SUPREME COURT OF THE UNITED STATES

No. 93–1001

ALLIED-BRUCE TERMINIX COMPANIES, INC., AND TERMINIX INTERNATIONAL COMPANY, PETITIONERS *v.* G. MICHAEL DOBSON ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

[January 18, 1995]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

I disagree with the majority at the threshold of this case, and so I do not reach the question that it decides. In my view, the Federal Arbitration Act (FAA) does not apply in state courts. I respectfully dissent.

In *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984), this Court concluded that §2 of the FAA "appl[ies] in state as well as federal courts," *id.*, at 12, and "withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *id.*, at 10. In my view, both aspects of *Southland* are wrong.

Section 2 of the FAA declares that an arbitration clause contained in "a contract evidencing a transaction involving commerce" shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2; see also §1 (defining "commerce," as relevant here,

to mean "commerce among the several States or with foreign nations"). On its face, and considered out of context, §2 draws no apparent distinction between federal courts and state courts. But not until 1959—nearly 35 years after Congress enacted the FAA—did any court suggest that §2 applied in state courts. See *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402, 407 (CA2 1959), cert. dism'd, 364 U. S. 801 (1960). No state court agreed until the 1960's. See, *e.g.*, *REA Express* v. *Missouri Pacific R. Co.*, 447 S. W. 2d 721, 726 (Tex. Civ. App. 1969) (stating that the FAA applies but noting that it had been waived in the case at hand); cf. *Rubewa Products Co.* v. *Watson's Quality Turkey Products, Inc.*, 242 A. 2d 609, 613 (D. C. 1968) (same). This Court waited until 1984 to conclude, over a strong dissent by JUSTICE O'CONNOR, that §2 extends to the States. See *Southland*, *supra*, at 10–16.

The explanation for this delay is simple: the statute that Congress enacted actually applies only in federal courts. At the time of the FAA's passage in 1925, laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance, because they were directed solely to the mechanisms for resolving the underlying disputes. As then-Judge Cardozo explained: "Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow." *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261, 270; 130 N. E. 288, 290 (1921) (holding the New York arbitration statute of 1920, from which the FAA was copied, to be purely procedural).[1] It would have been extraordinary for

[1]See also, *e.g.*, *Atlantic Fruit Co.* v. *Red Cross Line*, 276 F. 319, 323 (SDNY 1921) ("Arbitration statutes or judicial recognition of the enforceability of such provisions do not confer a substantive right, but a

Congress to attempt to prescribe procedural rules for *state* courts. See, *e.g.*, *Ex parte Gounis*, 304 Mo. 428, 437; 263 S. W. 988, 990 (1924) (describing the rule that Congress cannot "regulate or control [state courts'] modes of procedure" as one of the "general principles which have come to be accepted as settled constitutional law"). And because the FAA was enacted against this general background, no one read

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remedy for the enforcement of the right which is created by the agreement of the parties"), aff'd, 5 F. 2d 218 (CA2 1924); Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 276 (1926) ("[W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought. That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts" (footnote omitted)); Baum & Pressman, The Enforcement of Commercial Arbitration Agreements in the Federal Courts, 8 N. Y. U. L. Q. Rev. 428, 430 (1931) (referring uncritically to "the prevalent notions that arbitration legislation affects merely the remedy or procedural aspects and not substance"); 2 J. Beale, Conflict of Laws 1245–1246 (1935) ("American courts, without exception, hold that arbitration agreements pertain to remedy or procedure. Consequently, the law of the for[u]m determines their enforceability . . ." (footnote omitted)); cf. *Alexandria Canal Co.* v. *Swann*, 5 How. 83, 87–88 (1847) (whether a court should grant the parties' motion to refer a lawsuit to a panel of arbitrators, and then should enter judgment on the arbitrators' award, was "not [a question] upon the rights of the respective parties, but upon the mode of proceeding by which they were determined," and hence was governed by the law of the forum).

The prevalent view that arbitration statutes were

it as such an attempt. See, *e.g.*, Baum & Pressman, The Enforcement of Commercial Arbitration Agreements in the Federal Courts, 8 N. Y. U. L. Q. Rev. 428, 459 (1931) (noting that the FAA "does not purport to extend its teeth to state proceedings," though arguing that it constitutionally could have done so); 6 S. Williston & G. Thompson, Law of Contracts 5368 (rev. ed. 1938) ("Inasmuch as arbitration acts are deemed procedural, the [FAA] applies only to the federal courts . . ." (footnote omitted)); cf. *Southland*, 465 U. S., at 25–29 (O'CONNOR, J., dissenting) (describing "unambiguous" legislative history to this effect).

Indeed, to judge from the reported cases, it appears that no state court was even *asked* to enforce the statute for many years after the passage of the FAA. Federal courts, for their part, refused to apply state arbitration statutes in cases to which the FAA was inapplicable. See, *e.g.*, *California Prune & Apricot Growers' Assn.* v. *Catz American Co.*, 60 F. 2d 788 (CA9 1932). Their refusal was not the outgrowth of this Court's decision in *Swift* v. *Tyson*, 16 Pet. 1 (1842), which held that certain categories of state

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purely procedural does conflict with this Court's reasoning in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (1924), a case that in other respects undermines *Southland*'s position. See *infra*, Part I–B. Without analyzing the question, our opinion in *Red Cross Line* assumed that the threshold validity of an arbitration agreement (like the validity of other sorts of contracts) is a matter of "substantive" law. See 264 U. S., at 122–123. But our actual holding—that the remedies available to enforce a valid arbitration agreement do *not* involve "substantive" law, see *id.*, at 124–125—was perfectly consistent with the customary view. As discussed below, moreover, the FAA's text clearly reflects Congress' view that the statute it enacted was purely procedural.

judicial decisions were not "laws" for purposes of the Rules of Decision Act and hence were not binding in federal courts; even under *Swift*, state statutes unambiguously constituted "laws." Rather, federal courts did not apply the state arbitration statutes because the statutes were not considered *substantive* laws. See *California Prune*, *supra*, at 790 ("It is undoubtedly true that a federal court in proper cases may enforce state laws; but this principle is applicable only when the state legislation invoke[d] creates or establishes a substantive or general right"). In short, state arbitration statutes prescribed rules for the state courts, and the FAA prescribed rules for the federal courts.

It is easy to understand why lawyers in 1925 classified arbitration statutes as procedural. An arbitration agreement is a species of forum-selection clause: without laying down any rules of decision, it identifies the adjudicator of disputes. A strong argument can be made that such forum-selection clauses concern procedure rather than substance. Cf. Fed. Rules Civ. Proc. 73 (district court, with consent of the parties, may refer case to magistrate for resolution), 53 (district court may refer issues to special master). And if a contractual provision deals purely with matters of judicial procedure, one might well conclude that questions about whether and how it will be enforced also relate to procedure.

The context of §2 confirms this understanding of the FAA's original meaning. Most sections of the statute plainly have no application in state courts, but rather prescribe rules either for federal courts or for arbitration proceedings themselves. Thus, §3 provides:

> "If any suit or proceeding be brought in *any of the courts of the United States* upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the

> issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U. S. C. §3 (emphasis added).

Section 4 addresses the converse situation, in which a party breaches an arbitration agreement not by filing a lawsuit but rather by refusing to submit to arbitration:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition *any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties*, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." (Emphasis added.)

The Act then turns its attention to the covered arbitration proceedings themselves, treating the arbitration forum as an extension of the federal courts. Section 7, for instance, provides that the fees for witnesses "shall be the same as the fees of witnesses before masters of the United States courts"; it adds that if a witness neglects a summons to appear at an arbitration hearing,

> "upon petition the United States district court for the district in which such arbitrators . . . are sitting may compel the attendance of such person

> . . . or punish said person . . . for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."

Likewise, when the arbitrator eventually issues an award, either party (absent contrary directions in the agreement) may apply to "the United States court in and for the district within which such award was made" for an order confirming the award. §9. The District Court may also vacate or modify the award in a few specified circumstances, §§10–11, but generally it will simply enter a confirmatory judgment, §9, which is then docketed and given the same effect as a judgment in an ordinary civil case, §13.

Despite the FAA's general focus on the federal courts, of course, §2 itself contains no such explicit limitation. But the text of the statute nonetheless makes clear that §2 was not meant as a statement of substantive law binding on the States. After all, if §2 really was understood to "creat[e] federal substantive law requiring the parties to honor arbitration agreements," *Southland*, 465 U. S., at 15, n. 9, then the breach of an arbitration agreement covered by §2 would give rise to a federal question within the subject-matter jurisdiction of the federal district courts. See 28 U. S. C. §1331. Yet the ensuing provisions of the Act, without expressly taking away this jurisdiction, clearly rest on the assumption that federal courts have jurisdiction to enforce arbitration agreements only when they would have had jurisdiction over the underlying dispute. See 9 U. S. C. §§3, 4, 8. In other words, the FAA treats arbitration simply as one means of resolving disputes that lie within the jurisdiction of the federal courts; it makes clear that the breach of a covered arbitration agreement does not itself provide any independent basis for such jurisdiction. Even the *Southland* majority was forced to acknowledge this point,

conceding that §2 "does not create any independent federal-question jurisdiction under 28 U. S. C. §1331 or otherwise." 465 U. S., at 15, n. 9. But the *reason* that §2 does not give rise to federal-question jurisdiction is that it was enacted as a purely procedural provision. For the same reason, it applies only in the federal courts.

The distinction between "substance" and "procedure" acquired new meaning after *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938). Thus, in 1956 we held that for *Erie* purposes, the question whether a court should stay litigation brought in breach of an arbitration agreement is one of "substantive" law. *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U. S. 198, 203– 204. But this later development could not change the original meaning of the statute that Congress enacted in 1925. Although *Bernhardt* classified portions of the FAA as "substantive" rather than "procedural," it does not mean that they were so understood in 1925 or that Congress extended the FAA's reach beyond the federal courts.

When JUSTICE O'CONNOR pointed out the FAA's original meaning in her *Southland* dissent, see 465 U. S., at 25–30, the majority offered only one real response. If §2 had been considered a purely procedural provision, the majority reasoned, Congress would have extended it to *all* contracts rather than simply to maritime transactions and "contract[s] evidencing a transaction involving [interstate or foreign] commerce." See *id*., at 14. Yet Congress might well have thought that even if it *could* have called upon federal courts to enforce arbitration agreements in every single case that came before them, there was no federal interest in doing so unless interstate commerce or maritime transactions were involved. This conclusion is far more plausible than *Southland*'s idea that Congress both viewed §2 as a statement of substantive law and believed that it

created no federal-question jurisdiction.

Even if the interstate commerce requirement raises uncertainty about the original meaning of the statute, we should resolve the uncertainty in light of core principles of federalism. While "Congress may legislate in areas traditionally regulated by the States" as long as it "is acting within the powers granted it under the Constitution," we assume that "Congress does not exercise [this power] lightly." *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991). To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather, we must be "absolutely certain" that Congress intended such displacement before we give pre-emptive effect to a federal statute. *Id.*, at 464. In 1925, the enactment of a "substantive" arbitration statute along the lines envisioned by *Southland* would have displaced an enormous body of state law: outside of a few States, predispute arbitration agreements either were wholly unenforceable or at least were not subject to specific performance. See generally Note to *Williams* v. *Branning Mfg. Co.*, 47 L. R. A. (n.s.) 337 (1914) (detailed listing of state cases). Far from being "absolutely certain" that Congress swept aside these state rules, I am quite sure that it did not.

Suppose, however, that the first aspect of *Southland* was correct: §2 requires States to enforce the covered arbitration agreements and pre-empts all contrary state law. There still would be no textual basis for *Southland*'s suggestion that §2 requires the States to enforce those agreements through the remedy of specific performance—that is, by forcing the parties to submit to arbitration. A contract surely can be "valid, irrevocable and enforceable" even though it can be enforced only through actions for damages. Thus, on the eve of the FAA's enactment, this Court described executory arbitration

agreements as being "valid" and as creating "a perfect obligation" under federal law even though federal courts refused to order their specific performance. See *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120–123 (1924).[2]

To be sure, §§3 and 4 of the FAA require that *federal* courts specifically enforce arbitration agreements. These provisions deal, respectively, with the potential plaintiffs and the potential defendants in the underlying dispute: §3 holds the plaintiffs to their promise not to take their claims straight to court, while §4 holds the defendants to their promise to submit to arbitration rather than making the other party sue them. Had this case arisen in one of the "courts of the United States," it is §3 that would have been relevant. Upon proper motion, the court would have been obliged to grant a stay pending arbitration, unless the contract between the parties did not "evidenc[e] a transaction involving [interstate] commerce." See *Bernhardt*, 350 U. S., at 202 (holding that §3 is limited to the arbitration agreements that §2 declares valid). Because this case arose in the courts of Alabama, however, petitioners are forced to contend that §2 imposes precisely the same obligation on *all* courts (both federal and state) that §3 imposes solely on *federal* courts. Though *Southland* supports this argument, it simply cannot be correct, or §3 would be superfluous.

Alabama law brings these issues into sharp focus. Citing "public policy" grounds that reach back to

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[2]At the time, indeed, federal courts would award only *nominal* damages for the breach of such agreements. See *Aktieselskabet Korn-Og Foderstof Kompagniet* v. *Rederiaktiebolaget Atlanten*, 250 F. 935, 937 (CA2 1918), aff'd on other grounds *sub nom. The Atlanten*, 252 U. S. 313 (1920); *Munson* v. *Straits of Dover S.S. Co.*, 99 F. 787, 790–791 (SDNY), aff'd, 102 F. 926 (CA2 1900).

Bozeman v. *Gilbert*, 1 Ala. 90 (1840), Alabama courts have declared that predispute arbitration agreements are "void." See, *e.g.*, *Wells* v. *Mobile County Bd. of Realtors*, 387 So. 2d 140, 144 (Ala. 1980). But a separate state statute also includes "[a]n agreement to submit a controversy to arbitration" among the obligations that "cannot be specifically enforced" in Alabama. Ala. Code §8–1–41 (1975). Especially in light of the *Gregory* v. *Ashcroft* presumption, §2—even if applicable to the States—is most naturally read to pre-empt only Alabama's common-law rule and not the state statute; the statute does not itself make executory arbitration agreements invalid, revocable, or unenforceable, any more than the inclusion of "[a]n obligation to render personal service" in the same statutory provision means that employment contracts are invalid in Alabama. In the case at hand, the specific-enforcement statute appears to provide an adequate ground for the denial of petitioners' motion for a stay.

Rather than attempting to defend *Southland* on its merits, petitioners rely chiefly on the doctrine of *stare decisis* in urging us to adhere to our mistaken interpretation of the FAA. See Reply Brief for Petitioners 3–6. In my view, that doctrine is insufficient to save *Southland*.

The majority (*ante*, at 6) and JUSTICE O'CONNOR (*ante*, at 3) properly focus on whether overruling *Southland* would frustrate the legitimate expectations of people who have drafted and executed contracts in the belief that even state courts will strictly enforce arbitration clauses. I do not doubt that innumerable contracts containing arbitration clauses have been written since 1984, or that arbitrable disputes might yet arise out of a large proportion of these contracts. Some of these contracts might well have been written differently in the absence of *Southland*. Still, I see no

reason to think that the costs of overruling *Southland* are unacceptably high. Certainly no reliance interests are involved in cases like the present one, where the applicability of the FAA was not within the contemplation of the parties at the time of contracting. In many other cases, moreover, the parties will simply comply with their arbitration agreement, either on the theory that they should live up to their promises or on the theory that arbitration is the cheapest and best way of resolving their dispute. In a fair number of the remaining cases, the party seeking to enforce an arbitration agreement will be able to get into federal court, where the FAA will apply. And even if access to federal court is impossible (because §2 creates no independent basis for federal-question jurisdiction), many cases will arise in States whose own law largely parallels the FAA. Only Alabama, Mississippi, and Nebraska still hold all executory arbitration agreements to be unenforceable, though some other States refuse to enforce particular classes of such agreements. See Strickland, The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?, 21 Hofstra L. Rev. 385, 401–403, and n. 93 (1992).

Quoting *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984), JUSTICE O'CONNOR nonetheless acquiesces in the majority's judgment "because there is no `special justification' to overrule *Southland*." *Ante*, at 3. Even under this approach, the necessity of "preserv[ing] state autonomy in state courts," *ibid.*, seems sufficient to me.

But suppose that *stare decisis* really did require us to abide by *Southland*'s holding that §2 applies to the States. The doctrine still would not require us to follow *Southland*'s suggestion that §2 requires the specific enforcement of the arbitration agreements that it covers. We accord no precedential weight to mere dicta, and this latter suggestion was wholly unnecessary to the decision in *Southland*. The

arbitration agreement at issue there, if valid at all with respect to the particular claims in dispute, clearly was subject to specific performance under state law; indeed, the state trial court had already compelled arbitration for all the other claims raised in the complaint. See *Southland*, 465 U. S., at 4; Cal. Code Civ. Proc. Ann. §§1281.2, 1281.4 (West 1982). Accordingly, the only question properly before the *Southland* Court was whether §2 pre-empted a separate state law declaring the arbitration agreement "void" as applied to the remaining claims. See 465 U. S., at 10 (discussing Cal. Corp. Code Ann. §31512 (West 1977)). The same can be said for *Perry* v. *Thomas*, 482 U. S. 483 (1987), in which we again held that §2 pre-empted a California statute that (as we had observed in a prior case, see *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U. S. 117, 133 (1973)) made certain arbitration clauses "unenforceable." We have subsequently reserved judgment about the extent to which state courts must enforce arbitration agreements through the mechanisms that §§3 and 4 of the FAA prescribe for the *federal* courts. See *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 477 (1989). Cf. *McDermott Int'l, Inc.* v. *Lloyds Underwriters of London*, 944 F. 2d 1199, 1210 (CA5 1991) ("We conclude from the Supreme Court's opinions that state courts do not necessarily have to grant stays of conflicting litigation or compel arbitration in compliance with the FAA's sections 3 and 4"). In short, we have never actually held, as opposed to stating or implying in dicta, that the FAA requires a state court to stay lawsuits brought in violation of an arbitration agreement covered by §2.

Because I believe that the FAA imposes no such obligation on state courts, and indeed that the statute is wholly inapplicable in those courts, I would affirm the Alabama Supreme Court's judgment.