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THE REACH OF THE FEDERAL ARBITRATION ACT: IMPLICATIONS ON STATE PROCEDURAL LAW

I. INTRODUCTION

The Federal Arbitration Act[1] was enacted in 1925[2] to ensure the validity and enforcement of arbitration agreements in contracts involving maritime transactions or interstate commerce.[3] Generally, the Act has encountered few problems in federal courts. However, troubling questions have arisen concerning the Act's scope, specifically with regard to its applicability in state courts.[4] The Act's procedural provisions, designed to implement its substantive command, do not explicitly provide for enforcement in state courts.[5] The Supreme Court decisions regarding the Act's procedural requirements have been limited to their applicability in federal courts.[6] It was not until 1984, in *Southland Corp. v. Keating*,[7] that the United States Supreme Court stated that the Act's substantive provision applied to the states.[8] Until *Keating*, the Court effectively avoided directly addressing the issue of whether the substantive command of the Act applied to the states.[9] Today, despite the Court's holding in *Keating*, the question of whether the Act's procedural provisions apply to the states still remains unanswered.[10]

Despite the Court's holding that the Act's substantive provision is binding upon state courts, one member of the Court has questioned whether state courts still have the power to utilize state remedies for enforcement.[11] Although the Act's main substantive provision is ambiguous with regard to its applicability to state courts, the enforcement provi-

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1. Hereinafter referred to interchangeably as the Act or the FAA.

2. Arbitration Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified at 9 U.S.C. §§ 1-208 (1988)).

3. 9 U.S.C. § 2 (1988).

4. *Compare* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983) (stating that state courts are obliged, as much as federal courts, to grant stays of litigation pending arbitration) *with* Southland Corp. v. Keating, 465 U.S. 1, 31 (1984) (O'Connor, J., dissenting) (arguing that "state courts should nonetheless be allowed . . . to fashion their own procedures for enforcing [a valid arbitration agreement]").

5. The Act's coercive provisions speak only of "courts of the United States" and "United States district court[s]." 9 U.S.C. §§ 3 & 4 (1988).

6. *See infra* notes 103-161 and accompanying text. These decisions examine sections 3 and 4 of the Act, which provide for a stay of litigation pending arbitration and compel a federal district court to order arbitration. 9 U.S.C. §§ 3 & 4 (1988).

7. 465 U.S. 1 (1984).

8. Southland Corp. v. Keating, 465 U.S. 1, 14-15 (1984).

9. The Court, in an earlier decision, cleared the way for its inevitable holding in *Keating* by stating that "the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.' " Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967). The import of this statement is its characterization of the Act as federal substantive law as opposed to federal procedural law.

10. The Supreme Court has partially answered this question, stating that state courts are obliged to grant stays of litigation under section 3 of the Act. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983).

11. *See Keating*, 465 U.S. at 21 (O'Connor, J., dissenting).

sions of the Act appear to apply only to federal courts.[12] The result today is that state procedural law governing arbitration is of questionable force when a proceeding is governed by the Act.[13] Nevertheless, the United States Supreme Court has never explicitly stated that state courts must adhere to the Act's procedural provisions.[14]

The Act's preemptive strength is not absolute.[15] Parties may agree to displace the procedural mandates of the Act.[16] The overriding force in contracts containing arbitration agreements is the parties' agreement itself, notwithstanding that the contract falls under the Act's purview.[17] How the parties will proceed to arbitration depends upon the parties' agreement regarding what procedure will govern, and whether this agreement is consistent with the policies underlying the Act. In this sense, state procedural law that is consistent with the substantive command of the Act should be allowed to stand as well.[18]

The purpose of this Note is to explore the applicability of the Act's procedural provisions to state courts. Specifically, this Note will examine the severability of the Act's substantive and procedural commands. Assuming the Act's substance can be severed from its procedure, the issue becomes whether there is any practical distinction between parties' agreements to displace the Act's procedural provisions in favor of state procedural law, which the Supreme Court has upheld, and state procedural law that stands alone.

First, this Note will explore the Act's key provisions, focusing specifically on sections 2, 3 and 4.[19] Section 2 is the Act's main substantive

12. 9 U.S.C. §§ 3 and 4 (1988) (referring to "courts of the United States" and "United States district court").

13. *See, e.g.*, Woermann Constr. Co. v. Southwestern Bell Tel. Co., 846 S.W.2d 790, 792 (Mo. Ct. App. 1993) (holding as improper Missouri arbitration statute requiring a ten-point capital letter arbitration notice).

14. The Supreme Court has stated in dicta that state courts are as obliged as federal courts to grant stays under section 3. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 26. However, the accompanying footnote suggests only that states adhere to the section 3 command granting a stay. *Id.* at n.34.

15. The Act does not contain an express preemptive provision. Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 477 (1989).

16. *See generally id.* (upholding a choice of law provision in a contract that incorporated state procedural law which differed from the Act, based upon the fact that the parties agreed to the applicable state law in their contract).

17. *Id.* at 472.

18. The Court has stated that "even when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* at 477 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

19. Section 1 defines "maritime transactions" and "commerce" and provides narrow exceptions to the Act. 9 U.S.C. § 1 (1988). Sections 5-16, while also of questionable applicability to the states, do not concern the "pre-arbitration" stage for present purposes. 9 U.S.C. §§ 5-16. Sections 201 through 208 concern the recognition and enforcement of foreign arbitral awards. 9 U.S.C. §§ 201-208 (1988).

provision, recognizing the "[v]alidity, irrevocability, and enforcement" of arbitration agreements involved in commerce and maritime transactions.[20] Section 3 requires a stay of a trial pending arbitration.[21] Section 4 describes the specific enforcement procedure by which, upon petition, a United States district court must order arbitration in accordance with the terms of the agreement.[22]

Second, this Note will examine the Act's legislative history.[23] The legislative history behind the Act is ambiguous as to whether it was intended by Congress to apply in state courts at all.[24] Nothing in the Act's history clearly indicates whether it was enacted pursuant to the Commerce Clause or pursuant to federal control over inferior courts.[25] The United States Supreme Court has espoused the former view, thus enabling it to find that state courts must adhere to the Act's substantive command.[26]

Next, this Note will discuss the Act's substantive hold on the states and the application of the Act's procedural provisions in general.[27] It was not until the *Keating* decision that the Court was squarely confronted with the issue of whether the Act was binding upon the states.[28] Justice O'Connor's strong dissent in *Keating* supports the proposition that the Act's procedural provisions, namely sections 3 and 4, are inapplicable to the states, notwithstanding the fact that its substantive provision, which requires recognition of the validity of arbitration agreements, is applica-

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20. 9 U.S.C. § 2 (1988). *See infra* notes 33-35 and accompanying text.

21. 9 U.S.C. § 3 (1988). *See infra* notes 37-41 and accompanying text.

22. 9 U.S.C. § 4 (1988). *See infra* notes 42-45 and accompanying text.

23. *See infra* notes 46-59 and accompanying text.

24. *See* Southland Corp. v. Keating, 465 U.S. 1, 12 (1984) (stating that "[a]lthough the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts"). *But see id.* at 25 (O'Connor, J., dissenting) (asserting that "[o]ne rarely finds a legislative history as unambiguous as the FAA's [with respect to the Act's application to federal courts only]").

25. The legislative history of the FAA does not indicate conclusively from which of its powers Congress had drawn. For example, the House Report stated that "[t]he purpose of this bill is to make valid and enforcible [*sic*] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or [*sic*] admiralty, *or* which may be the subject of litigation in the Federal courts." H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924) (emphasis added). The House Report also stated that "[t]he bill declares simply that such agreements for arbitration shall be enforced, *and provides a procedure in the Federal courts for their enforcement.*" *Id.* at 2 (emphasis supplied). The distinction is central to the Act's applicability to state courts, because the power to regulate interstate commerce allows Congress to preempt state law in the field in which it is legislating, whereas if the Act was derived from congressional control over federal court procedure, the Act would have no application in state courts. *See generally* Southland Corp. v. Keating, 465 U.S. 1 (1984).

26. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (stating that "it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty' ") (quoting in part H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924)); Southland Corp. v. Keating, 465 U.S. 1, 11 (1984).

27. *See infra* notes 60-160 and accompanying text.

28. *Keating*, 465 U.S. 1, 14-15 (1984).

ble.[29] Nevertheless, decisions rendered by the Court prior to *Keating*, but read today in conjunction with *Keating*, indicate that the Act's procedural provisions should be followed by the states.[30]

Finally, this Note will focus on the Act's impact on state arbitration law.[31] No state-federal conflict arises when an agreement to arbitrate falls outside of section 2.[32] The states are free to legislate in this regard. Still, no practical reason exists for states to enact one provision for agreements covered by the Act and another provision covering agreements not falling within the Act's purview. This Note concludes by advocating that states should stay consistent with the Act to ensure that the federal law governing substantive enforceability remains intact. States should avoid enacting procedural rules that frustrate the Act's purpose, which is to ensure enforceability of arbitration agreements.

II. OVERVIEW OF THE FEDERAL ARBITRATION ACT

Section 2 is the substantive provision of the Federal Arbitration Act.[33] It provides that written provisions calling for arbitration in any "maritime transaction or 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."[34] When a transaction or contract does not fall within this definition, the Act will not apply.[35] However, in *Prima Paint Corp. v. Flood & Conklin Man-*

29. *Id.* at 31 n.20.

30. *See infra* notes 60-160 and accompanying text.

31. *See infra* notes 162-216 and accompanying text.

32. Unless an agreement evidencing a transaction involving commerce or maritime transaction is involved, section 2 of the Act will not apply. 9 U.S.C. § 2 (1988).

33. 9 U.S.C. § 2 (1988).

34. *Id.* Section 2 provides in full that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

Section 1 defines maritime transactions and commerce:

> "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1 (1988).

35. Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 201-02 (1956).

ufacturing Co., the United States Supreme Court noted that the "commerce" requirement is not difficult to fulfill.[36] Thus, there are few instances in which a contract or transaction will not be covered by the Act.

Section 3 of the Act is a procedural provision that requires a court of the United States to grant, upon motion of a party, a stay of litigation when the court is satisfied that by the terms of the arbitration clause, the issue is referable to arbitration.[37] Of notable importance in this section is the language "courts of the United States."[38] When read in conjunction with section 4,[39] the other pre-award procedural provision of the Act, "courts of the United States" appears to mean federal district courts rather than state courts. Indeed, a United States Supreme Court Justice has noted that, even when read outside of the context of the other provisions of the Act, "courts of the United States" is commonly used in reference to federal courts.[40] Nevertheless, although it has not explicitly held as such, the Supreme Court has asserted that state courts are bound by the command of section 3, despite its seemingly federal reference to "courts of the United States."[41]

The specific enforcement remedy in the Act's other pre-award provision is contained in section 4.[42] Like section 3, section 4 is also a proce-

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36. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 n.7 (stating that " '[t]he control over interstate commerce [one of the bases for the legislation] reaches not only the actual physical interstate shipment of goods but also contracts [that merely relate] to interstate commerce' ") (citing H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924)). Interestingly, the United States Supreme Court recently granted certiorari on this issue. Allied-Bruce Terminix Co., Inc. v. Dobson, 628 So. 2d 354 (Ala. 1993), *cert. granted*, 114 S. Ct. 1292 (1994) (No. 93-1001). The appellants in *Dobson* argued that because the Court in *Keating* held that Congress's regulatory power under the FAA is coextensive with its commerce power, the Alabama Supreme Court should apply the "slightest nexus" standard to determine whether the "involving commerce" requirement had been fulfilled. *Dobson*, 628 So. 2d at 355. The Supreme Court of Alabama, however, stated that the proper standard is whether the parties "contemplated substantial interstate activity." *Id.* The court held that the parties' activity did not satisfy this standard. *Id.* at 357.

37. 9 U.S.C. § 3 (1988). Section 3 in full 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.

Id.

38. *Id.*

39. Section 4 states in relevant part that "[a] party . . . may petition any *United States district court* . . . ." 9 U.S.C. § 4 (1988) (emphasis added).

40. *See* Southland Corp. v. Keating, 465 U.S. 1, 29-30 n.18 (1984) (O'Connor, J., dissenting) (stating that the change in wording from "courts of the United States" to "United States district court" was intended by Congress only to be a "clerical change").

41. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983) (stating that "state courts, as much as federal courts, are obliged to grant stays of litigation under section 3 of the Arbitration Act").

42. 9 U.S.C. § 4 (1988). Section 4 provides that

> [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,

dural provision. It allows an aggrieved party to petition "any United States district court" for an order to compel arbitration in the event that the "breaching"[43] party neglects, refuses, or fails to arbitrate.[44] Like section 3, there is a strong indication that Congress intended section 4 to apply solely to federal courts, as evidenced by the words "United States district court."[45]

III. THE HISTORY OF THE FEDERAL ARBITRATION ACT

The Federal Arbitration Act was promulgated in response to the hostility courts had shown towards arbitration agreements.[46] American courts had previously followed the English common law principle, which allowed a party to revoke an arbitration agreement prior to an award being issued.[47] Thus, at that time, an aggrieved party was without an adequate remedy. However, in 1924, the United States Supreme Court upheld the New York arbitration law, which was enacted in 1920.[48] Following the Court's approval of the New York Law, Congress enacted the Federal Arbitration Act, thereby abrogating the common law approach.[49]

The authority of Congress to enact such a law was considered "ample," and unfortunately, discussion regarding such authority was limited.[50] Herein lies the crux of the pre-*Keating* debate over Congress's authority for passing the Act: whether the Act grew out of congressional

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> 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. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

Id.

43. The term "breaching" refers to the arbitration clause itself and not necessarily to the contract as a whole.

44. 9 U.S.C. § 4 (1988).

45. *Id.*

46. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1-2 (1924). The House Report stated that "[t]he need for the law arises from an anachronism of our American law. . . . [B]ecause of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." *Id.* This principle of nonenforcement was adopted by the American courts. *Id.*

47. S. REP. NO. 536, 68th Cong., 1st Sess. 2 (1924). The Senate Report cited several reasons for the common law rule. One reason was that courts did not feel that arbitration tribunals possessed the means to give relief. *Id.* Another was the fear that these tribunals lacked the element of justice. *Id.* Perhaps the most significant reason for the lack of enforceability was that the courts feared they would be "ousted from their jurisdiction." H.R. REP. NO. 96, 68th Cong., 1st Sess. 2 (1924).

48. *See* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124-25 (1924) (upholding the Arbitration Law of New York).

49. *See supra* note 2; *see also* H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924) and S. REP. NO. 536, 68th Cong., 1st Sess. 1 (1924).

50. Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Committees on the Judiciary, 68th Cong., 1st Sess. 24 (1924).

authority to control inferior federal courts, or whether it was based upon congressional power over interstate commerce.[51] If Congress had relied solely on the former, the Act's substantive provision[52] would only be applicable in federal courts.[53] On the other hand, if the sole basis of the Act was derived from congressional power over interstate commerce, then the Act's substantive applicability to the states would be difficult to dispute.[54]

The issue of congressional authority impacts the procedural question because if the "maritime transactions" or "interstate commerce" requirements contained in the section 2 substantive provision are not met, then the other procedural provisions will not apply.[55] In light of the Supreme Court's holding in *Southland Corp. v. Keating*,[56] the basis of congressional authority for the Act is no longer at issue.[57] However, there is an inconsistency between the plain language of the Act and its legislative history that bears on the current procedural issue. First, nothing in the Act's legislative history suggests an intention to bifurcate its substantive and procedural provisions.[58] Second, the procedural sections of the Act still appear to refer to federal courts.[59] The following discussion outlines

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Rep. Dyer: "There is no question of the authority of Congress to legislate on this subject as provided in the bill, is there?"
The Chairman: "I do not think there is." Rep. Dyer: "The authority and jurisdiction is *ample*?"
The Chairman: "Yes."

Id. (emphasis added).

51. Congressional power to regulate commerce is derived from Article I, Section 8, Clause 3 of the United States Constitution. Congressional power to establish inferior federal courts is derived from Article III. U.S. CONST. art. III, § 1. *See* Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (holding that the Act is "based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty' ") (quoting H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924); S. REP. No. 536, 68th Cong., 1st Sess 3 (1924)).

52. 9 U.S.C. § 2 (1988). Section 2 provides in relevant part that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable . . . ."

53. If the Act was derived from congressional power to control federal courts, the Act would be procedural in nature. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 418 (Black, J., dissenting). "So far as congressional acts relate to the procedure in such courts, they are clearly within the congressional power. This principle is so evident and so firmly established that it cannot be seriously disputed." Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275 (1926) (Julius Cohen participated in the Joint Hearings on S. 1005 and H.R. 646).

54. For a discussion of the significance of this distinction, see *supra* note 25 and accompanying text. In *Keating*, the Court stated that if Congress had intended to enact a procedural rule which was applicable only in federal court, "it would not so limit the Act to transactions involving commerce." Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

55. *See infra* notes 60-71 and accompanying text.

56. 465 U.S. 1 (1984).

57. Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (holding that "[t]he Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause").

58. *See, e.g.*, H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924). The House Report states that "[the proposed Act] declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement." *Id.*

59. Section 3 refers to "courts of the United States." 9 U.S.C. § 3 (1988). Section 4 refers to "any United States district court." 9 U.S.C. § 4 (1988).

the effect of the Act's substantive command on the state courts and the difficulties that have ensued regarding the application of the Act's procedural provisions to the states.

IV. SECTION 2 AND ITS BINDING EFFECT ON THE STATES

A. THE SECTION 2 REQUIREMENT

As noted earlier, the substantive command in section 2 of the Act provides, without reference to federal or state courts, that arbitration agreements contained in maritime contracts and contacts involving interstate commerce are "valid, irrevocable, and enforceable."[60] Without a contract or transaction first satisfying section 2, the procedural sections of the Act do not apply.[61]

In *Bernhardt v. Polygraphic Co.*,[62] the Supreme Court held that section 3, which requires a stay of litigation pending arbitration, is inapplicable when the contract or transaction did not otherwise satisfy section 2.[63] The Court asserted that although "section 3 does not repeat the words 'maritime transaction' " as found in section 2, the " 'agreement in writing' for arbitration referred to in section 3 is the kind of agreement which sections 1 and 2 have brought under federal regulation."[64] The Court found that the section 2 commerce or admiralty requirements must first be satisfied before the section 3 stay requirement applies.[65]

Perhaps the most interesting aspect of the *Bernhardt* decision was the hesitation of the Court to address whether "arbitration touched on substantive rights, . . . or was a mere form of procedure within the power of the federal courts or Congress to prescribe."[66] Since the transaction at issue did not satisfy section 2 of the Act, the Court avoided the issue by reading section 3 narrowly.[67] Justice Black's dissent in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[68] characterized the tight dilemma that Justice Medina would have faced in *Bernhardt* had the transaction satisfied section 2:[69]

60. 9 U.S.C. § 2 (1988).

61. *See generally* Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956).

62. 350 U.S. 198 (1956).

63. Bernhardt v. Polygraphic Co., 350 U.S. 198, 202 (1956).

64. *Id.* at 201.

65. *Id.* at 202.

66. *Id.*

67. *Id.* A significant factor in *Bernhardt* was that Vermont law recognized the revocability of arbitration agreements at any time prior to award. *Id.* at 199-200. This factor, combined with the absence of a transaction satisfying section 2, precluded a determination that section 3 was indeed binding by its own force. *Id.* at 201.

68. 388 U.S. 395 (1967).

69. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967).

> If [Justice Medina] held that the Arbitration Act rested solely on Congress' power, widely recognized in 1925 but negated in *Erie*, to prescribe general federal law applicable in diversity cases, he would be compelled to hold the Act unconstitutional as applied to diversity cases under *Erie* and *Bernhardt*. If he held that the Act rested on Congress' power to enact substantive law governing interstate commerce, then the *Erie-Bernhardt* problem would be avoided and the application of the Act to diversity cases involving commerce would be saved.[70]

Consequently, the question regarding the Act's derivation was not resolved in *Bernhardt* since its resolution was not imperative to the outcome of the case.[71]

B. THE *KEATING* DECISION

In *Southland Corp. v. Keating*,[72] the United States Supreme Court stated that the section 2 substantive requirement of the Act is binding upon state courts.[73] At issue in *Keating* was whether a provision of the California Franchise Investment Law invalidated the parties' agreement to arbitrate their disputes.[74] The California court construed the law to require judicial resolution of franchise-related claims and held that the arbitration agreement between the parties in their contract was invalid, despite the applicability of the Federal Arbitration Act.[75] The United States Supreme Court reversed and held that the California statute violated the Supremacy Clause of the United States Constitution because of its direct conflict with section 2 of the Federal Arbitration Act.[76]

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70. *Id.* at 417.

71. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1956).

72. 465 U.S. 1 (1984).

73. Southland Corp. v. Keating, 465 U.S. 1, 14-15 (1984). The dispute in *Keating* was between the appellant Southland, who was the franchisor of 7-Eleven convenience stores, and the appellees, who were approximately 800 franchisees. *Id.* at 3-4. Southland Corp.'s standard franchise agreement contained a clause requiring arbitration of any controversies or claims. *Id.* at 4.

74. *Id.* at 3. The California statute provided in relevant part that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of [the California Franchise Investment Law] is void." CAL. CORP. CODE § 31512 (West 1977). *See* Keating v. Superior Court, 645 P.2d 1192 (1982).

75. Keating v. Superior Court, 645 P.2d at 1203-04.

76. *Keating*, 465 U.S. at 10. The Court was unpersuaded by the California Supreme Court's analogy to Wilko v. Swan, 346 U.S. 427 (1953). In *Wilko*, the United States Supreme Court held that the anti-waiver provision of the Securities Act of 1933 overrides arbitration agreements incorporating securities claims. *Wilko*, 346 U.S. at 438. Section 14 of the Securities Act provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter . . . shall be void." 15 U.S.C. § 77(n) (1988). The Court found that there exists a strong federal policy favoring enforcement of securities laws. *Wilko*, 346 U.S. at 431. Consequently, the Court in *Wilko* held that the anti-waiver provision of the Securities Act operated as an exception to the FAA. *Id.* at 435.

The *Keating* Court found the California Supreme Court's analogy to *Wilko* flawed because *Keating* involved a state-created right, whereas the statute in *Wilko* was federal. *Keating*, 465 U.S. at 16 n.11.

The Court stated that "the 'involving commerce' requirement in [section] 2 [is not] an inexplicable limitation on the power of the federal courts, but . . . a necessary qualification on a statute intended to apply in state and federal courts."[77] The *Keating* decision thus explicitly adopted the notion that the Act is a substantive statute derived from the Commerce Clause.[78] Nevertheless, the majority in *Keating* stated that although state law is preempted to the extent that it undercuts enforceability of arbitration agreements, "we do not hold that sections 3 and 4 of the Arbitration Act apply to proceedings in state courts."[79]

Justice O'Connor, in her dissent, asserted that the majority's interpretation of section 2 was directly contrary to the structure of the Act.[80] Although her view of the Act has been criticized as overbroad,[81] it may, in fact, be a more accurate characterization. Relying on the legislative history of the Act, she found that "[s]ection 2, like the rest of the FAA, should have no application whatsoever in state courts."[82] Justice O'Connor's position was that it is not necessary to hold that section 2 is binding on the states in order for a party to have its rights vindicated.[83] She argued that if the transaction falls within the commerce or admiralty requirement, thus bringing the arbitration provision within the Act's purview, the aggrieved party is protected by the Act if the usual diversity requirements have been met.[84] Justice O'Connor concluded that when a suit is premised upon diversity of citizenship in a state court, parties gain no forum shopping advantages because there is either no access to federal court in incomplete diversity cases or equal access to all when there is complete diversity of citizenship.[85] Furthermore, if a party seeks to avoid the Act by initiating suit in state court, the aggrieved party can secure an order from a federal court compelling arbitration.[86]

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77. *Id.* at 14-15. The Court refused to endorse forum shopping, stating that "[w]e are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." *Id.* at 15.

78. *Id.* at 11. An earlier decision by the Court helped pave the way for the Court's ultimate decision in *Keating* by concluding "that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.' " Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967).

79. *Keating*, 465 U.S. at 16 n.10.

80. *Id.* at 29 (O'Connor, J., dissenting).

81. Barbara Ann Atwood, *Issues in Federal-State Relations Under the Federal Arbitration Act*, 37 U. FLA. L. REV. 61, 83 (1985).

82. *Keating*, 465 U.S. at 31 (O'Connor, J., dissenting). She went on to state that "[a]ssuming, to the contrary, that [section] 2 *does* create a federal right that the state courts must enforce, state courts should nonetheless be allowed, at least in the first instance, to fashion their own procedures for enforcing the right." *Id.*

83. *Id.* at 33-34 (O'Connor, J., dissenting).

84. *Id.* (O'Connor, J., dissenting).

85. *Id.* at 34 (O'Connor, J., dissenting).

86. *Id.* (O'Connor, J., dissenting). Section 4 of the FAA provides that "[a] party aggrieved by the alleged failure . . . of another to arbitrate . . . may petition any United States district court . . . for an

The *Keating* decision has given rise to concerns regarding the power of the states to enforce their rules of procedure when a transaction or contract is governed by section 2.[87] The most difficult issue, not yet confronted squarely by the Supreme Court,[88] is whether the applicability of the Act's substantive provision to state courts means that the procedural provisions also apply.[89] The key to the analysis of this problem begins with an understanding of the *Erie* doctrine, which helps define the limits of federal control over state court autonomy.

C. THE *ERIE* DOCTRINE

In *Erie Railroad Co. v. Tompkins*[90] the United States Supreme Court held that a federal court sitting in diversity must apply the substantive law of the state in which it sits.[91] The Court stated that "Congress has no power to declare substantive rules of common law applicable in a state . . . ."[92] This holding in *Erie* was extended seven years later in *Guaranty Trust Co. v. York*,[93] in which the Court explained that "[t]he nub of the policy that underlies *Erie Railroad Co. v. Tompkins* is that for the same transaction . . . a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."[94]

The Act's applicability to state courts appears to be somewhat of a "reverse *Erie*" problem.[95] *Erie* requires that federal courts apply the substantive law of the state in diversity suits.[96] Here, the issue is whether federal procedural law should displace state procedural law when a proceeding is initiated in state court. The problem occurs because the Act's

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order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4 (1988).

87. *Keating*, 465 U.S. at 31 (O'Connor, J., dissenting) (arguing, for example, that some state courts may choose to award punitive damages for the violation of section 2).

88. The Court has not been called upon to resolve this issue. The closest it has come to addressing this issue was in Volt Info. Sciences v. Board of Trustees, 489 U.S. 468 (1989). The Court in *Volt* held that a choice of law provision, in which the parties agreed to have "the law of the place where the project is located," was valid despite the difference in state procedure. *Id.* at 472. However, this holding seems to be based upon the fact that the parties agreed to the provision, rather than because the state law itself required it. *Id.* at 477-78.

89. At least two state court decisions have held that when a contract is governed by section 2 of the Act, sections 3 and 4 also apply. *See* GAF Corp. v. Werner, 485 N.E.2d 977 (N.Y. 1985), *cert. denied*, 475 U.S. 1083 (1986); Galtney v. Underwood Neuhaus & Co., 700 S.W.2d 602 (Tex. Ct. App. 1985).

90. 304 U.S. 64 (1938).

91. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

92. *Id.* at 78.

93. 326 U.S. 99 (1945).

94. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

95. *See generally* Warren E. Johnson, Note, *The Federal Arbitration Act in State Courts: Converse* Erie *Problems*, 55 CORNELL L. REV. 623 (1970).

96. *Erie*, 304 U.S. at 78.

procedural law is so intertwined with its substantive law.[97] However, determining whether states may apply their own procedural law when federal substantive law controls depends not simply on whether the suit's outcome will be different, but whether the federal law's *policy* will be upheld.[98]

When the Act is viewed in light of *Erie* and its progeny, it becomes evident that state procedural law should be preempted to the extent that it frustrates congressional policy, as well as when the possible outcome may differ under state law.[99] Federal preemption generally occurs when state law stands in the way of congressional objectives.[100] Hence, whenever state procedural or substantive law interferes with the enforceability of valid arbitration agreements governed by the Act, the state law should be preempted.[101] The preemption of state law should occur as a result of the Supreme Court's holding in *Keating* that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[102]

V. THE APPLICATION OF SECTIONS 3 AND 4

A. CONCURRENT STATE AND FEDERAL JURISDICTION

The Supreme Court's dicta in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[103] drastically limited state legislative attempts to undercut the stay requirement in section 3 of the Act. The Court, by implication, stated that section 3 of the Act is binding upon state courts.[104]

In *Moses H. Cone*, the Court was called upon to determine whether a federal district court should stay litigation pending the resolution of the same issue of arbitrability in state court.[105] The Court stated that section

97. The legislative history of the Act indicates that Congress was not only concerned with upholding the validity of arbitration agreements, but was equally concerned about enforcing these agreements, albeit in federal courts. H. R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924).

98. *See, e.g.*, Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958) (weighing federal policy favoring jury decisions with state interest in uniformity).

99. Zhaodong Jiang, *Federal Arbitration Law and State Court Proceedings*, 23 LOY. L.A. L. REV. 473, 532 (1990).

100. Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

101. It seems unlikely that the Court can reasonably hold that the procedural provisions are *directly* binding upon state courts because the language of these provisions precludes such a holding. *See* 9 U.S.C. §§ 3 and 4 (1988). The Court's only reasonable approach to this dilemma appears to be to emphasize the federal policy that favors arbitration agreements. *See* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (recognizing the congressional policy favoring arbitration agreements).

102. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

103. 460 U.S. 1 (1983).

104. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983).

105. *Id.* at 4.

2 creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[106]

The significant aspect of the *Moses H. Cone* decision was the Court's expansion of the stay requirement to state courts. The Supreme Court stated in dictum that "state courts, as much as federal courts, are obliged to grant stays of litigation under [section] 3 of the Arbitration Act."[107] The Court appears to have decided that the Act's section 3 procedural requirement for a stay of litigation affects states at least in principle, if not by its literal command.[108] However, the Court was more reticent when addressing section 4, which allows a party to secure an order compelling arbitration, noting that the language of that provision "speaks only of a petition to 'any United States district court.' "[109] The willingness of the Court to expand the reading of section 4 was nevertheless evident.[110]

B. BIFURCATION OF ARBITRABLE AND NONARBITRABLE ISSUES

Section 4 of the Act provides that "the [district] court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[111] Therefore, the terms of the Act do not give the court discretion to deny an order for arbitration.[112] This results in separate proceedings when arbitrable and nonarbitrable issues are pleaded in the same complaint.[113]

In *Dean Witter Reynolds, Inc. v. Byrd*[114] an investor, Byrd, filed suit against Dean Witter Reynolds alleging violations of federal securities law and state law.[115] When Byrd had invested his funds with Dean Witter, he signed a Customer's Agreement providing that any controversy arising out of the contract was to be settled by arbitration.[116] The suit was originally brought in a United States District Court based on federal question jurisdiction.[117] The issue presented to the United States Supreme Court was

106. *Id.* at 24. The Court stated further that "[s]ection 2 is a congressional declaration of a liberal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.*

107. *Moses H. Cone*, 460 U.S. at 26.

108. The reference to state courts was dicta and therefore had no bearing on the merits of the case.

109. *Moses H. Cone*, 460 U.S. at 26 n.35.

110. *Id.* (recognizing that "at least one state court has held that [section] 4 does require state courts to issue [section] 4 orders to arbitrate where the section's conditions are met"). *Id.* (*citing* Main v. Merrill Lynch, Pierce, Fenner & Smith, 136 Cal. Rptr. 378, 380-81 (1977)).

111. 9 U.S.C. § 4 (1988) (emphasis added).

112. Dean Witter Reynolds, Inc., v. Byrd, 470 U.S. 213, 218 (1985).

113. *Id.* at 217.

114. *Id.* at 213.

115. *Id.* at 214. Since Dean Witter assumed that the federal securities claim was not arbitrable, it sought only to compel arbitration of the state law claim. *Id.* at 215.

116. *Id.* at 215.

117. *Byrd*, 470 U.S. at 214.

whether, in light of section 4 of the Act,[118] a federal district court may deny a motion to compel arbitration of a pendant state law claim when the parties have agreed to arbitrate the claim.[119]

In resolving the issue, the Court in *Byrd* compared the conflicting views of the circuit courts.[120] One approach, espoused by the ninth, fifth, and eleventh circuits, was the "doctrine of intertwining."[121] This doctrine allows the district court discretion to deny arbitration of the arbitrable claims and try all claims together when arbitrable and nonarbitrable claims arise out of the same transaction and are factually and legally intertwined.[122] The contrasting bifurcation approach, taken by the sixth, seventh, and eighth circuits, asserts that the Act divests the district courts of any discretion to deny arbitration and that the courts must order arbitration of the arbitrable claim when asked to do so.[123]

In *Byrd*, the Supreme Court adopted the latter view, acknowledging the fact that bifurcated proceedings may result in undermining judicial economy.[124] The Court looked to the legislative history of the Act and reasoned that the main purpose behind the Act's passage was to ensure judicial enforcement of arbitration agreements, not to assure expeditious resolution of disputes as suggested by the respondent.[125]

C. FRAUD IN THE INDUCEMENT

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[126] the Supreme Court confronted the issue of whether a federal court should resolve a claim of fraud in the inducement of an entire contract or whether this claim should be referred to arbitration.[127] The applicable provision of the Act in the case was section 4.[128]

In *Prima Paint*, the petitioner, Prima Paint, originally filed a complaint in federal district court seeking rescission of its contract with Flood & Conklin on the basis of fraudulent inducement.[129] At the same time, Prima Paint sought an order from the court to enjoin Flood & Conklin from proceeding to arbitration.[130] Flood & Conklin then cross-moved to

118. 9 U.S.C. § 4 (1988). Section 4 states that when a party is aggrieved by another's failure to arbitrate, the court *shall*, upon proper petition, order the parties to proceed to arbitration. *Id.*
119. *Byrd*, 470 U.S. at 214.
120. *Id.* at 216-17.
121. *Id.* at 216.
122. *Id.* at 216-17.
123. *Id.* at 217.
124. *Byrd*, 470 U.S. at 217.
125. *Id.* at 219.
126. 388 U.S. 395 (1967).
127. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967).
128. *Id.* at 403. For the text of section 4, *see supra* note 41.
129. *Id.* at 398.
130. *Id.* at 399.

stay the litigation.[131] The district court granted Flood & Conklin's motion to stay litigation and the Second Circuit Court of Appeals dismissed Prima Paint's appeal.[132]

On appeal, the Second Circuit Court of Appeals stated that "arbitration clauses as a matter of federal law are 'separable' from the contract in which they are" contained and that, when a fraud claim is directed at the entire contract containing a broad arbitration clause, the fraud claim is arbitrable.[133] The First Circuit's view, on the other hand, was that "the question of 'severability' is one of state law, and that [when] a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court."[134]

The United States Supreme Court looked to section 4 of the Act:[135]

> Under section 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue."[136] Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.[137]

The Court then briefly addressed the constitutional basis of its holding.[138] It relied upon the distinction between substance and procedure set forth in *Erie*.[139] Since section 4 of the Act is a procedural provision and the action was brought in federal court,[140] the Court stated that such a rule of "separability" is constitutionally permissible.[141] The Court stated that the question "is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases . . . [but

131. *Id.*
132. *Prima Paint*, 388 U.S. at 399.
133. *Id.* at 402.
134. *Id.* at 403.
135. *Id.*
136. 9 U.S.C. § 4 (1988).
137. *Prima Paint*, 388 U.S. at 403.
138. *Id.* at 404.
139. *Id.* *See also* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (stating that the distinction between substance and procedure hinges on whether the matter is "outcome determinative").
140. *Prima Paint*, 388 U.S. at 405.
141. *Id.* at 407. Justice Black criticized the majority for elevating arbitration clauses above other contractual provisions. *Id.* at 411 (Black, J., dissenting). He asserted that "[u]nder [the majority's] new formulation, section 2 now makes arbitration agreements enforceable, 'save upon such grounds that exist at *federal* law for the revocation of any contract.'" *Id.* at 421 (Black, J., dissenting).

rather,] whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate."[142]

Nothing in section 4 requires the separability of the arbitration clause from the contract. It merely requires the court to order arbitration once the arbitration clause is no longer at issue.[143] Nevertheless, *Prima Paint*'s rule of "separability" is consistent with the substantive requirement of enforceability of arbitration agreements because the opportunity for an arbitrable forum should not be lost merely because a party pleads fraud.[144]

D. CHOICE OF LAW CLAUSES

Often, parties to a contract incorporate a provision stating that a certain state's laws will apply to the contract. Parties are generally allowed great freedom in this regard.[145] The decision to choose a particular state's laws may affect how a subsequent dispute will be resolved.

Section 4 of the Act requires that federal district courts "make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement*."[146] This language gives the parties some latitude to determine which state's arbitration law will apply.[147] Nevertheless, section 4 does not appear to provide a vehicle by which either of the parties may avoid arbitration entirely.[148] To do so would frustrate the original intent of the parties, which was to submit their disputes to arbitration.

In a recent case, *Volt Information Sciences, Inc. v. Board of Trustees*,[149] the Supreme Court faced a novel issue: whether a choice of law provision in a contract selecting state law can displace the procedural pro-

142. *Id.* at 405.

143. 9 U.S.C. § 4 (1988). The provision states that "[t]he 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 . . . ." *Id.*

144. It is conceivable that a party might plead fraud in the inducement as a means to avoid arbitration of its claims. *See, e.g.*, Fouquette v. First Am. Nat'l Sec., Inc., 464 N.W.2d 760 (Minn. Ct. App. 1991) (holding that parties will have their claims resolved in a judicial forum when a party seeks rescission of the contract based upon allegations of fraud).

145. ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 102 n.2 (5th ed. 1993).

146. 9 U.S.C. § 4 (1988) (emphasis added). *See supra* note 42.

147. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989).

148. The author's attempts to uncover a Supreme Court decision in which the parties have agreed to arbitrate disputes, while providing within the contract an alternative remedy in the event one party fails to arbitrate, have been unsuccessful. Nor does it appear that the Court has addressed what the result might be if the parties to an arbitration agreement chose a particular state's laws to govern and that law provided a remedy which could not be characterized as a specific enforcement remedy (i.e., damages or litigation costs).

149. 489 U.S. 468 (1989).

visions of the Act.[150] The suit in *Volt* was brought in the California Superior Court.[151] The parties had agreed in their choice of law clause that the contract would be " 'governed by the law of the place where the Project is located.' "[152] California was the location, and its law provided that a stay of arbitration may be granted "pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it."[153] The Court looked to the applicable language of section 4 of the Act, which requires the court to direct arbitration to proceed *by the terms of the parties' agreement*.[154] As such, because the parties in effect agreed to be bound by California law, the Court held that the choice of law clause was not preempted by section 4 of the Act.[155]

The Court seemed to imply that the intent of the parties may override the Act's procedural provisions. It stated that

> because "[t]he thrust of the [Act] . . . is strictly a matter of contract," the parties to an arbitration agreement should be "at liberty to choose the terms under which they will arbitrate." [When], as here, the parties have chosen in their agreement to abide by the state rules of arbitration, application of the FAA to prevent enforcement of those rules would actually be "inimical to the policies underlying state and federal arbitration law," because it would "force the parties to arbitrate in a manner contrary to their agreement."[156]

Significantly, the Court pointed out that "[section] 4 [order compelling arbitration requirement] of the FAA does not confer a right to compel arbitration of any dispute at any time."[157] It was noted that "the FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[158] Perhaps even more significantly, the Court stated that "we have never held that [sec-

150. Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 476 (1989).

151. *Id.* at 470-71.

152. *Id.* at 470 (quoting the construction contract at issue).

153. CAL. CIV. PROC. CODE ANN. § 1281.2(c) (West 1982), *construed in Volt*, 489 U.S. at 471.

154. *Volt*, 489 U.S. at 475. Section 4 states in relevant part that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (1988).

155. *Volt*, 489 U.S. at 477.

156. *Id.* at 472 (quoting the California Court of Appeals). The majority simply read the "law of the place" language as an intention by the parties to have California law apply because California was where the project was located. *Id.* at 470. Justice Brennan took the analysis one step further by asserting that for purposes of arbitration, the parties did not know what law would apply. Thus, the parties did not necessarily *choose* California law. *Id.* at 480 (Brennen, J., dissenting).

157. *Id.* at 474.

158. *Id.* at 477.

tions] 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court."[159]

It is uncertain how strictly parties' choice of law clauses will be construed. If parties agree on state law that undermines enforceability of the arbitration clause, the Act will preempt that state's applicable law by virtue of section 2.[160] As Justice Brennan asserted in his dissent, "[w]ere every state to construe such clauses as an expression of the parties' intent to exclude the application of federal law, . . . the result would be to render the Federal Arbitration Act a virtual nullity as to presently existing contracts."[161] The effect of the *Volt* decision thus renders enforceable choice of law clauses dictating which procedure will govern.

VI. THE FEDERAL ARBITRATION ACT AND STATE LAW

The current status of the Act with respect to state courts is as follows: (1) the provisions of the Act are inapplicable in any proceeding unless the contract or transaction at issue is governed by section 2 of the Act;[162] (2) states are bound by the substantive command of section 2 of the Act, which provides that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract;"[163] and (3) state law which undermines the substantive command of section 2 is invalid.[164]

The applicability of the Act's pre-award procedural provisions upon state courts is uncertain. State courts appear to be generally bound by the command of section 3 to grant a stay of litigation pending arbitration.[165] The federal requirement of adherence by state courts to section 4, however, is even less clear.[166] The Court held in *Volt* that the parties' choice of law provision will govern, but it did not address state law procedure that, standing alone, is consistent with the Act.[167]

One commentator asserts that the proper resolution is for courts to uphold state procedural rules as long as they do not conflict with the sub-

159. *Id.* at 477 n.6. The Court further stated that "we need not resolve it to decide this case, for we conclude that even if [sections] 3 and 4 of the FAA are fully applicable in state-court proceedings, they do not prevent application of CAL. CIV. PROC. CODE ANN. [section] 1281.2(c) . . . ." *Id.* at 477.

160. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

161. Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 491 (1989) (Brennan, J., dissenting).

162. Bernhardt v. Polygraphic Co., 350 U.S. 198, 202 (1956).

163. 9 U.S.C. § 2 (1988).

164. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

165. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983).

166. *Id.*

167. Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 474-76 (1989). The *Volt* Court only stated that "[i]nterpreting a choice-of-law clause to make state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend . . . *Moses Cone's* [rule of liberal construction]." *Id.* at 475-76.

stantive command of section 2.[168] Justice O'Connor espoused this view as well in *Keating*:[169]

> [W]e should at a minimum allow state courts and legislatures a chance to develop their own methods for enforcing the new federal rights. Some might choose to award compensatory or punitive damages for the violation of an arbitration agreement; some might award litigation costs to the party who remained willing to arbitrate; some might affirm the "validity and enforceability" of arbitration agreements in other ways. Any of these approaches could vindicate [section] 2 rights in a manner fully consonant with the language and background of that provision.[170]

The difficulty with this approach, however, is that it does not recognize the importance of the actual end result—specific enforcement—which ensures that valid arbitration agreements lead to arbitration.[171] This seems to have been one premise behind the Act, despite the fact that Congress chose to have this explicitly stated in the enforcement provisions of sections 3 and 4 and not in section 2.[172] Section 2 on its face declares only that arbitration agreements are valid, irrevocable, and enforceable absent contractual grounds for revocation.[173] Nevertheless, the overall structure of the Act is geared toward specific enforcement of arbitration agreements.[174]

A. STATE ARBITRATION LAW

As a result of the United States Supreme Court's holding in *Keating*, state courts have recognized that they are bound by the Act's substantive

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168. Atwood, *supra* note 81, at 64.

169. Southland Corp. v. Keating, 465 U.S. 1, 31 (1984) (O'Connor, J., dissenting). Justice O'Connor stated: "Assuming . . . that [section] 2 *does* create a federal right that the state courts must enforce, state courts should nonetheless be allowed, at least in the first instance, to fashion their own procedures for enforcing the right." *Id.*

170. *Id.* at 31-32.

171. The assurance that the parties' arbitration agreements will be specifically enforced is a reflection of the federal *policy* underlying the entire Act, not an assurance derived from section 2 itself. H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924) This policy has resulted in part from the developments in the law prior to *Keating*. *Cf.* Keating, 465 U.S. at 17 (Stevens, J., concurring in part and dissenting in part) (recognizing that intervening developments in the law compelled his concurring opinion).

172. "The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the [f]ederal courts for their enforcement." H. REP. No. 96, 68th Cong., 1st Sess. 2 (1924).

173. 9 U.S.C. § 2 (1988).

174. The House Report exemplifies the fact that section 2 cannot sufficiently ensure enforcement of arbitration agreements on its own. Among the objectives of the Act was to ensure arbitration: "If one party is recalcitrant he can no longer escape his agreement, but his rights are amply protected. At the same time the party willing to perform his contract for arbitration is not subject to the delay and cost of litigation." H.R. REP. No. 96, 68th Cong., 1st Sess. 2 (1924).

provision.[175] The majority of states have thus adopted the Uniform Arbitration Act (UAA). As of 1991, 35 states and the District of Columbia have enacted the UAA in varying forms.[176] The UAA in its barest form differs little from the Federal Arbitration Act.[177] Its widespread enactment indicates that substantive enforceability is no longer disputed. As such, those states which have adopted the UAA or similar law will not be substantially affected by the Federal Arbitration Act. North Dakota, for example, previously recognized specific enforcement of arbitration agreements only with regard to existing controversies.[178] Since *Keating*, North Dakota has adopted the UAA, thereby recognizing the enforcement of prospective controversies.[179]

B. STATE COURT DECISIONS

1. *Fraud in the Inducement*

The United States Supreme Court has held that when a party asserts a claim of fraud in the inducement of an entire contract (and not specifically fraud in the inducement of the arbitration clause), the issue must be

175. *See, e.g.*, Fairview Cemetery Ass'n v. Eckberg, 385 N.W.2d 812, 813 (Minn. 1986); Allison v. Medicab Int'l, Inc., 597 P.2d 380, 381-82 (Wash. 1979); *Ex Parte* Shamrock Food Serv., Inc., 514 So. 2d 921, 922 (Ala. 1987).

176. ALASKA STAT. §§ 09.43.010 to 09.43.180 (1983); ARIZ. REV. STAT. ANN. §§ 12-1501 to 12-1518 (1982 & Supp. 1993); ARK. CODE ANN. §§ 16-108-201 to 16-108-224 (Michie 1987 & Supp. 1993); COLO. REV. STAT. §§ 13-22-201 to 13-22-223 (1987 & Supp. 1993); DEL. CODE ANN. tit. 10, §§ 5701 to 5725 (1974 & Supp. 1992); D.C. CODE ANN. §§ 16-4301 to 16-4319 (1989); FLA. STAT. §§ 682.01 to 682.22 (West 1990 & Supp. 1994); IDAHO CODE §§ 7-901 to 7-922 (1990 & Supp. 1993); ILL. ANN. STAT. ch. 710, para. 5/1 to 5/23 (Smith-Hurd 1992); IND. CODE ANN. §§ 34-4-2-1 to 34-4-2-22 (Burns 1986 & Supp. 1993); IOWA CODE ANN. §§ 679A.1 to 679A.19 (West 1987 & Supp. 1994); KAN. STAT. ANN. §§ 5-401 to 5-422 (1991 & Supp. 1993); KY. REV. STAT. ANN. §§ 417.045 to 417.240 (Michie 1992); ME. REV. STAT. ANN. tit. 14 §§ 5927 to 5949 (West 1980 & Supp. 1993); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-201 to 3-234 (1989 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 251, §§ 1 to 22 (West 1988 & Supp. 1994); MICH. COMP. LAWS ANN. §§ 600.5001 to 600.5035 (West 1987 & Supp. 1993); MINN. STAT. ANN. §§ 572.08 to 572.30 (West 1988 & Supp. 1994); MO. ANN. STAT. §§ 435.350 to 435.470 (Vernon 1992 & Supp. 1994); MONT. CODE ANN. §§ 27-5-111 to 27-5-324 (1993); NEB. REV. STAT. §§ 25-2601 to 25-2622 (1989); NEV. REV. STAT. ANN. §§ 38.015 to 38.205 (Michie 1986 & Supp. 1993); N.M. STAT. ANN. §§ 44-7-1 to 44-7-22 (Michie 1978 & Supp. 1992); N.C. GEN. STAT. 1-567.1 to 1-567.20 (1993); N.D. CENT. CODE §§ 32-29.2-20 (Michie — & Supp. 1991); OKLA. STAT. ANN. tit. 15, §§ 801 to 818 (West 1993 & Supp. 1994); 42 PA. CONS. STAT. ANN. §§ 7301 to 7320 (1982 & Supp. 1993); S.C. CODE ANN. §§ 15-48-10 to 15-48-240 (Law Co-op Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 21-25A-1 to 21-25A-38 (1987 & Supp. 1993); TENN. CODE ANN. §§ 29-5-301 to 29-5-320 (Supp. 1993); TEX. REV. CIV. STAT. arts. 224 to 238-6 (West 1973 & Supp. 1994); UTAH CODE ANN. §§ 78-31a-1 to 78-31a-18 (Michie 1992); VT. STAT. ANN. tit. 12, §§ 5651 to 5681 (Supp. 1993); VA. CODE ANN. §§ 8.01-581.01 to 8.01-581.016 (Michie 1992 & Supp. 1993); WYO. STAT. §§ 1-36-101 to 1-36-119 (1977 & Supp. 1988).

177. For example, the state of North Dakota has adopted the UAA. Its analogy to section 2 of the Act dispenses with the unnecessary requirements of admiralty or interstate commerce (because if these requirements are present in a contract or transaction, the Act will govern). It further dispenses with the employee exemptions. N.D. CENT. CODE § 32-29.2-01 (Supp. 1991).

178. Atwood, *supra* note 81, at 72 n.71 (1985) (citing N.D. CENT. CODE § 32-29-01(1) (Supp. 1983)).

179. N.D. CENT. CODE § 32-29.2-01 (Supp. 1991).

resolved through arbitration.[180] At least two state courts have followed this course.[181]

One state court, however, has held the opposite.[182] In *Fouquette v. First American National Securities, Inc.*,[183] the Minnesota Court of Appeals stated that the Act does not preempt state procedural law with regard to severability of an arbitration clause from the contract itself, despite the United States Supreme Court declaration in *Prima Paint*.[184] The Minnesota Court of Appeals framed the issue:

> Does federal law, which allows arbitration clauses to be severed from the entire contract, conflict with state law, which does not allow arbitration clauses to be severed, as to an arbitration clause in a customer securities agreement which applies to any controversy "unless unenforceable due to federal or state law?"[185]

The Minnesota court concluded that pursuant to Minnesota law, the party's fraudulent inducement claim, whether or not pertaining to the arbitration clause itself, was not severable from the entire contract.[186] Thus, in Minnesota, because allegations of fraud in the inducement render the entire contract nonarbitrable, it seems likely that a party seeking to avoid an arbitration clause in its contract would only need to plead fraud in the inducement of the contract.[187] The Supreme Court of Minnesota has expressed this concern and thus requires allegations of fraud to be pleaded with particularity in order to avoid this result.[188]

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180. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405-06 (1967).

181. *See, e.g.*, Pinkis v. Network Cinema Corp., 512 P.2d 751, 754-55 (Wash. Ct. App. 1973); Konewko v. Kidder, Peabody & Co., 528 N.E.2d 1 (Ill. App. Ct. 1988), *appeal denied*, 535 N.E.2d 915 (1989).

182. *See* Fouquette v. First Am. Nat'l Sec., Inc., 464 N.W.2d 760, 762-63 (Minn. Ct. App. 1991) (stating that under state law, a claim of fraud in the inducement is not arbitrable).

183. 464 N.W.2d 760 (1991). The dispute in *Fouquette* arose out of a securities purchase agreement in which the parties agreed to submit any controversies to arbitration "unless unenforceable due to state or federal law." *Id.* at 761.

184. Fouquette v. First Am. Nat'l Sec., Inc., 464 N.W.2d 760, 762-63 (Minn. Ct. App. 1991). For discussion of the Supreme Court's *Prima Paint* decision, *see supra* notes 126-144 and accompanying text.

185. *Fouquette*, 464 N.W.2d at 762.

186. *Id.* The court nevertheless ordered arbitration of the fraud claims because the party sought damages as his mode of relief. *Id.* at 763. Had the party's preferred remedy been rescission, the court would have held that the proper forum should be judicial because the Minnesota court, unlike the United States Supreme Court, contends that allegations of fraud vitiate the entire contract, including the arbitration clause. *Id.* at 762-63.

187. *Id.*

188. Michael-Curry Companies, Inc. v. Knutson Shareholders Liquidating Trust, 449 N.W.2d 139, 142 (Minn. 1989). "We are also concerned that parties often allege fraud in the inducement as a final attempt to avoid arbitration. We therefore emphasize that, where a party applies for a stay of arbitration, 'circumstances constituting fraud . . . shall be stated with particularity.'" *Id.* at 143 (quoting Atcas v. Credit Clearing Corp., 197 N.W.2d 448, 456 (Minn. 1972)).

Does the Minnesota rule directly conflict with the Act? The Minnesota Court of Appeals did not think so.[189] "The FAA does not manifest a policy preference for a certain set of procedural rules . . . . While the FAA contains no express preemptive provision, federal law may preempt state law [only] to the extent that it actually conflicts with federal law."[190] This interpretation is true to the plain language of section 4 of the Act but is contrary to the United States Supreme Court's view in *Prima Paint*.[191] The key distinction may be that state courts are not bound by *Prima Paint* because in *Prima Paint*, the matter was heard in federal court.

2. *Waiver of the Right to Arbitrate*

An issue that has remained untouched by the United States Supreme Court is whether a party can waive an otherwise enforceable arbitration agreement by performing acts inconsistent with that right.[192] In *Donald & Co. Securities., Inc. v. Mid-Florida Community Services, Inc.*,[193] a Florida court of appeals held that the right to arbitration can be waived.[194] Mid-Florida initially "filed a complaint . . . against the appellants alleging a violation of the Florida Securities and Investor Protection Act."[195] Thirteen months later, in order to compel arbitration, Mid-Florida served a motion to stay the proceedings it had earlier initiated.[196] In response, the appellants contended that Mid-Florida had waived its right to arbitration because it had initiated and participated in extensive litigation.[197] The Florida District Court of Appeal reversed the circuit court order compelling arbitration and stated that "a party may waive arbitration by actively participating in a law suit or by taking action inconsistent with that right."[198]

The holding in *Donald & Co. Securities* exemplifies a case in which a party forfeits its right to arbitrate by acting inconsistently with that right.[199] Sections 3 and 4 of the Act provide that arbitration agreements

189. *Fouquette*, 464 N.W.2d at 762.

190. *Id.* at 762 (citing Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 477-78 (1989)).

191. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04 (1967).

192. For example, a waiver might arise when a party files an action seeking to litigate a claim and later attempts to invoke arbitration pursuant to the arbitration clause in the contract.

193. 620 So. 2d 192 (Fla. Dist. Ct. App. 1993).

194. Donald & Co. Sec., Inc. v. Mid-Florida Community Serv., Inc., 620 So. 2d 192, 194 (Fla. Dist. Ct. App. 1993).

195. *Id.* at 193.

196. *Id.*

197. *Id.*

198. *Id.* at 194. The Third District of Florida and the Eleventh Circuit Court of Appeals required a showing of prejudice to establish waiver. *Id.* The Second District Court did not feel that prejudice was a necessary element. *Id.* Since there was no federal law controlling on the issue, the court applied the law of Florida. *Id.*

199. *Donald & Co. Sec.*, 620 So. 2d at 194.

are to be specifically enforced.[200] However, section 4 provides that the right to enforce a valid agreement to arbitrate is held by the party who is aggrieved by *another's* failure to arbitrate.[201] There is no indication in the Act that the one who fails to arbitrate by initiating litigation can later invoke the Act's protection.[202] Since the issue in *Donald & Co. Securities* is limited to waiver, the holding should not be read as undermining the substantive mandate of section 2, which requires the recognition of these arbitration agreements.[203]

3. *Choice of Law Clauses*

A significant number of states advocate the position that a choice of law clause will not be preempted by the Act's procedural provisions.[204] A separate issue, however, is whether a choice of law clause may operate to preclude a party's right to arbitration entirely.[205] If this were permitted, federal substantive law would be displaced.

For example, consider the scenario in which parties incorporate a choice of law clause in their arbitration agreement, and the applicable state law requires bold print in the contract to alert parties that an arbitration clause is contained within the contract.[206] Consider further that the contract will be governed by the Act. Will the Act preempt state law if the bold print requirement is not followed, rendering the arbitration clause nevertheless enforceable?

The Missouri Court of Appeals held in *Woermann Construction Co. v. Southwestern Bell Telephone Co.*[207] that when state procedural law operates to deny arbitration entirely, the applicable state law is pre-

200. 9 U.S.C. §§ 3, 4 (1988).

201. *Id.* § 4.

202. *See supra* note 42.

203. 9 U.S.C. § 2 (1988). Presumably, the other party to the action may file a motion to stay the litigation as long as it has not acquiesced, thereby waiving its own right to compel arbitration. *See generally* 9 U.S.C. § 4 (1988).

204. *See* Albright v. Edward D. Jones & Co., 571 N.E.2d 1329 (Ind. Ct. App. 1991), *cert. denied*, Edward D. Jones & Co. v. Carter, 113 S. Ct. 61 (1992) (concluding that the arbitration clause was not in compliance with the Missouri law chosen by the parties); American Physicians Serv. Group, Inc. v. Port Lavaca Clinic Assoc., 843 S.W.2d 675, 678 (Tex. Ct. App. 1992) (finding that the procedural provision in the Texas Arbitration Act prevailed over the Federal Arbitration Act because parties chose Texas law); Madison Beauty Supply, Ltd. v. Helene Curtis, Inc., 481 N.W.2d 644, 648 (Wis. Ct. App. 1992), *review denied*, 490 N.W.2d 24 (Wis. 1992) (stating that parties were entitled to choose procedure for enforcing their agreement to arbitrate); Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co., 191 Cal. Rptr. 15 (Cal. Ct. App. 1983) (finding that where the parties agreed on the law of the construction site, its law governed the dispute, notwithstanding the fact that the contracts involved interstate commerce).

205. *But cf.* Volt Info. Sciences v. Board of Trustees, 489 U.S. 468, 479 (1989) (upholding a choice-of-law clause consistent with the policies of the FAA).

206. *See, e.g.*, MO. ANN. STAT. § 435.460 (Vernon 1986) (requiring ten-point notice that the contract contains a binding arbitration provision).

207. 846 S.W.2d 790 (Mo. Ct. App. 1993).

empted by the Act.[208] At issue in *Woermann* was the Missouri Arbitration Act's requirement of a ten point capital letter notice stating "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."[209] The contract between the parties did not contain this language.[210] Consequently, Missouri law rendered the arbitration clause unenforceable.[211] After a thorough analysis regarding the commerce requirement of the Act, the Missouri Court of Appeals found that the contract at issue was governed by the Federal Arbitration Act.[212] The court found that, whereas the choice of law clause at issue in the United States Supreme Court's holding in *Volt*[213] had the effect of staying arbitration, the Missouri law operated to deny arbitration entirely.[214] Therefore, the court held that the Missouri provision was preempted by the Act.[215] The *Woermann* decision provides a persuasive reason why *Volt*, which allowed a stay of arbitration, should be construed only to apply to choice of law clauses addressing pre-award proceedings, and not to situations in which state law displaces federal substantive law.[216]

VII. CONCLUSION

The Federal Arbitration Act was adopted to sustain the validity and enforcement of arbitration agreements.[217] The outdated perception of arbitration as an inferior means to resolve disputes has been superseded by the Act and the United States Supreme Court decisions declaring the federal policy favoring arbitration agreements.[218]

Until *Southland Corp. v. Keating*,[219] the Act's applicability to the states was uncertain. After *Keating*, it became clear that the states are bound by the Act's substantive provision. However, it is uncertain whether the Act's procedural provisions are binding on the states as

208. Woermann Constr. Co. v. Southwestern Bell Tel. Co., 846 S.W.2d 790, 793 (Mo. Ct. App. 1993).

209. *Id.* at 792.

210. *Id.* at 791-92.

211. *Id.* at 792.

212. *Id.* at 793 (finding that the commerce requirement had been fulfilled because, among other reasons, the equipment used and the manufacturer were located outside of Missouri).

213. Volt Info. Sciences v. Board of Trustees, 489 U.S. 468 (1989).

214. *Woermann*, 846 S.W.2d at 793.

215. *Id.*

216. "The great weight of lower court authority similarly rejects the notion that a choice-of-law clause renders the FAA inapplicable. Choice-of-law clauses simply have never been used for the purpose of dealing with the relationship between state and federal law." *Volt*, 489 U.S. at 489-90 (Brennan, J., dissenting).

217. 9 U.S.C. § 2 (1988).

218. *See generally* H.R. REP. No. 96, 68th Cong., 1st Sess. 1 (1924) and S. REP. No. 536, 68th Cong., 1st Sess. 2 (1924); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

219. 465 U.S. 1 (1984).

well.[220] The plain wording of the Act's procedural provisions, specifically in sections 3 and 4, suggests that the Act does not stretch this far.[221] However, specific enforcement is the only remedy that will ensure an aggrieved party the right to have arbitrable claims arbitrated.[222] Hence, although the section 3 and 4 procedural provisions, which require specific enforcement of arbitration agreements, do not appear to be directly binding on the states, the Supreme Court has implied that specific enforcement was the intended remedy in the event a party fails to honor the agreement.[223] Therefore, a potential litigant in state court who is unsatisfied with his or her arbitration agreement will almost certainly be compelled to arbitrate his or her claim.

A potential denial of arbitration exists when arbitrable and nonarbitrable issues are commingled. Thus, state courts should follow the *Byrd* decision, despite the fact that it resulted from the application of section 4 of the Act and not section 2.[224] Moreover, if the denial of a party's right to arbitration in fact occurs, the court's decision denying arbitration would likely be overturned on appeal because section 2 requires that courts respect the validity and enforceability of arbitration agreements.[225] It is evident, therefore, that a statute or decision calling for the "doctrine of intertwining" has implications for state courts beyond the section 4 procedural requirement, for section 2 inevitably comes into play.

Choice of law clauses may be used to alter the procedural requirements of the Act as long as the substantive mandate of enforceability is not infringed upon. However, choice of law clauses displacing the applicability of the Act's substantive mandate will be invalid, as evidenced by the Missouri Court of Appeals decision in *Woermann*.[226]

The remaining issue concerning the Act and its effect on state court proceedings is whether federal or state procedural law controls when a contract is governed by the Act. There is no practical reason for the preemption of state procedural law if it is generally consistent with the purpose of the Act. State law should be upheld whether or not parties incorporate a choice of law clause in their agreement because, just as state

220. *See supra* notes 165-74 and accompanying text.

221. 9 U.S.C. §§ 3 & 4 (1988). *See also supra* notes 37-45 and accompanying text.

222. *See supra* notes 171-74 and accompanying text.

223. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26-27 (1983).

224. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

225. Even if section 4 is inapplicable to state court proceedings, state law cannot displace the section 2 validity provision. *See* Southland Corp. v. Keating, 465 U.S. 1 (1984) (striking down a provision of the California Franchise Investment Law because of its direct conflict with section 2 of the Act).

226. *See supra* notes 207-16 and accompanying text.

law cannot displace federal law where federal law controls, neither should parties' choice of law clauses displace federal law.[227]

It is clear now that any state law infringing on parties' valid arbitration agreements under the Act will be preempted.[228] The proper solution is to allow states to enforce their own procedural provisions as long as section 2 of the Act is honored. This will reconcile the inapplicability of the Act's procedural provisions while promoting the states' adherence to the policies underlying the Act. In order to ensure state court autonomy, only state procedural provisions and choice of law clauses that truly affect the right to arbitration should be preempted. Consistent choice of law clauses and consistent state procedural law should be placed on the same footing.

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227. *See* Volt Info. Sciences v. Board of Trustees, 489 U.S. 468, 488 (1989) (Brennan, J., dissenting) (arguing that choice of law clauses are not designed to displace federal law).

228. *See supra* notes 72-79 and accompanying text.