many conclusions yet, but it is worth monitoring the development. *See Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors, LLC*, 2019 WL 333339 (9th Cir. Jan. 28, 2019); *Sw. Airlines Co. v. Local 555, Transp. Workers Union of America AFL-CIO*, 2019 WL 139247 (5th Cir. Jan. 9, 2019); and *Koester v. U.S. Park Police*, 2019 WL 81105 (Fed. Cir. Jan. 3, 2019).

[125] *See* CARBONNEAU, *supra* note 4, at 138-39.

2. Clarifying Awards

The development of modern arbitration law has not been exclusively the province of the Supreme Court. The courts of appeals (the federal circuits) have also had an impact. For example, the Second Circuit created a mechanism by which the courts may clarify an arbitral award.[126] This has the singular advantage of allowing the award to stand instead of setting it aside in its entirety. Vacating awards due to minor errors (e.g. typographical errors) forces the parties to redo the procedure or go to court. This is inevitably a cumbersome, costly, time-consuming and largely unnecessary process. When a court invokes the mechanism of clarification, the court in effect "remands" the award back to the tribunal. The tribunal then, among other things, has a second shot at explaining in clear terms what it meant. This mechanism can actually promote finality—the "one-stop-shop" principle—and also enhance arbitral legitimacy. How this mechanism fits with the doctrine of *functus officio* and the FAA § 10(a)(3)'s requirement to vacate an "incomprehensible award" is unclear. But the law of arbitration has not been logic, it has been all about experience. The tool to remand back for clarification sits well with the "strong federal policy favoring arbitration." It does, however, contradict the text of the statute and the doctrine on *functus officio*. We shall not engage in a debate on whether the mechanism is so crucial that the objectives of the U.S. law on arbitration mandates its existence, but we do wish to emphasize that it is a favorable procedure that will likely bear the test of time. We will likely see more such ventures in the near future.

D. *Subject-Matter Arbitrability and the FAA*

If Gorsuch's intent-based and actual language approach to the FAA become the new norm, what will become of all the current doctrine on subject-matter arbitrability? Subject matter arbitrability is one of the most important developments in modern arbitration law—leaving to the arbitral tribunal the authority to decide virtually all issues in a dispute, no matter what the subject matter covers. To answer this question, we must divide the issue of subject-matter arbitrability into, two separate components: domestic arbitration matters and international arbitration matters. To

126 *See Hardy v. Walsh Manning Sec., LLC*, 341 F.3d 126 (2d Cir. 2003).

understand the underlying tension in either context, the reader must understand the position of the adversaries of contemporary arbitration. The crux of the matter for the adversary is a jurisdictional battle between the true source of judicial power and an illegitimate scam. Arbitration was "perceived by commentators, the judiciary, practitioners, and captains of industry as a blunt and imprecise methodology for dispute resolution."[127] With respect to arbitrability, the early hostility was manifested primarily in *Wilko v. Swan* and the *American Safety* case.[128]

In domestic arbitration, the widening of subject-matter arbitrability was motivated primarily by three factors: (1) respect for the parties' agreement; (2) respect for arbitral autonomy; and (3) other precedential decisions that echoed decisions that emphasized the distinctiveness of international commercial commerce and trade.[129] In the international setting, the United States Supreme Court took on a strong leadership role by elaborating a nearly universal doctrine on subject-matter arbitrability that was grounded in arbitral autonomy and freedom of contract, but also anchored in the distinctness of the international nature of the agreements. Notably, neither § 2 nor § 3 of the FAA address subject-matter arbitrability. Congress' silence (and total inaction) on this issue has allowed the Court to circumvent certain concerns of public policy (including public interest and public law concerns) having to do with subject-matter *in*arbitrability. A great deal of this discussion is beyond the scope of this article. We do not directly address the question of whether many issues should or should not be subject to arbitration such as antitrust, corruption, securities, bankruptcy, labor, consumer protection and the like. We do note, however, that on virtually all of these issues, the Supreme Court has spoken decisively in favor of arbitration.

Statutory and regulatory matters traditionally belonged to the subject matter jurisdiction of the courts because most scholars and most government entities believed that the courts were the best vehicle for adjudicating matters of public policy and public interest. It was always taken as a given that the judiciary had the primary, if not the exclusive, role in interpreting statutes enacted by the demo-

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127 MARTINEZ-FRAGA, *supra* note 22, at 1.

128 *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968); *Wilko v. Swan*, 346 U.S. 427 (1953).

129 *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), reh'g denied, 419 U.S. 885 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *See* BORN, *supra* note 18, at 635, 668.

cratically elected Congress. The source of the doctrine of subject-matter *in*arbitrability—which has been less significant than expected—is to be found in Congress' desire to exclude certain statutory and regulatory matters from private adjudication. In fact, "[t]he Court never identified a true statutory command of inarbitrability—despite clear and unambiguous phraseology to that effect in a number of congressional statutes."[130] In truth, the core concept underlying subject-matter arbitrability is not a matter of contractual freedom, but rather that a democratically-elected legislative branch is responsible for shielding the public from unwarranted intrusions upon the judicial function. Moreover, Congress has a duty to protect its citizenry; for example, through environmental law, public health law, tax reforms, labor legislation, etc. In order to protect vulnerable groups and the society at large, the Congress could clearly spell-out where grievances could (and should) be and not be redressed. Whether all statutory and regulatory matters should be arbitrable is subject of continuous debate. Even more debatable is arbitration with respect to the Civil Rights Act and in the adhesive context.

Nonetheless, in recent times, federal courts have seen fit to enhance the arbitral process at the expense of the traditional role of the courts. These cases have had the effect of undermining any of *in*arbitrability and have paved the way for the courts to craft an almost universal–and judge-made—doctrine that gives arbitral tribunals almost plenary authority to decide any issues involving the subject-matter of a dispute. The court has concluded repeatedly that nothing in the provisions of the FAA *prohibits* the submission of statutory and regulatory disputes to arbitration. Thus, elaborating an almost universal subject-matter arbitrability. On the other hand, it has failed to acknowledge that nothing in the FAA *permits* statutory nor regulatory matters. This can partly be explained by partisan politics and stalemate in the legislative body. "Despite the . . . political gridlock and diminution of resources, American society must still provide constitutionally sufficient civil justice for its citizens."[131] Dynamic business needs nurturing and a proactive Court cannot sit idly by. This is the definition of public accountability and responsibility. The Supreme Court has under-

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[130] CARBONNEAU, *supra* note 16, at 95. For an unwavering stance on delegation even in matters that could potentially harm the public interest, *see PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003) (the Court held that threshold questions with respect to RICO claims should be considered first by the arbitrators).

[131] CARBONNEAU, *supra* note 4, at 45.

stood this and therefore elaborated an extensive doctrine on subject-matter arbitrability and rejected to even semi-seriously consider a doctrine on subject-matter *in*arbitrability.

1. Subject-Matter Arbitrability and International Commercial Arbitration

The Supreme Court has been enormously powerful in crafting an emphatic policy favoring arbitration including the vital area of international commercial arbitration (ICA), where the Court has played a leading role in providing legitimacy to—and defining the contours of–ICA. But, history has not been straightforward. U.S. courts traditionally took a more reserved stance, as evidenced by the Supreme Court in *Wilko v. Swan* and the Circuit Court in *American Safety Equipment Corporation v. JP Maguire Co.*[132] The Supreme Court reasoned that the Securities Act was enacted:

> [T]o protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.[133]

The Court's opinion is emphatic: Arbitration is inferior in the jurisdictional battle for standing. It is limited to commercial controversies arising in matters that are not of public policy interest, i.e. where the Congress regulates or enacts statutes to protect the public. In light of this narrow understanding of the arbitral procedure and the arbitrators' autonomy, the Second Circuit reasoned that: "A claim under antitrust laws is not merely a private matter. . . . Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage. . . . We do not believe Congress intended such claims to be resolved elsewhere than the courts."[134]

Both decisions were purely based on public interest, which is *per se* a subjective concept that changes over time and conflicts with other policies, e.g. economic policies and policies of interna-

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132 *Am. Safety Equip Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

133 *Wilko v. Swan*, 346 U.S. 427, 438 (1953). On the same lines, it was held in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974) that "arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate form for the final resolution of rights created by Title VII."

134 *Am. Safety Equip. Corp.*, 391 F.2d at 826-27.

tional affairs. *American Safety* increased the standing of courts and weakened the legitimacy of arbitral agreements and the authority of an arbitral tribunal to decide disputes.

However, things were about to change. The pro-arbitration policy was crafted, and the Court established an almost universal subject-matter arbitrability and a pro-enforcement rationale that is resoundingly clear. In fact, this development is one of the expressions of a strong federal policy favoring arbitration. The Court has articulated a nearly universal subject-matter arbitrability doctrine in line with its "hands-off" approach.

In this respect, three cases demonstrate the importance of judge-made law: *The Bremen v. Zapata Off-Shore Co*;[135] *Scherk v. Alberto-Culver Co*;[136] and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*.[137] This has been described as one of four pillars of U.S. arbitration law and the third of the "trilogies."[138] The Court has, through this string of cases, played an architectural role in crafting the subject-matter arbitrability doctrine—in domestic arbitration and in ICA.

In *The Bremen* (which involved the enforcement of a forum-selection-clause) the Court stated that international commercial contracts implicate special policy concerns and the "[d]omestic strictures on judicial jurisdiction and the enforceability of contract provisions had to yield to the provisions in the parties' bargain."[139] Prior to *The Bremen*, the Court was hostile towards the exercise of contract authority and generally invalidated forum-selection clauses.[140] The Court in this case understood the risk and complex international transactions associated with business in the global marketplace. The Court had thereby adapted to global commercial realities. The court held that:

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. . . . The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a *parochial* [emphasis added] concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world mar-

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135 *M/S Breman v. Zapata Off Shore Co.*, 407 U.S. 1 (1972).

136 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), *reh'g denied*, 419 U.S. 885 (1974).

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

138 CARBONNEAU, *supra* note 4, at 49, CARBONNEAU, *supra* note 16, at 41-46.

139 CARBONNEAU, *supra* note 16, at 322.

140 *See Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180 (1959), *reh'g denied*, 359 U.S. 999 (1959).

> kets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[141]

Domestic perceptions nor domestic approaches should function as a barrier to transnational practices, in general, and in international adjudication in particular. *The Bremen* was important in establishing that domestic realities are sometimes at unease with international ones. In fact, "the Bremen set the stage for everything that followed."[142] Building on this notion, the Court continued in accommodating the demand for neutrality, expertise, finality, and enforceability in the transnational context. In a word, *The Bremen* underscores the internationally-minded decisional law in the absence of rules, it announces a "comprehensive regulatory framework for private international transactions through the invocation of a single but vital legal concept."[143]

However, in *Scherk*, the parties agreed to arbitrate in Paris. Alberto-Culver alleged that Scherk's breach violated the 1933 Securities Act and the 1934 Securities Exchange Act. The central question in Scherk was whether that issue of regulatory law could be resolved by arbitrators? The court held that:

> A parochial [emphasis added] refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.
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> . . . .
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> For all these reasons, we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by

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141 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972).

142 Fox, *supra* note 21, at 350-59. In fact, the Court in *Scherk* followed the reasoning and held that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of. Forum selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." This conflation of arbitration clauses on the one hand and forum selection clauses on the other has been repeated on other occasions. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). *See also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

143 Thomas E. Carbonneau & William E. Butler, International Litigation And Arbitration: Cases And Materials 248-49 (2d ed. 2013). The authors argue that "*The Bremen* is good law and acts as the foundation for the Court's gradual articulation of a judicial policy on trans-border litigation and international arbitration. *The Bremen* is the first case in which the Court established a clear boundary between law for domestic and international matters, holding that domestic rules may be inapposite in the international sector." *Id.* at 257. *Conversely see Monrosa v. Carbon Black Export,* 359 U.S. at 248–49. *The Bremen* overruled this decision, which was a manifestation of the traditional view of U.S. courts that forum-selection clauses with a "less convenient forum" are essentially contrary to public policy.

> the federal courts in accord with the explicit provisions of the [FAA].[144]

Accordingly, the Court, concluding that contracts calling for arbitration were vital to both global commerce and international contracting, took a leadership position in preserving the integrity of ICA at the expense of the courts.

The ruling in favor of international comity in *Scherk* was followed by the Court's decision in *Mitsubishi*. There, the Court cited *Scherk* with approval and determined that there was a virtually irrebuttable presumption favoring the enforcement of the provisions of freely-negotiated transborder contracts. It decided that antitrust disputes arising from national law were arbitrable. International arbitrators could rule on the application. The stance favoring arbitration and arbitrability also characterizes the enforcement stage of the arbitral process.

The U.S. Supreme Court took the leading role in reshaping international commercial arbitration by enhancing arbitrability. In *Mitsubishi Motors Corporation v. Soler Chrysler Plymouth Inc*,[145] the court stated that:

> [C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes all require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[146]

The *Mitsubishi* decision has given international tribunals heightened standing and arbitration agreements an increased currency and legitimacy.[147] *Mitsubishi* essentially recognized that arbitration has been—and would continue to be—the favored means of litigating international disputes. Countries had decided to submit some of its mandate to private justice in order to stimulate and foster a global business environment that was friendly to trade, commerce, and investment. National courts ought to respect that choice.

But, *Mitsubishi* is not free of defects. In a later portion of the opinion, *Mitsubishi* took a weird turn that at least somewhat undercuts much of the pro-arbitration reasoning in the opinion. The

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144 *Scherk*, 417 U.S. at 516-20.

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

146 *Id.* at 629.

147 For the second leading case on antitrust and international commercial arbitration, *see Eco Swiss China Time Ltd v. Benetton International NV*, Case C126/97, [1999] ECR I-3055 (1999).

Court recognized that national courts could exercise some significant powers of review when and if an award was subject to enforcement in domestic courts. Establishing the well-known "second-look doctrine" the Court, playing lip-service to the importance of international commercial arbitration at the beginning of the opinion, at the end of the opinion opened up the possibilities for judicial review and judicialization of the procedure.

Scherk and *Mitsubishi* established that a "special regime emerged for international business contracts that allowed international arbitrators to rule upon claims based upon U.S. regulatory law."[148] In these two cases and many others, the Court has blurred the distinction between domestic and international arbitration in relation to subject-matter arbitrability and "made universal subject-matter arbitrability an integral part of U.S. domestic law."[149] The Court was willing to enhance arbitration by protecting and implementing its purposes. These cases signal clearly that the U.S. legal system had taken a business efficient and effective pro-arbitration stance. Initially, it was surmised that the U.S. courts would enforce international dispute resolution clauses providing for arbitration that may not have been enforceable domestically, given that the Court formulated a very strong favoring international commerce and arbitration. These days virtually that same policy also underlies domestic arbitration.

While these cases do not give us the entire landscape of U.S. arbitration law, they indisputably signal its evolution in the area of ICA. *Mitsubishi* resonated globally. The Court paved the way for pro-arbitration sentiments in the world, strengthening arbitration by enhancing subject-matter arbitrability and not allowing for an international agreement to be denied enforcement because of—among other things—domestic public interest concerns. By decisional law giving effect to honest enforcement of arbitral agreements and awards, the Court crafted a policy strongly and "emphatically" favoring international commercial arbitration.[150]

Therefore, the pro-arbitration stance in respect of whether a dispute is capable of being referred to arbitration is, like arbitration itself, a result of deeply rooted legal need and economic competition. Learned commentators wrote that: "In the international sphere, the interests of promoting international trade, as well as

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148 CARBONNEAU, *supra* note 16, at 324.

149 *Id.* at. 326.

150 *See* CARBONNEAU, *supra* note 16, at 334.

international comity, have proven important factors in persuading the courts to treat certain types of dispute as arbitrable."[151]

If other states have determined for themselves that certain regulatory and statutory matters are arbitrable (e.g. antitrust), why should a U.S. court decline to recognize such an award or arbitral agreement? It was probably carefully considered in each jurisdiction that has taken a stance on the matter. If states decide that it was unwise, they are free to make subject-matters *in*arbitrable. In fact, the arguments against arbitrating antitrust claims (and other statutory and regulatory matters) are motivated by the importance of the laws and the jurisdictions regulatory role in furthering and protecting public policy goals and objectives. It is a compelling argument—it is logically sound and analytically rich. But, law and commerce are not always logical. As has been said elsewhere in this paper, the life of law and arbitration has been experience in light of practicality.

If the *American Safety* rationale would rule, national courts would more easily refuse enforcement of arbitral awards, national courts would generally have a bigger role in setting-aside awards at the seat of arbitration, and national courts would also have the power to refuse enforcement. Such court interventions would totally judicialize the arbitration procedure. If somehow the *American Safety* approach movement becomes too powerful and influential by waiving the bandwagon of public interest, its negative effects should be limited to scaling back arbitrability only. Thus, rather than collectively transforming the entirety of the procedure by allowing for intense judicial interference and pushing for formal intricacies akin to court litigation, the courts or legislators could make certain issues inarbitrable.

Scherk distinguished *Wilko*, and *Mitsubishi* rendered it essentially null and void as a doctrine.[152] The final overruling came with *McMahon* and *Rodriguez de Quijas*, which was based on the reasoning in *Scherk* and *Mitsubishi* but applied in the domestic context.[153] In this way, the Court had elaborated a doctrine on ICA and used that to elaborate a doctrine on the U.S. law of arbitration. With all this said, neither Scherk[154] *nor* Mitsubishi[155] would have

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151 NIGEL BLACKABY ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 124 (2009).

152 *See* BORN, *supra* note 18 at 965-966.

153 *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), *reh'g denied*, 483 U.S. 1056 (1987).

154 *Scherk*, 417 U.S. 506.

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

been decided the way they were if the actual language or original intent approach had prevailed at the time the cases were decided. Ultimately, with that approach finding its way into the methodological understanding of the FAA, it may lead to the federal courts once again competing with international arbitration for jurisdictional supremacy. It is evident that the 1925 intention of the FAA was not in favor of allowing arbitrators to decide claims that implicate U.S. regulatory or statutory law. The reasoning of Justice Reed in Wilko v. Swan[156] might eventually find its way back—i.e. the often-disparaged *Wilko* doctrine might come to haunt the arbitration community. The Gorsuch Court might end-up adopting language that has been outdated since *Mitsubishi* (for example, such adopted in the infamous *American Safety Equipment Corporation v. JP Maguire Co*[157] mentioned above). The *Wilko* and *American Safety* reasoning is probably more in line with the intention and actual language of the FAA with respect to subject-matter arbitrability.

In all of its decisional rulings, the Court reinforced the unconditional independence and autonomous standing of arbitration.[158] The arbitral procedure is anchored in the principle of contract freedom and hands-off approach in the supervision of arbitral agreements and arbitral awards. With the Court's intent-based and actual language approach, the evolution of the doctrine on arbitrability would have looked substantially different.

VI. Trying to Predict the Future: Some Tentative Concluding Remarks

What we mainly want to highlight is our concern regarding Gorsuch's intent and actual language approach, and Kavanaugh's lack of appreciation for the judges' role in making arbitration law. What will happen if this approach is taken in future cases? It will certainly result in a change on the meaning and scope—and therefore the understanding—of the FAA. Up until these two most recent cases, the issue has been less an interpretative problem than one might initially had expected, because virtually every arbitra-

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156 *Wilko v. Swan*, 346 U.S. 427 (1953).

157 *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826-27 (1968).

158 *See also Vimar Seguros y Reseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.,* 460 U.S. 1 (1983).

tion-related matter was given a pro-arbitration touch by the Court. However, the current validity of the text in the FAA—through "purposivist" decisional law—might be under unintentional, unwelcomed siege. The doctrinal development of arbitration is intimately linked to the emphatic policy favoring arbitration. If the case law will no longer re-write the content, will the policy remain intact? What stance will the court take on subject-matter arbitrability in international business contracts? In short: will the new, likely unintentional, interpretative framework, lead to a new hypothesis on the understanding of the FAA? It is clear that arbitration sceptics will seize this moment to try to elaborate a new, much more restrictive doctrine on arbitration in general and ICA in particular.

The current theory of arbitration rests on a doctrine crafted with a pro-arbitration bias, i.e. a hierarchal understanding of the FAA as subordinate to decisional law, which in turn can re-write its content. This has been motivated by the role arbitration plays in legal civilization. Essentially, the U.S. Supreme Court has helped shape the world view on ICA by adopting a methodology that strongly favors arbitration, so much so that it has deduced hypotheses on the content of the FAA that are mostly value and purpose based. But to be clear, these are not the values or intent of the original drafters in 1925. The systematic understanding of arbitration may be redefined, and therefore a new hypothesis of arbitration deduced as a result of Gorsuch's and Kavanaugh's interpretation in *New Prime* and *Schein*. This would disrupt the evolution of arbitration in the U.S. but also of ICA as such.

Much can be said of the new conservative bench seeking to redo the constitutional landscape in the United States (for *better* or *worse*). With a constitutional agenda in mind, the justices seem eager to adopt a consistent methodological approach to statutory interpretation. These consistency cravings can spill-over to interpreting federal legislation conservatively despite having been given a more pragmatic approach for decades. The U.S. Supreme Court was instrumental in elaborating a judicial doctrine on arbitration by construing the FAA liberally and will, in fact, continue to do so. Judicial legislation has been crucial in light of the bi-partisan deadlock in the U.S. Congress. The stalemate has prevented the enactment of a new arbitration act. Congress has instead provided the Court with tacit approval of being the chief architect in elaborating the federal doctrine on arbitration by altering and adding to the enacted statute. For these reasons, the Act is the oldest still func-

tional arbitration act in the world. With Congress' approval the FAA has become a "living statute."

Through decisional law it made the Court's rulings superior and the text inferior. Once the judicial doctrine on arbitration became the norm, every arbitration-related matter was interpreted in light of a "strong federal policy favoring arbitration." *Stare decisis* makes the settled principles irrevocable and irreversible. Any future issue will receive a pro-arbitration touch in light of the judicial policy favoring arbitration. Contractual freedom fill the gaps of federal legislation and the Court cements the words into law. Put differently, the text of the FAA does not override the interest in effectuating the intent of the contracting parties.[159] By judicial deference, the Court has transformed arbitration into an autonomous procedure that regulates itself. Arbitration is autonomous in a domestic context and almost a-national in a transnational context. All this, however, will likely still only the better or best approach but does not represent the only approach going forward. Justices Gorsuch and Kavanaugh have put consistent, emphatic arbitration evolution unintentionally on its head by reasoning in a way that opens a can of worms—making it possible for adversaries of arbitration to put the pro-arbitration landscape under siege. They will do so by seizing upon (1) the intent-based and actual language approach in understanding the scope and meaning of the FAA (as presented by Justice Gorsuch), and (2) making the case against judge-made law with respect to elaborating on the scope and meaning of the FAA (as presented by Justice Kavanaugh).

Adversaries will utilize (1) or (2) in an organized and streamlined effort to (a) limit arbitral autonomy; (b) limit the arbitral tribunal's jurisdictional powers—and thus, arbitral autonomy, too—at the front-end of the procedure (i.e. elaborate an anti-arbitration stance on negative *komptetenz-kompetenz*); (c) elaborate a doctrine on *in*arbitrability that excludes statutory and regulatory matters; and (d) eliminate the "hands-off" judicial deference in the supervision and enforcement of arbitral awards. This is just one step toward judicializing the arbitral procedure. In conjunction with heightened court intervention, the adversaries will call for formal, intricate court-like procedures grafted onto the arbitration process. They will logically and analytically articulate why fairness and procedural guarantees should trump arbitral efficacy. Essentially, the adversaries are of the same opinion as the Court in *McDonald v. City of West Branch, Michigan*, in which it opined that:

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159 *See Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (Stevens. J., dissenting).

> [F]inally, arbitral fact finding is generally not equivalent to judicial fact finding. As we explained [in a previous case] "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath are often severely limited or unavailable." (citations omitted) It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial.[160]

If the Court returns to its early position of judicial hostility and again gives the courts overwhelming and exclusive powers to control arbitration (even if tied to a consistent constitutional agenda, and loud, logical, and analytical adversaries) arbitration and all of its attendant strengths will be thrown back hundreds of years. The landscape of dispute resolution will be burdened with institutions poorly designed to meet the constitutional and procedural needs of its citizenry. Justice and fairness will be an ancient memory of a long-forgotten past—if it ever existed in the manner as was proclaimed when contrasted with arbitration. Functionality in civil adjudication will be a dead aspiration of a workable legal order. Moreover, the world of international arbitration will lose its main architect in elaborating a sustainable and legitimate doctrine on international commercial arbitration. The only thing in common between the justice system in the outlined scenario and that of today is a *deeply rooted legal need* for a procedurally workable alternative dispute resolution mechanism that is faster, cheaper, and renders *reasonable* substantive fairness. The main difference is that we actually have it today. When courts have resumed jurisdictional hegemony and independent contractors—such as Uber drivers—commence actions or class actions all over U.S., at least we can remember that arbitration once remedied an adjudicatory and constitutional crisis.

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160 *McDonald v. City of West Branch, Michigan,* 466 U.S. 284, 291-92 (1984). The adversaries are probably also more in support of cases such as *Wilko v. Swan* 346 U.S. 427 (1953); *American Safety Corp. v. J.P. Maguire & Co.*, Inc., 391 F.2d 821 (2d Cir. 1968); and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).