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Protecting Consumers from Arbitration Provisions in Cyberspace, the Federal Arbitration Act and E-SIGN Notwithstanding

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PROTECTING CONSUMERS FROM ARBITRATION PROVISIONS IN CYBERSPACE, THE FEDERAL ARBITRATION ACT AND E-SIGN NOTWITHSTANDING

Stephen E. Friedman[†]

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INTRODUCTION

Consumers making purchases on the Internet are well practiced at scrolling through and “agreeing” to “Terms and Conditions” with extraordinary speed and extraordinarily little thought. These terms frequently include an arbitration provision that deprives the consumer of the right to sue if a dispute arises. The combination of a significant contract provision with a particularly problematic method of contract formation raises serious problems for consumers and for contract law. These problems are exacerbated by the increasing likelihood that the consumer will be viewing and agreeing to on-line contract terms not through the large screen of a desktop computer, but rather through the tiny screen of a cell phone or similar device.

The ability of contract law to meet these challenges is jeopardized by the combined effect of two federal statutes: the Federal Arbitration Act¹ (FAA) and the Electronic Signatures in Global and National Commerce Act² (E-SIGN). The FAA provides virtually no protection for consumers and, to make matters worse, largely federalizes what would otherwise be an area of state authority.³ E-SIGN adds to the problem by significantly limiting the ability of the states to regulate electronic

1. 9 U.S.C. §§ 1-16 (2000 & Supp. V 2005).

2. 15 U.S.C. §§ 7001-7031 (2000).

3. See discussion *infra* Part II.

commerce even in the face of changing technologies.⁴ The FAA and E-SIGN are generally believed to leave little room for meaningful state regulation of arbitration provisions in cyberspace.⁵ This Article takes a contrary view. I argue that notwithstanding the FAA and E-SIGN, there is meaningful space for state law regulation of arbitration provisions in consumer Internet transactions and that securing this space restores a proper balance between state and federal law.

This space for state regulation exists because only “written” arbitration provisions are within the scope of the FAA.⁶ Written text and electronically displayed text differ from each other. For instance, the term “written” connotes a tangibility and materiality that is lacking in text on a website. In some contexts, the differences between written text and electronically displayed text do not matter. However, those differences *are* relevant when it comes to the applicability of the FAA to arbitration provisions in consumer contracts formed over the Internet. Reaching this conclusion requires a discussion of the purpose of the FAA’s limitation to written provisions.

In this Article, I challenge the conventional wisdom that the FAA’s “written” limitation was intended primarily to ensure sufficient evidence of an arbitration agreement. I argue that this “statute of frauds” approach to the “written” limitation largely misses the mark. I contend that when Congress enacted the FAA in 1925, it excluded oral and other non-written arbitration agreements from the FAA’s coverage because agreements in those forms do not sufficiently register a choice to arbitrate and do not sufficiently impart the seriousness of that choice. In the current commercial environment, arbitration provisions on consumer websites are the closest equivalent to what oral and other unwritten arbitration provisions were in 1925—a form of contracting notable for its casual nature and its failure in most instances to register meaningful choice or to impart seriousness. Arbitration provisions in consumer Internet transactions are thus properly excluded from the FAA. States should generally be able to regulate such provisions as they see fit.

This interpretation of “written” must be reconciled with E-SIGN. E-SIGN generally ensures that electronic documents are given the same effect as written documents. E-SIGN could thus be seen as requiring that arbitration provisions in electronic form be treated the same as those in written form. While I acknowledge and discuss that argument, I take a contrary position and argue that E-SIGN does not dictate that text on an

4. See *infra* Part IV.

5. See *infra* Part III.B.3 and Part IV.A.

6. 9 U.S.C. § 2; *infra* text accompanying note 37.

Internet website must always be considered “written” for purposes of the FAA.

As an initial matter, when Congress passed E-SIGN in 2000, the dominant paradigm for Internet access was that of a computer user sitting at a desktop computer that was attached to a printer and a large monitor. But that paradigm no longer prevails. Small mobile devices capable of accessing the Internet wirelessly, virtually unknown when E-SIGN was enacted, are proliferating. This shift in the way that the Internet is accessed puts serious pressure on the assumptions underlying E-SIGN and should lead courts to apply E-SIGN with care.

Further, I argue that interpreting “written” to exclude at least some electronically displayed text from the scope of the FAA recalibrates the balance between state and federal arbitration law in an appropriate way and in an appropriate context. This is particularly true because it is not clear that the FAA was intended to cover consumer contracts in the first place and because online standardized consumer contracts raise a number of troubling issues that their written cousins do not.

This Article proceeds as follows: In Part I, I provide some background on the FAA, including the law prior to the FAA’s passage in 1925. In Part II, I describe how the Supreme Court has greatly expanded the scope and impact of the FAA at the expense of state law. In Part III, I discuss the FAA’s limitation to written provisions or written agreements to arbitrate and I argue that “written” should not be read to include text on Internet websites (at least in the consumer context). In Part IV, I discuss E-SIGN. I argue that E-SIGN does not require that “written” in the FAA be read to include all electronically displayed text. And in Part V, I argue that the interpretation of “written” that this Article urges would limit the FAA in ways consistent with Congress’ intent in passing the FAA.

A Concrete Example: The Proposed State Arbitration Law

Before I proceed to the body of the Article, I pause to present a simple draft of a state law relating to arbitration agreements. I am not advocating for passage of this law, which I will refer to as the “Proposed State Arbitration Law.” Instead, I will use it as a concrete example to illustrate various points throughout the Article.

The Proposed State Arbitration Law provides:

- (a) Arbitration provisions in consumer contracts that are not in interstate commerce must be conspicuous.
- (b) Arbitration provisions in consumer contracts that are formed over the Internet must be conspicuous.

I. BACKGROUND

A. *The Common Law Preceding the Passage of the FAA*

Understanding why Congress passed federal arbitration legislation in 1925 requires some brief background on the common law at that time. The common law severely hindered the enforcement of agreements to arbitrate future disputes. These agreements were largely ineffectual because they could not be enforced in equity.⁷ Instead, if a dispute arose, a party to a contract with an arbitration agreement could sue in court even if the dispute was within the scope of the arbitration provision.⁸ The existence of the arbitration agreement could not be asserted as a bar to the action.⁹ Further, any party to a contract that included an arbitration agreement could revoke the arbitration agreement at any time before an award was entered.¹⁰ These common law rules, which were sometimes referred to collectively as the rule of revocability,¹¹ had been “almost universally accepted” by American jurisdictions in the early twentieth century.¹²

This hostility towards arbitration agreements was explained in a variety of ways. One explanation was the “expressed fear on the part of the courts that arbitration tribunals [lacked] the means to give full or proper redress” to an aggrieved party.¹³ Another explanation was that the common law rules were designed to protect stronger parties from taking away the rights of weaker ones.¹⁴ Others explained the hostility as

7. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 16-17 (1924) [hereinafter *Joint Arbitration Hearings*] (statement of Julius Henry Cohen, Member, American Bar Association Committee on Commerce, Trade, and Commercial Law; General Counsel, New York State Chamber of Commerce); S. REP. NO. 68-536, at 2 (1924) (“[I]t is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in the bar of the action . . .”).

8. *See* S. REP. NO. 68-536, at 2.

9. *Id.*

10. *Id.*; *see also* WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS 45 (1930).

11. *See* STURGES, *supra* note 10, at 45 (explaining that “either or both of the[se] . . . rules are generally intended [by the term ‘revocable’]”).

12. *Id.*; *see also* S. REP. NO. 68-536, at 2.

13. S. REP. NO. 68-536, at 2.

14. *See Joint Arbitration Hearings, supra* note 7, at 15 (statement of Julius Henry Cohen, Member, American Bar Association Committee on Commerce, Trade, and Commercial Law; General Counsel, New York State Chamber of Commerce) (“[T]he real fundamental cause was that at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them”).

a result of judicial resistance to agreements that would “oust the courts of their jurisdiction.”¹⁵ But a number of courts simply enforced the common law rules because the rules had become so firmly established.¹⁶ In fact, there were quite a few opinions that articulated the view that the common law rules were neither just nor logical, but that enforced the rules nonetheless based only on the well settled nature of the common law rules.¹⁷ As Judge Cardozo observed, the doctrine of revocability had been criticized by many courts as “anomalous and unjust” and “was followed with frequent protest, in deference to early precedents.”¹⁸

B. Arbitration Reform: A State-Led Initiative

The drive against the common law rule of revocability was not a “top down” effort. Instead, it began in the states.¹⁹ Efforts, led primarily by the New York State Chamber of Commerce, to “break[] loose” from the common law resulted in the 1920 passage of an arbitration statute by the New York legislature.²⁰ The New York Arbitration Law, which was the “first of the American statutes seeking to make arbitration really effective,”²¹ stated that a “provision in a written contract to settle by arbitration a controversy thereafter arising between the parties . . . shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²² The New York statute declared “a new public policy” regarding arbitration and operated to “abrogate[] [the] ancient rule” that made arbitration agreements revocable.²³

15. STURGES, *supra* note 10, at 45 (internal quotation marks omitted).

16. S. REP. NO. 68-526, at 3 (“[E]stablished precedent has had its large part of course in perpetuating the old rules long after the courts themselves could no longer see that they were founded in reason or justice.”).

17. *See, e.g.*, U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007-12 (S.D.N.Y. 1915) (sharply criticizing the rule of revocability but upholding it due to the rule’s firmly settled nature); Henry v. Lehigh Valley Coal Co., 64 A. 635, 636 (Pa. 1906) (*per curiam*) (noting that it was “much to be regretted that agreements to arbitrate . . . should be excepted from the general law of contracts and treated as revocable by one party without consent of the other,” but upholding the rule of revocability as “too firmly settled to be changed without legislative authority”).

18. *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 292 (N.Y. 1921).

19. *See generally* J. P. Chamberlain, *The Commercial Arbitration Law*, 9 A.B.A.J. 523 (1923) (discussing the approaches taken by states in adopting arbitration enforcement legislation).

20. *Id.* at 524.

21. *See* Am. Eutectic Welding Alloys Sales Co. v. Grier, 108 N.W.2d 831, 837 (Mich. 1961) (Smith, J., dissenting) (footnote omitted).

22. New York Arbitration Law, ch. 275, 1920 N.Y. LAWS 803, *reprinted in* STURGES, *supra* note 10, at 92 (current version at N.Y.C.P.L.R. § 7501 (McKinney 1998)).

23. *Berkovitz*, 130 N.E. at 289.

Within a decade of New York's enactment of an arbitration law, a number of states followed suit and adopted similar statutes: New Jersey enacted its statute in 1923; Massachusetts and Hawaii²⁴ in 1925; California and Pennsylvania in 1927; Louisiana in 1928; and Arizona, Connecticut, New Hampshire, and Rhode Island in 1929.²⁵ In the midst of the passage of these state laws, the FAA, which followed along the lines of the New York statute,²⁶ was enacted in 1925.²⁷ The FAA, then, was not the shepherd leading the flock. It was just one of the sheep. The initiative and model for the FAA came from state law.

C. *The Passage of the FAA*

Largely at the urging of the American Bar Association, Congress enacted the United States Arbitration Act (as the FAA was originally titled).²⁸ The FAA was primarily passed to undo the rule of revocability and to put arbitration agreements on "the same footing" as other types of contracts.²⁹ According to the House Report accompanying the bill:

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.³⁰

The FAA was intended to deal with what the House Report describes as "an anachronism" in the law (i.e., the rule of revocability) that mandated that courts refuse to enforce "specific agreements to arbitrate."³¹ As the House Report notes, despite judicial criticism of the rule, "courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment."³² Therefore, the FAA

24. At the time, Hawaii was a territory, and not yet a state. Hawaii became a state in 1959. Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4.

25. STURGES, *supra* note 10, at 88.

26. S. REP. NO. 68-536, at 8 (1924).

27. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2000 & Supp. V 2005)).

28. See Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 & n.2 (1926). There are a number of excellent and detailed descriptions of the history surrounding the passage of the FAA. See, e.g., IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 15-101 (1992); Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 425-37 (1998).

29. H.R. REP. NO. 68-96, at 1-2 (1924); see also Harding, *supra* note 28, at 435.

30. H.R. REP. NO. 68-96, at 1.

31. *Id.*

32. *Id.* at 2.

“declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.”³³

D. Section 2: The Act's Primary Substantive Provision

The FAA achieved its purpose of putting arbitration provisions on the same footing as other contracts primarily through section 2 of the Act.³⁴ Section 2 provides in part that “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³⁵

The Supreme Court has described section 2 as the “primary substantive provision” of the FAA.³⁶ The first part of section 2, along with section 1 of the FAA,³⁷ “purport[s] to determine what arbitration agreements qualify” for coverage under the FAA.³⁸ That is, it covers “written provision[s]” to arbitrate disputes when such provisions are found in “contract[s] evidencing . . . transaction[s] involving commerce.”³⁹ Thus, the first part of section 2 describes the scope of the FAA and has been referred to by the Court as providing “the basic coverage authorization.”⁴⁰

One consequence of an arbitration agreement falling within the coverage of the FAA is that the agreement is then enforceable in the federal courts through the procedural mechanisms and rules set forth in the FAA.⁴¹ But there is a second, even more critical consequence (at least for purposes of the FAA's impact on state law) of an arbitration

33. *Id.* Similarly, the Senate Report also indicates that the legislation was motivated primarily by a need to undo the rule of revocability and to empower the federal courts to enforce arbitration agreements. S. REP. NO. 68-536, at 2 (1924).

34. *See* 9 U.S.C. § 2 (2000).

35. *Id.* Section 2 also applies to arbitration provisions in maritime transactions, but that matter is beyond the scope of this Article. *Id.*

36. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

37. 9 U.S.C. § 1. Section 1 defines some terms and exempts from the coverage of the FAA “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” *Id.*

38. Wesley A. Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 586 (1952).

39. 9 U.S.C. § 2.

40. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001).

41. For example, section 3 of the FAA requires a federal court to stay an action pending arbitration if the action is based on an issue that is covered by a qualifying arbitration agreement. 9 U.S.C. § 3. Under section 4, a federal court is required to issue an order “directing the parties to proceed to arbitration in accordance with the terms of the agreement.” *Id.* § 4.

agreement falling within the scope of section 2. Arbitration provisions that fall within the scope described by the first part of section 2 are subject to the last part of section 2. These provisions are “valid, irrevocable, and enforceable” under federal law,⁴² unless they are rendered unenforceable by a narrow category of state law—only “such grounds as exist at law or in equity for the revocation of any contract.”⁴³ I discuss the balance between federal and state arbitration law in the FAA in more detail in the next part of the Article.

II. ARBITRATION ASCENDANT: THE FEDERAL CRUNCH ON STATE LAW

Section 2 provides two points at which the balance between federal and state law can be calibrated. First, the scope language of section 2 could either be read broadly to encompass more arbitration agreements (thus increasing the federal role) or narrowly to encompass fewer arbitration agreements (thus increasing the state role).⁴⁴ Second, the savings clause could be read to permit either comparatively more or less state regulation of arbitration provisions.⁴⁵ At both these points, the Supreme Court has acted to increase the federal role at the expense of the state role. In Part II.A, I describe how the Court has read the language of the FAA to expand the Act’s scope. In Part II.B, I describe how the Court has read the savings clause of section 2 to minimize the ability of state law to regulate arbitration provisions.

A. *The Supreme Court’s Expansion of the Scope of Section 2*

The Supreme Court has, over the past few decades, systematically read the language of the scope portion of section 2 (and relevant language in section 1) to expand the range of arbitration agreements falling within the scope of the FAA. As noted above, section 2 applies to “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction.”⁴⁶

The FAA defines “commerce,”⁴⁷ but does not define the other key terms in section 2. It is, accordingly, left to the courts to determine the meaning of terms such as “involving commerce,” “transaction,” “written

42. *Id.* § 2.

43. *Id.*

44. *See generally id.*

45. By “savings clause” I mean the part of the statute that provides for the applicability of some, but not all, state laws: “save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.*

46. *Id.*

47. *Id.* § 1 (defining commerce as “commerce among the several States or with foreign nations”).

provision,” and so forth. In the following subsections I describe how the Court has consistently read these and other terms quite broadly. Thus, most of the space within which states could have operated has already been put beyond the reach of state law. One key exception is the reference to a “written provision,” which remains one of the last opportunities to maintain meaningful space for state law.

Before addressing specific language from section 2, it may first be useful to describe the two key Supreme Court precedents that laid the foundation for much of the expansive reading of section 2. First, in 1967, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court held that the FAA, and not state arbitration law, was applicable to cases that were in federal court due to diversity jurisdiction.⁴⁸ Second, and of signal importance, was the Court’s 1984 decision in *Southland Corp. v. Keating*.⁴⁹ There, the Court held that despite “ambiguities” in the legislative history,⁵⁰ Congress had intended to create a body of substantive law and that section 2 was applicable in state courts, as well as federal courts.⁵¹ The holding in *Southland* was a large step towards reducing the state role in regulating arbitration provisions. Whether that decision was correct or not has been ably addressed by many others⁵² and is not the subject of this Article.

Prima Paint and *Southland* set the stage for the further expansion of the role of the FAA relative to state law. Parts II.A.1-4 below each focus on specific language that has already been expansively interpreted by the Court. Part II.A.5 focuses on a decision by the Court to read narrowly

48. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404-05 (1967).

49. 465 U.S. 1 (1984).

50. *Id.* at 12. In her dissent, Justice O’Connor argued that not only is the legislative history unambiguous, but that such legislative history demonstrates that Congress explicitly intended that the FAA would not be applicable to state courts. *Id.* at 25-31 (O’Connor, J., dissenting).

51. *Id.* at 11-16 (majority opinion).

52. Compare Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 189-92 (2002) (arguing that the Court decided *Southland* incorrectly and that the Court ignored relevant legislative history and other material in reaching its decision), Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 864-65, 867 (2002) (arguing that the Court’s statutory interpretation left “much to be desired” and that *Southland* was “wrongly decided”), and David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 554-58 (2004) (arguing, among other things, that the conclusion in *Southland* that the FAA created substantive law was flawed), with Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002) (arguing that there is significant evidence surrounding the passage of the FAA to support the position that the FAA was intended to apply in the state courts).

an exception to section 2 (a reading that also ensures an expansive scope for the FAA).

1. "Involving Commerce"

The Court has expansively interpreted the phrase "involving commerce." In *Allied-Bruce Terminix Cos. v. Dobson*, the Court noted that the language Congress typically uses to signal its intent to exercise its full power under the Commerce Clause is "affecting commerce," not "involving commerce."⁵³ Thus, the Court was faced with the question of whether "involving commerce" was synonymous with "affecting commerce," or whether it meant something narrower.⁵⁴

The Court, after examining the "language, background, and structure" of the statute, concluded that the phrase "involving commerce" is "broad" and was intended as "the functional equivalent of 'affecting' commerce."⁵⁵ The Court noted, for example, that a 1933 dictionary indicated that "involve" and "affect" can have approximately the same meaning.⁵⁶ Additionally, the Court noted that the FAA's legislative history indicated an "expansive congressional intent" when it comes to the reach of the statute.⁵⁷ And the broader interpretation was, in the Court's view, "more consistent with the Act's basic purpose, to put arbitration provisions on 'the same footing' as a contract's other terms."⁵⁸ In reaching the conclusion it did, the Court put a great deal of potential space beyond the reach of state law.⁵⁹

In her concurring opinion, Justice O'Connor predicted that the Court's holding in *Allied-Bruce Terminix*, when coupled with the decision in *Southland* that section 2 applied to the states, would "displace many state statutes carefully calibrated to protect consumers . . . and state

53. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995).

54. *Id.* at 273-74.

55. *Id.*

56. *Id.* at 274 (citing 5 OXFORD ENGLISH DICTIONARY 466 (1st ed. 1933)).

57. *Id.*

58. *Id.* at 275 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

59. *See id.* at 272-73 (noting that by adopting a broader interpretation of the language in section 2, the Court was declining to "carv[e] out an important statutory niche in which a State remains free to apply its antiarbitration law or policy"). The Court's subsequent decision in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003), demonstrates how little space the Court's broad interpretation of "involving commerce" leaves for the states. *Alafabco* involved the question of whether certain debt restructuring agreements between an Alabama lending institution and an Alabama fabrication and construction company were transactions involving interstate commerce. *Id.* at 53. The Court held that they were. *Id.* at 56-58. The Court stated that it was "perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce'—that is, 'within the flow of interstate commerce.'" *Id.* at 56 (quoting *Allied-Bruce Terminix*, 513 U.S. at 273).

procedural requirements aimed at ensuring knowing and voluntary consent.”⁶⁰ Justice O’Connor’s prediction was accurate, as I discuss later in the Article.⁶¹

2. “Evidencing a Transaction”

In addition to addressing the meaning of “involving commerce,” the Court in *Allied-Bruce Terminix* also addressed the meaning of the language “evidencing a transaction,” and again chose a broader over a narrower interpretation. The Court was faced with the question of whether “evidencing a transaction” in interstate commerce means the relevant transaction must merely have in fact involved interstate commerce (what the Court referred to as the “commerce in fact” interpretation) or whether the parties, at the time they entered into the contract, must have actually contemplated substantial interstate activity.⁶² The Court found the choice a close one, but concluded that the broader “commerce in fact” interpretation was “more faithful to the statute.”⁶³ The Court again selected the interpretation likely to place more agreements within the scope of section 2.

3. “Transaction”

In its 2001 decision *Circuit City Stores, Inc. v. Adams*, the Supreme Court rejected a narrow reading of the word “transaction” in favor of a broader and more encompassing one.⁶⁴ In *Adams*, the Court addressed the enforceability of an arbitration provision in an employment contract.

The former employee argued that the word “transaction” in section 2 extended “only to commercial contracts” (that is, to “commercial deal[s] or merchant’s sale[s]”) and did not include employment contracts.⁶⁵ The Court rejected this argument and held that “transaction” should not be interpreted so narrowly.⁶⁶

60. *Allied-Bruce Terminix*, 513 U.S. at 282 (O’Connor, J., concurring).

61. See discussion *infra* Part II.B.

62. *Allied-Bruce Terminix*, 513 U.S. at 277-78.

63. *Id.* at 280.

64. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-15, 119 (2001).

65. *Id.* (quoting *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (1999)) (alterations in original).

66. *Id.* at 113-19. The Court noted that reading “transaction” in the way suggested would render superfluous the language in section 1 excepting from coverage of the FAA “contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce.” 9 U.S.C. § 1 (2000), *quoted in Adams*, 532 U.S. at 113. The Court also noted it had previously required the enforcement of an arbitration provision in a dispute that did not arise from a “commercial contract.” *Adams*, 532 U.S. at 113 (“The proffered interpretation of ‘evidencing a transaction involving commerce’ . . . would be inconsistent with *Gilmer v. Interstate/Johnson Lane Corp.*, where we held that

The former employee made a second argument that focused on an exception to the FAA's coverage.⁶⁷ The Court's disposition of that argument also enlarged the scope of the FAA, as I discuss later.⁶⁸

4. "Contract"

The Supreme Court recently gave an expansive reading to the word "contract" in section 2 as well. In its 2006 decision *Buckeye Check Cashing, Inc. v. Cardegna*, the Court addressed the specific question of "whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality."⁶⁹ Thus, the case did not directly address the state-federal balance. Nonetheless, the Court's holding removed still more space from the state sphere.

In *Buckeye Check Cashing*, members of a putative class claimed that their agreements with a lender violated Florida state lending and consumer protection law and that therefore the agreements were void ab initio.⁷⁰ The class members pointed out that the language in section 2 applies only to arbitration agreements that involve a "contract." They reasoned that "since an agreement void ab initio under state law is not a 'contract,' there is no 'written provision' in . . . a 'contract' to which [section] 2 can apply."⁷¹

The Court refused to read the word "contract" as narrowly as the class members urged. The Court focused on the reference in section 2 to challenges to arbitration provisions being made "upon such grounds as exist at law or in equity for the revocation of any *contract*."⁷² The use of the word "contract" in this context led the Court to conclude that "contract" refers not only to valid contracts but to "putative contracts" as well,⁷³ a reading that the Court described as "more natural" than the meaning urged by the class members.⁷⁴ The Court held that since this use of "contract" necessarily had to mean "putative contract," then "contract" must have that same meaning every time it is used in section 2.⁷⁵ The Court thus rejected the class members' argument that section 2

[section] 2 required the arbitration of [a] . . . claim . . . that did not arise from a 'commercial deal or merchant's sale.'" (citation omitted)). And, further, the Court noted that it had previously given an expansive reading to the language at issue in *Allied-Bruce Terminix, Id.*

67. *Adams*, 532 U.S. at 114.

68. See discussion *infra* Part II.A.5.

69. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442 (2006).

70. *Id.* at 443.

71. *Id.* at 447.

72. *Id.* (quoting 9 U.S.C. § 2).

73. *Id.*

74. *Id.* at 448 n.3.

75. *Id.* at 448.

was not applicable. Again, the Court removed more potential space from the state sphere through a broad reading of the language in section 2.

5. *Refusal to Broaden an Exception*

In *Circuit City Stores, Inc. v. Adams*, a case already discussed for its expansive reading of the word “transaction,”⁷⁶ a former employee argued that the arbitration provision in his employment agreement was not within the scope of the FAA because his employment agreement was exempted by section 1 of the FAA.⁷⁷ Section 1 exempts from FAA coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁷⁸ The former employee argued that the language “engaged in . . . interstate commerce” in section 1 should be read to mean that section 1 excludes from the FAA’s coverage all employment contracts for workers engaged in interstate commerce.⁷⁹ Such a broad reading would have had the effect of excluding from the FAA a large swath of employment contracts.

The Court rejected that argument. According to the Court, the text of the statute, interpreted through various canons of construction, did not support the former employee’s argument.⁸⁰ The Court held that the exemption does not apply to all employees engaged in interstate commerce. Instead, section 1 exempts only a narrow range of contracts: “only contracts of employment of transportation workers.”⁸¹ The Court thus read the language of the exception in a narrow way—a reading that increased the scope of the FAA.

B. *Minimal State Space Provided by the Savings Clause*

If an arbitration agreement falls outside of the FAA, such an agreement is subject to the full panoply of state law. If an arbitration provision falls within section 2 (as most arbitration provisions will, given

76. See discussion *supra* Part II.A.3.

77. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001).

78. 9 U.S.C. § 1 (2000).

79. 532 U.S. at 114.

80. *Id.* at 114-16.

81. *Id.* at 119. The Court also rejected the former employee’s argument that the Court’s position was untenable since the Court’s reading exempted from coverage those contracts “most involving interstate commerce, and thus most assuredly within the Commerce Clause power in 1925 . . . while those employment contracts having a less direct and less certain connection to interstate commerce” would be included within the FAA. *Id.* at 120. According to the Court, Congress simply wanted to make clear that transportation workers were to be governed by federal statutes other than the FAA. *Id.* at 120-21.

the discussion above), then it can still be regulated, to some degree, under state law. Pursuant to the savings clause, an arbitration provision within the scope of section 2 “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁸² The reference to “such grounds as exist at law or in equity for the revocation of any contract” is far from clear. The Court has interpreted that language to leave very little room for state regulation of arbitration provisions.

The FAA is silent on whether the “grounds as exist at law or in equity for the revocation of any contract” are state or federal. However, courts have assumed that the reference is to grounds under state law.⁸³ As the Court stated in *Doctor’s Associates, Inc. v. Casarotto*, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [section] 2.”⁸⁴ This purported state role is actually quite limited. Section 2, of course, disables the rule of revocability, which was an arbitration-specific rule permitting a party to unilaterally avoid enforcement of an arbitration provision. The key question is the degree to which the FAA disables other types of state regulation of arbitration provisions.

Section 2 preempts state laws that make arbitration provisions ineffective either generally or in specific contexts. For instance, in *Perry v. Thomas*, the Court held that section 2 preempted a California statute that provided that “actions for the collection of wages may be maintained ‘without regard to the existence of any private agreement to arbitrate.’”⁸⁵ The statute was deemed by the Court to be an impermissible effort by a state to “undercut the enforceability of arbitration agreements.”⁸⁶ The Court noted that section 2 established the balance between state law principles and federal common law, and that agreements to arbitrate that fall within the purview of section 2 are “valid, irrevocable, and enforceable as a matter of federal law” unless they are rendered unenforceable by a principle of state law.⁸⁷ But the principle of state law must not be one that is directed against arbitration provisions in particular. Rather, as the Court noted, “state law, whether of legislative

82. 9 U.S.C. § 2.

83. See Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in *ARBITRATION LAW IN AMERICA* 63, 83 (Edward Brunet et al. eds., 2006).

84. *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

85. *Perry v. Thomas*, 482 U.S. 483, 484 (1987) (quoting CAL. LAB. CODE § 229 (West 1971)).

86. *Id.* at 489 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)).

87. *Id.* at 492 n.9 (emphasis omitted).

or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport” with the savings clause of section 2.⁸⁸

Similarly, the Court in *Allied-Bruce Terminix* held that an Alabama statute that made “written, predispute arbitration agreements invalid and ‘unenforceable’” was preempted with respect to agreements within section 2.⁸⁹ Although that decision was relatively clear cut (the more difficult issue in the case was whether the transaction at issue was sufficiently in interstate commerce to fall within section 2⁹⁰), the Court’s reasoning and language were rather broad. The Court stated:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing” directly contrary to the Act’s language and Congress’ intent.⁹¹

Taken literally, this language seems to mean that although a contract containing an arbitration provision may be deemed unconscionable, the finding of unconscionability must have nothing to do with the fact that a provision at issue is an arbitration provision. Although at least one commentator has noted that this language “simply cannot mean what it sounds like,”⁹² lower courts cannot disregard the language or its import: arbitration provisions may be subject to state law, but such provisions are also largely insulated from the effect of any state law that regulates arbitration provisions *qua* arbitration provisions.

Building upon the language in these cases, the Court further increased the preemptive effect of section 2 in *Casarotto*.⁹³ There, the Court was faced with a Montana statute that provided: “Notice that a contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.”⁹⁴

88. *Id.*

89. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268-70 (1995).

90. See discussion *supra* Part II.A.1-2.

91. *Allied-Bruce Terminix*, 513 U.S. at 281.

92. Schwartz, *supra* note 52, at 562. The author notes that “a consumer contract may establish a reasonable sales price, but provide that future disputes will be arbitrated in Borneo before a panel of arbitrators chosen by the seller, with the consumer to pay a \$1 million forum fee to arbitrate his claim.” *Id.*

93. *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

94. *Id.* at 684 (quoting MONT. CODE ANN. § 27-5-114(4) (repealed 1997)).

The Court could have viewed the Montana statute as furthering a purpose of the FAA—that consensual arbitration agreements be enforced.⁹⁵ Instead, the Court held that the FAA preempted the Montana statute as applied to arbitration provisions within the scope of section 2. The Court held that state law may not “singl[e] out arbitration provisions for suspect status” by requiring any sort of heightened notice requirement for such provisions.⁹⁶ The Court found that the “‘goals and policies’ of the FAA” (primarily ensuring that private agreements to arbitrate are enforced according to their terms) were “antithetical” to the Montana statute.⁹⁷ The Court held that the Montana statute placed arbitration agreements “in a class apart” and was therefore “inconsonant with, and . . . preempted by” the FAA.⁹⁸

The Supreme Court recently confirmed that the FAA leaves very little room for state law. In *Preston v. Ferrer*, the Court addressed a California statute that gave a state administrative agency primary jurisdiction over certain disputes between talent agents and artists.⁹⁹ In *Preston*, the parties had entered into a contract that included an arbitration provision.¹⁰⁰ The issue before the Supreme Court was whether the administrative agency or an arbitrator should resolve a dispute that was arguably subject to the California statute.¹⁰¹ The Court held that “[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.”¹⁰²

These cases make clear that the space available to the states under the savings clause is extremely limited.¹⁰³ For instance, the Proposed State

95. See Brunet, *supra* note 83, at 69; cf. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 705-07 (1996) (arguing that Congress should amend the FAA to permit states to regulate arbitration provisions to ensure that consent to such provisions is knowingly given).

96. *Casarotto*, 517 U.S. at 687.

97. *Id.* at 688.

98. *Id.*

99. *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (citing California Talent Agencies Act, CAL. LAB.CODE § 1700 *et seq.* (West 2003 and Supp. 2008)).

100. *Id.* at 982.

101. *Id.* at 983.

102. *Id.* at 987.

103. Others have ably discussed how unconscionability can function as a possible check on particularly one-sided or onerous arbitration provisions. Some commentators have hailed the increased use of unconscionability. For instance, Professor Jeffrey Stempel has argued that the use of unconscionability to regulate onerous arbitration provisions is appropriate and should be encouraged and expanded. See generally Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004)

Arbitration Law may seem like an innocuous statute that merely imposes a conspicuousness requirement on arbitration provisions within its scope. But like the Montana statute in *Casarotto*, the Proposed State Arbitration Law imposes a special notice requirement on arbitration provisions and would be preempted to the extent that it applies to contracts within the scope of section 2. The Proposed State Arbitration Law would not be preempted insofar as it applies to arbitration provisions in purely intrastate contracts (since *Casarotto* only applies to arbitration provisions within the scope of section 2). But the Proposed State Arbitration Law has more ambition than just to apply to intrastate contracts—it purports to apply to consumer Internet contracts as well. Whether those contracts are within the scope of the FAA (i.e., whether they are “written provisions” to arbitrate) is the subject of the next part of the Article.

III. THE “WRITTEN” LIMITATION IN THE FAA

As noted above, most of the key language in section 2 has already been construed by the Supreme Court in a fashion that expands the scope of the FAA at the expense of state law. But the Court has not yet construed the FAA’s limitation to “written provision[s]” to arbitrate. Interpreting that language to exclude consumer Internet transactions is one of the last ways through which meaningful space can be reserved to the states for the regulation of arbitration provisions. This Part of the Article argues that the term “written provision” should be construed to exclude arbitration provisions in electronically displayed text in consumer contracts formed over Internet websites. In Part III.A, I provide an overview of the FAA’s limitation to written arbitration provisions. In Part III.B, I describe some crucial differences between electronically displayed text on a consumer website and written text on paper. I also describe the only case of which I am aware that fully and directly addresses whether “written” in the FAA includes electronically displayed text. In Part III.C, I address the critical question of the underlying purpose of the FAA’s “written” limitation. I argue that non-

(“[A] reasonably vigorous unconscionability doctrine remains an appropriate and important means for courts to prevent arbitration abuses.”). On the other hand, Professors Stephen Broome and Susan Randall see the use of unconscionability as evidencing a renewed (and FAA-prohibited) return to singling out arbitration provisions for hostile treatment. See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44-48 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194-96 (2004). But the regulation of one-sided arbitration provisions is not the focus of this article. Instead, I am focused on the ability of states to regulate arbitration provisions as arbitration provisions.

written arbitration provisions were excluded from the coverage of the FAA because they do not sufficiently register intent or seriousness. Consumer contracts formed over the Internet are the modern day equivalent of non-written arbitration provisions in 1925. Both forms of agreement are notable for the casual way in which they are formed and their inability to impart seriousness or register choice. Accordingly, arbitration provisions in consumer contracts formed over the Internet should generally be excluded from the scope of the FAA.

A. Overview of the FAA's Limitation to Written Arbitration Provisions

Section 2, as noted, limits the FAA's coverage to written provisions. Additionally, section 3 refers to the necessity of an "agreement in writing" to arbitrate¹⁰⁴ and section 4 speaks of a "written agreement for arbitration."¹⁰⁵ Neither "writing" nor "written" are defined in the FAA. Courts have required relatively little in the way of formality beyond the existence of an arbitration provision embodied in written form. For example, "the overwhelming weight of authority supports the view that no signature is required to meet the FAA's 'written' requirement."¹⁰⁶ Many courts have also indicated that the terms of the contract may be included in multiple documents and need not be contained in a single integrated writing.¹⁰⁷ And at least one court has held that the overall contract need not be in writing, so long as the arbitration provision is in writing.¹⁰⁸ Even a draft of an agreement may qualify as a written agreement.¹⁰⁹ The lack of formalities beyond the written form, however, should not be seen as diminishing the importance of the written form

104. 9 U.S.C. § 3.

105. *Id.* § 4.

106. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005); *see also Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) (noting that "it is well-established that a party may be bound by an agreement to arbitrate even absent a signature," and that "while the [FAA] requires a writing, it does not require that the writing be signed by the parties"); *M & I Elec. Indus., Inc. v. Rapistan Demag Corp.*, 814 F. Supp. 545, 547 (E.D. Tex. 1993) ("Neither the [FAA] nor the courts require that written agreements be signed or subscribed by the parties.").

107. *Caley*, 428 F.3d at 1369 (citing case law indicating that it is not necessary that there be a single integrated writing); *Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc.*, 334 F. Supp. 1013, 1019-20 (S.D.N.Y. 1971) (holding that a "written provision" under section 2 is not limited to "a contract completely integrated in a single written agreement").

108. *Durkin v. Cigna Prop. & Cas. Corp.*, 942 F. Supp. 481, 487 (D. Kan. 1996) (rejecting the argument that because the relevant employment agreement was at-will and unwritten, the arbitration provision was not within section 2 of the FAA, and instead holding that all that is necessary is that the arbitration provision itself be in writing).

109. *Herlofson Mgmt. A/S v. Ministry of Supply, Kingdom of Jordan*, 765 F. Supp. 78, 85 (S.D.N.Y. 1991).

limitation. To the contrary, it makes it all the more important that courts be scrupulous with respect to the written form limitation, since that limitation is the only form-based one in the statute.

B. Words on an Internet Website Are Text, but Not Written Text

1. Thinking About Electronically Displayed Text

Words displayed on an Internet website are text. They are not, however, written text. We are at a transitional stage in how we think and speak about on-screen text. It may have seemed, early on, like the closest (or only) analogy to text on a screen was written text. Lacking a sufficient vocabulary, we fell back on the familiar concept of writing. We are now, however, becoming more comfortable speaking in different ways about the act of “writing” electronically. “Texting”—sending messages through a cell phone—is now ubiquitous,¹¹⁰ as is “instant messaging.” If the problem is that we lack a word or phrase to describe the text on an Internet website then let me propose “electronically displayed text,” as a more accurate way to describe on-screen text than as “written.”

Having said that, I readily concede that I “wrote” this Article, even though I composed it entirely on a computer. Typing on a computer keyboard is so similar to typing on a typewriter (which I am old enough to have done) that to call this act anything but writing would be forced. But how text is created is less important, in the consumer context, than how it is received and perceived. An exchange of e-mails between sophisticated business entities might be deemed both to have been written and to be in writing. But even though the words on an Internet website were probably “written” by their author, they are, when viewed by a consumer, neither written nor in writing. In fact, they are no more written or in writing than they would be if someone were to recite those written terms verbally to a consumer over the phone. Text that has been written can be read, it can be written, or it can be displayed electronically. Text on an Internet website is displayed electronically. I am not trying to denigrate electronically displayed text or to romanticize written text. I am only pointing out that we are beginning to understand that written text and electronically displayed text differ in important ways. I discuss some differences between these types of text in the following section.

110. See Alan Stewart, *Text Messaging: WAN2TLK*, in *ENCYCLOPEDIA BRITANNICA 2006 BOOK OF THE YEAR* 165, 165 (Karen Jacobs Sparks ed. 2006) (“In 2005 some 45 billion text messages were expected to be sent by cellular phone users in the United States.”).

2. Some Differences Between Written Contract Terms and Electronically Displayed Contract Terms

In this part of the Article, I describe a number of differences between written text on paper and electronically displayed text on a website. As I will argue in Part III.C, these differences are relevant for purposes of the FAA.

a. Materiality and Tangibility

The most obvious difference between written text on paper and electronically displayed text on a website is that the former is in material and tangible form. This characteristic is a key component of a writing. An entry from a dictionary roughly contemporaneous with the passage of the FAA begins the first definition of “writing” as follows: “The act or art of forming letters and characters on paper, wood, stone, or *other material*.”¹¹¹ A portion of the first definition of “write” also conveys this sense of materiality: “To set down, as legible characters; to form the conveyance of meaning; to inscribe *on any material* by a suitable instrument.”¹¹²

The word “written” is also understood in the commercial community as incorporating an aspect of materiality. Although the UCC was not officially promulgated until the 1950s, drafting began in 1940, relatively close to the passage of the FAA.¹¹³ The general definition of “writing” adopted in the UCC hinges in large part on tangibility and provides that “‘written’ or ‘writing’ includes printing, typewriting or any other intentional reduction to *tangible* form.”¹¹⁴

The revised version of the UCC retains that definition of “writing” while adding a separate term, “record,” that is sufficiently broad to incorporate electronic documents. A “record” can be information that is either “inscribed on a tangible medium” (in other words, a writing), or information that is “stored in an electronic or other medium and is retrievable in perceivable form” (in other words, in electronic, and presumably non-written, form).¹¹⁵ While “[a]ny ‘writing’ is a record,”¹¹⁶ the converse is not true, and commercial law continues to recognize that “writings” are tangible.

111. WEBSTER'S DICTIONARY 1669 (1913 ed.) (emphasis added).

112. *Id.* (emphasis added).

113. See Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275, 277 (1998) (describing the history of the drafting of the UCC).

114. U.C.C. § 1-201(46) (2002) (amended 2003) (emphasis added).

115. See U.C.C. §§ 1-201(b)(31), § 9-102(a)(69) (2007).

116. *Id.* § 9-102 cmt. 9a.

Consumer contracts formed on a website lack the materiality and tangibility fundamental to a writing. While providing contract terms in a material, tangible form has some potential to signal to the consumer that important contract terms are contained within, providing contract terms in a more ethereal form likely does not have this same impact.

Further, the sheer length of a contract is affected by the intangible nature of electronically displayed text. Professor Vincent Gautrais notes that “sellers who propose electronic contracts have a tendency to make them very long.”¹¹⁷ When it comes to a “physical medium,” like paper, parties have at least two incentives to keep the contract terms to a relative minimum: extensive terms give rise to a cumbersome multi-page document, and they also give rise to higher publication costs.¹¹⁸ In contrast, “[i]n an electronic medium, there are no financial limitations in making a document available to the public.”¹¹⁹ There is a difference between an arbitration provision among ten short contract terms and one among forty lengthy ones. Further, in the paper world we think in terms of pages. A consumer presented with dozens of terms might begin to feel some creeping concern and ask, “I wonder why this contract for a computer is twelve pages long?” But on a website, even the longest contract can be scrolled through in moments without the user realizing just how many equivalent pages of text are whisking by.

Further, a paper contract is at least a self-contained universe and is, for the most part, clearly a contract. There are exceptional cases in the world of paper contracting, of course. The Restatement (Second) of Contracts identifies a number of different documents that are of potential concern in that they have both a contractual and non-contractual component: “baggage checks or automobile parking lot tickets,” as well as “invoices” and “instructions for use.”¹²⁰ For provisions in such dual use documents to be binding, the consumer must have reason to know that the document is contractual in nature.¹²¹ But the exception is the norm on a website. An Internet website is typically a jumble of often distracting information and serves a number of different purposes, leading Professor Russell Korobkin to describe the website contract as a “uniquely modern analog of the claim check.”¹²² Although there may be something labeled “terms and conditions,” the distinction

117. Vincent Gautrais, *The Colour of E-consent*, 1 U. OTTAWA L. & TECH. J. 189, 196 (2003-2004).

118. *Id.*

119. *Id.*

120. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. d (1981).

121. *Id.*

122. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1268-69 (2003).

between contract and non-contract is far from clear. The problem is exacerbated by the fact that there are as yet no “set standards regarding the placement of contractual clauses” in electronic contracts.¹²³

The durability of the medium containing text is also relevant. Paper is not indestructible, of course, but after a transaction is complete a consumer maintains a more or less permanent record of that to which the consumer has agreed. Such retention sends a message. It signals a consumer that the consumer has entered into a potentially important and legally binding agreement.

Additionally, retention of the contract terms also provides the opportunity for post-transaction review of the contract terms. Such post-transaction review is potentially important. It provides a consumer with the opportunity to review terms at the consumer’s leisure, to have second thoughts about a transaction (and possibly undo it through a return option), or to decide not to deal with a particular seller in the future based on those terms. It also enables a consumer to readily determine the scope of the consumer’s agreement if a dispute arises.

Electronically displayed text is theoretically permanent but, as a practical matter, fleeting. That is, some server somewhere probably records every key stroke and every contract term ever agreed upon. And a consumer does have the opportunity to print up or store contract terms. But the likelihood of that happening cannot be very high. From the point of view of the consumer, once an “I accept” icon has been clicked, the terms are gone from the consumer’s life forever.

Whereas post-transaction retention of written contract terms signals the importance of the transaction, the fleeting nature of a consumer internet transaction sends just the opposite signal. Further, the benefits of post-transaction retention described above are lost when the consumer is not automatically provided with a material and tangible record of the transaction.

b. Methods of Assent

The methods of assent in the world of paper contracting are fairly well understood, whether such assent occurs through a symbolic act, such as signing, or through conduct. Assent in the world of electronically displayed text, usually registered through clicking on icons, is far less understood.

Indeed, the concept of assent, already more theoretical than real in the world of mass-market written contracts, is strained even further in the world of online contracting which led Professor Charles Knapp to refer to the standardized terms in electronic contracts as “[s]tandardized forms

123. Gautrais, *supra* note 117, at 196.

on steroids.”¹²⁴ Professor Knapp observes that signing a written contract tends to be a “one-time action” in the making of an individual contract and thus both demonstrates that consent is being given and impresses on the user the significance of the user’s action.¹²⁵ In contrast, “on-line transactions typically involve a whole series of clickings and typings to get from start to finish; whether any particular one of those has the kind of symbolic significance equal to the signing of one’s name on a document seems . . . extremely dubious.”¹²⁶ Additionally, Professors Robert Hillman and Jeffrey Rachlinski, although generally satisfied that electronic contracting requires no special contract rules, have observed that “e-consumers” may not fully appreciate the significance of a “mouse click” as compared to the significance of signing their name on a piece of paper.¹²⁷

The ability of electronically displayed text in a consumer transaction to impart a sense of seriousness is also impaired by the fact that consumers typically go on-line as opposed to going to a brick and mortar store with the hope and expectation of saving time.¹²⁸ Professors Hillman and Rachlinski note that, “[b]ecause of their relative youth and their frequent use of the Internet to save time, e-consumers might be a little too eager to complete their transactions.”¹²⁹ Such users “may not pay attention to the legal concerns addressed in the boilerplate” and “have become accustomed to speed and instant gratification when using the Internet.”¹³⁰ And these users, described by Professors Hillman and Rachlinski as “click-happy,” may simply fail to investigate the standardized terms, including any arbitration provisions, at all.¹³¹ The fact that consumers are expecting a quick process (coupled with the anonymity of an online transaction) also affects the extent to which the electronic contracting process can and does register any sort of knowing or serious choice or intent.

c. Consistency and Uniformity

A mass market written consumer contract will be consistent from consumer to consumer. But this is not true of electronically displayed

124. Charles L. Knapp, *Opting Out or Copping Out? An Argument for Strict Scrutiny of Individual Contracts*, 40 LOY. L.A. L. REV. 95, 113 (2006).

125. *Id.* at 113 n.71.

126. *Id.*

127. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 481 (2002).

128. See Gautrais, *supra* note 117, at 196; Hillman & Rachlinski, *supra* note 127, at 479.

129. Hillman & Rachlinski, *supra* note 127, at 479.

130. *Id.*

131. *Id.* at 480 (internal quotation marks omitted).

text. There are a number of variables as to how a consumer will view text on a website. The size of the screen, the resolution, and the browsing program will all affect how electronically displayed text will appear to a consumer. Thus, contract terms viewed on a 21-inch monitor may convey some sense of seriousness. Terms viewed on a tiny mobile device may convey instead only a sense of informality and casualness.

Further, one concern in general when it comes to standardized terms is that sellers of consumer goods and services will expend considerable resources to determine how to present arbitration provisions in a way that these provisions will not be fully registered or appreciated by the consumer.¹³² A website provides almost infinite possibility for this type of mischief. Sellers on a website have a large number of ways in which they can highlight or downplay an arbitration provision—everything from the use of hypertext links to the means of navigating the website—that are not available in the world of paper contracting. Consider, for example, that research suggests that when it comes to navigating text on a screen, “[p]aging is apparently superior to scrolling in terms of both performance and user preference. One advantage of paging is that incidental memory for location within a page may facilitate processing.”¹³³ Readers can conduct their own surveys, but I have found that websites invariably present standardized terms through a scrolling device, not through paging. Apparently, sellers have decided to use the more disorienting and less effective method for delivering contract terms, including arbitration provisions.

I am not arguing that electronically displayed text cannot be treated the same way as written text for many purposes. But written text and electronically displayed text are not the same. Whether electronically displayed text should be treated like written text depends on whether the differences between them are relevant in a given context. I argue in Part III.C that the differences are relevant in the context of the FAA’s limitation to written arbitration. I argue as well that consumer Internet contracting is the equivalent of oral contracting in 1925—it is the current “bottom of the barrel” of contracting seriousness and should be excluded from the coverage of the FAA.

132. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648-49 (2005) (“Some companies may even deliberately design their arbitration clauses in a manner geared to decrease the likelihood that the consumer will focus on the arbitration clause.”).

133. Paul Muter, *Interface Design and Optimization of Reading of Continuous Text*, in COGNITIVE ASPECTS OF ELECTRONIC TEXT PROCESSING 161, 169 (Herre van Oostendorp & Sjaak de Mul eds., 1996) (internal citations omitted).

3. In re RealNetworks, Inc., Privacy Litigation

One court has assessed whether “written” in section 2 includes electronically displayed text. *In re RealNetworks, Inc., Privacy Litigation* is the only case of which I am aware that directly discusses whether “written” in section 2 includes electronically displayed text.¹³⁴ Given the number of electronic contracts, this paucity of cases might seem odd. It is presumably the result of two things. First, the proliferation of electronic contracting (especially in the consumer context) is a relatively recent phenomenon. And, second, courts seem to have assumed that E-SIGN resolved the issue (although I argue to the contrary).¹³⁵ Because E-SIGN was passed in 2000, there was a narrow span of time within which the issue would have been deemed relevant. *RealNetworks* fell within that span.¹³⁶

RealNetworks was a class action suit in which the court assessed the enforceability of an arbitration provision that appeared on users’ computer screens before the users could download a software package over the Internet.¹³⁷ The court considered the argument that “[b]ecause the terms in the [FAA] must be given their plain meaning and do not explicitly allow for an ‘electronic’ agreement . . . an electronic communication cannot satisfy the writing requirement, but only a written one can.”¹³⁸

The court rejected this argument. The court looked to definitions of “writing,” “write,” and “written” in dictionaries that were roughly contemporaneous with the passage of the FAA.¹³⁹ For example, the court noted that the 1913 *Webster’s Dictionary* (to which I referred above in my discussion of materiality and the definition of “written”¹⁴⁰) defined “writing” in part as “[t]he act or art of forming letters or characters on

134. *In re RealNetworks, Inc., Privacy Litig.*, No. 00-C-1366, 2000 WL 631341, at *2-3 (N.D. Ill. May 8, 2000). Some courts have concluded that arbitration agreements in electronic form are “written” for purposes of the FAA without any meaningful discussion of the issue (and without any mention of E-SIGN). See, e.g., *Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1065-67 & n.2 (9th Cir. 2007) (apparently concluding that an arbitration provision posted on an Internet website was “written” because the court applied the FAA); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 603-04, 611 (E.D. Pa. 2007) (same).

135. See discussion *infra* Part IV.

136. *RealNetworks* was decided on May 8, 2000. *RealNetworks*, 2000 WL 631341, at *1-2. This was less than two months before E-SIGN was signed into law on June 30, 2000. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (codified at 15 U.S.C. §§ 7001-7031 (2000)).

137. *RealNetworks*, 2000 WL 631341, at *1.

138. *Id.* at *2.

139. *Id.* at *2-3.

140. See discussion *supra* Part III.B.2.a.

paper, wood, stone, or other material” to record or communicate ideas.¹⁴¹ The court was satisfied from the dictionary definitions it cited that “‘written’ does not exclude all electronic communications.”¹⁴² The court never explained what the relevant “material” is in an electronic contract, thus ignoring the feature of materiality that distinguishes written text from other types of text.¹⁴³

Moreover, the court’s holding is limited. The court merely held that “‘written’ [in section 2] does not exclude all electronic communications”¹⁴⁴ (a conclusion with which I agree, since e-mails between sophisticated parties may, under some circumstances, properly be viewed as “written” under the FAA). The court explicitly stated that it was not finding that all electronic communications should be considered “written,” but only that the communications before it should.¹⁴⁵

The court was persuaded that the on-screen arbitration provision should be considered written because of the “easily printable and storable nature” of the license agreement containing the arbitration provision.¹⁴⁶ The court brushed aside as “melodrama” arguments regarding the difficulty of saving and printing the license agreement in the absence of a clearly marked “save” or “print” icon.¹⁴⁷ First, the court noted, “the user can right click his mouse over the text of the License Agreement, select all, and copy and paste it onto any word processing program.”¹⁴⁸ The court continued, with some sarcasm: “Since using the right click function is too specialized for Intervenor, he even has the option to simply click and drag the cursor over the text of the License Agreement in order to highlight it and then copy and paste the License Agreement onto any word processing program.”¹⁴⁹ Additionally, the court advised that since the license agreement is automatically downloaded and saved to the user’s hard drive, “the user can then click on the License Agreement, listed separately as either ‘RealJukeBox License Agreement’ or ‘RealPlayer License Agreement,’ depending on the product, and easily print out either agreement from the file pull down menu.”¹⁵⁰ To me, none of that sounds quite as likely to occur as the court

141. *RealNetworks*, 2000 WL 631341, at *2 (quoting WEBSTER’S DICTIONARY (1913)).

142. *Id.*

143. *See supra* Part II.B.2.

144. *RealNetworks*, 2007 WL 631341, at *2.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

seems to assume. The words and letters floating around in cyberspace are capable of being reduced to a material form (just as is spoken language or text appearing on a television screen during a commercial), but even casual users of computers know electronically displayed text is quite unlikely to ever actually be put in material form by a consumer.

Further, the court's assessment of the ease and likelihood of printing seems to be premised on a world of desktop computers hooked up to printers. That was a reasonable premise to be working under in 2000. But since 2000 we have seen a switch from desktops to laptops (which are by definition mobile and thus not invariably attached to a printer), as well as the proliferation of handheld devices through which the Internet can be accessed.¹⁵¹ The likelihood of saving and printing has probably decreased markedly since *RealNetworks* was decided as we have moved away from the paradigm of a desktop computer hooked up to a printer.

Additionally, the court should have focused on the purpose underlying the restriction of the FAA's coverage to "written" agreements.¹⁵² That purpose should dictate whether a given electronic communication is "written" or not for purposes of the FAA. I discuss that purpose in more detail in the following section.

C. The Purpose of the Written Limitation

1. Critique of the "Statute of Frauds" Approach

In the view of some relatively recent courts and commentators, the FAA's limitation to written arbitration provisions was intended to ensure that only sufficiently evidenced agreements be enforced—in other words, "to protect parties who never agreed to arbitrate from dissembling

151. See discussion *infra* Part IV.B.

152. The court also arguably erred in a third way. When limiting state power to legislate, courts must be "absolutely certain" that Congress intended to extend its power into an area traditionally reserved to the states. See *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991); see also 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-28, at 1175-76 (3d ed. 2000) ("[The Court] require[s] that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end."). Consumer protection and the regulation of contracts are two such areas. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 156 (2006) (noting that "contract law, including consumer protection" is a "core area" that is "typically within the province of the states"). Justice Thomas has stated that in the absence of such certainty, the scope of the FAA should not be expanded. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 292-93 (1995) (Thomas, J., dissenting).

adversaries.”¹⁵³ The “written provision” language has thus been described as something akin to “arbitration’s ‘own peculiar and special’ statute of frauds.”¹⁵⁴ Courts seem simply to be looking for evidence that memorializes an agreement to arbitrate.¹⁵⁵ As one court put it, “evidentiary concerns” underlie the FAA’s limitation to writings: “the requirement of a writing is intended to permit enforcement of arbitration agreements only in the face of competent evidence of the agreement’s existence and scope.”¹⁵⁶ But these recent courts and commentators are assigning to the written limitation a role that it was likely not intended to serve.

In general, the “primary purpose” of a writing in a statute of frauds is “evidentiary, to require reliable evidence of the existence and terms of the contract and prevent enforcement through fraud or perjury.”¹⁵⁷ But the statute of frauds is the wrong analogy here. The writing limitation in the FAA is not designed merely to evidence intent. Instead, the limitation is designed to *register* intent.

First, the structure and language of the FAA show that something other than a statute of frauds was intended. A typical statute of frauds requires only that there be some evidence of an agreement—that the agreement or a “memorandum or note” of it be in writing.¹⁵⁸ The writing need not be the complete contract¹⁵⁹—it is enough that the memorandum

153. See, e.g., Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 *FORDHAM URB. L.J.* 167, 182 (1999) (arguing that the “written” limitation is not needed to protect these parties).

154. 1 MARTIN DOMKE, GABRIEL WILNER & LARRY E. EDMONSON, *DOMKE ON COMMERCIAL ARBITRATION* § 9:1, at 9-4 (3d ed. 2007) (citation omitted); see also Davis, *supra* note 153, at 182 (characterizing the limitation to written agreements as a “Statute of Frauds”).

155. See, e.g., *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1439-40 (9th Cir. 1994) (holding that an employee handbook providing for arbitration, along with letter from an employee requesting to proceed with the process outlined in the handbook, constituted “a writing memorializing an agreement to arbitrate” and hence satisfied the section 2 “written” requirement).

156. *Durkin v. Cigna Prop. & Cas. Corp.*, 942 F. Supp. 481, 487 (D. Kan. 1996); see also Davis, *supra* note 153, at 182 (arguing that if a litigant admits under oath that he entered into an arbitration agreement, there is no reason the agreement should not be enforced).

157. *RESTATEMENT (SECOND) OF CONTRACTS* § 131 cmt. c (1981); see also *Consolidation Servs., Inc. v. KeyBank Nat’l Ass’n*, 185 F.3d 817, 821 (7th Cir. 1999) (“The principal purpose of the statute of frauds is evidentiary.”); *Elec. Wholesalers, Inc. v. M.J.B. Corp.*, 912 A.2d 1117, 1123 (Conn. App. Ct. 2007) (“The primary purpose of the statute of frauds is to provide reliable evidence of the existence and the terms of the contract” (internal quotation marks omitted)).

158. 10 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 29:1, at 426 (4th ed. 1999).

159. See JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 74(A), at 378 (4th ed. 2001) (“The typical American statute of frauds does not require the writing evidencing

reasonably identifies the contract's subject matter, indicates a contract has been made, and "set[s] forth the essential terms of the contract with reasonable certainty."¹⁶⁰

The FAA is structured differently. First, section 2 makes clear that the arbitration provision itself must be in writing.¹⁶¹ Sections 3 and 4 clarify further that the writing is not merely evidence of the agreement but rather is the agreement itself. Section 3 refers to the necessity of an "agreement in writing" to arbitrate,¹⁶² and section 4 speaks of a "written agreement for arbitration."¹⁶³ The writing is not treated as evidence of the fact of an agreement. Instead, the writing *is* the agreement to be enforced by the court.¹⁶⁴ The very lack of a signature requirement shows that something other than a statute of frauds was intended. The FAA's applicability only to written agreements is not a statute of frauds designed to evidence a transaction and it should not be treated as such.

2. Registering Choice and Imparting Seriousness

If the FAA's "written" limitation is not intended to serve a primarily evidentiary function, then what is its purpose? There are not many clues. The statute does not define "written" or "writing." Professor Paul Sayre, writing nearly contemporaneously with the passage of the FAA, could discern "no useful purpose" for the limitation of coverage of the FAA to written agreements.¹⁶⁵ Nonetheless, the clues that do exist show that the written limitation is not one to be taken lightly and is intended to register a choice and to impart the seriousness of the contract term at issue.

Interestingly, the first draft of the FAA did not limit its coverage to written agreements, and instead included oral agreements within the scope of the FAA.¹⁶⁶ Congress therefore presumably contemplated but rejected this extremely broad scope for the FAA. The "written"

the contract to be intended by the parties as their complete or final statement of the contract. A memorandum of the contract will be sufficient.").

160. *Id.* § 74(B); cf. U.C.C. § 2-201(1) (2002) (amended 2003) ("A writing [evidencing a sale of goods] is not insufficient because it omits or incorrectly states a term agreed upon").

161. 9 U.S.C. § 2 (2000).

162. *Id.* § 3.

163. *Id.* § 4.

164. *See id.* (providing that arbitration is enforced according to the terms of the written agreement to arbitrate).

165. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 613 (1928).

166. *See* MACNEIL, *supra* note 28, at 85.

limitation was consciously added to the legislation,¹⁶⁷ indicating that Congress had in mind that arbitration provisions would only be enforced if something beyond the most basic and informal means of contracting was utilized by the parties.

The legislative history of the FAA gives some indication that the writing proviso was designed to ensure that only agreements in which the parties were registering a careful choice to select arbitration would be covered by the FAA. The Senate Report accompanying the bill, for instance, refers to the “justice . . . [of enforcing] arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into.”¹⁶⁸

Contemporaneous commentary also supports the proposition that the “written” limitation was intended to have real significance. A law review article co-authored by Julius Henry Cohen, who was one of the principal drafters of the FAA¹⁶⁹ and one of its most significant proponents,¹⁷⁰ notes that “[a]rbitration under the [FAA] depends upon a written instrument.”¹⁷¹ The writing thus serves as the parties’ mechanism for choosing arbitration under the FAA. Further, Cohen’s use of the word “instrument” is telling. “Instrument” connotes some degree of seriousness and materiality. Indeed, even as Article 9 of the UCC recognizes that many types of documents need not be in written form,¹⁷² it continues to require that to satisfy the Article 9 definition of “instrument,” a document must be “written” (i.e., in tangible form).¹⁷³

Cohen’s article goes on to liken arbitration clauses to “the promissory note, the bond and mortgage, or the will”¹⁷⁴—hardly examples of informal documents or documents that merely contain evidence of an agreement. A person signing a will or agreeing to a promissory note, bond, or mortgage is likely to understand that he is agreeing to a very specific (and serious) kind of a transaction or arrangement, something akin to a transfer of a property right. Entering into such an agreement registers a serious level of intent.

167. The language, which had not been included in the 1921 draft of the legislation, was included in the 1922 draft. *See id.* at 87.

168. S. REP. NO. 68-536, at 3 (1924).

169. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995).

170. *See Moses*, *supra* note 152, at 101-13 (discussing Julius Cohen’s role in the passage of the FAA).

171. Cohen & Dayton, *supra* note 28, at 281.

172. *See* U.C.C. § 9-102 cmt. 9a (2007) (“In many, but not all, instances, the term ‘record’ replaces the term ‘writing’ and ‘written.’”).

173. *Id.* § 9-102(a)(47) (defining “instrument” to mean “a negotiable instrument or any other writing” that meets the remainder of the definition).

174. Cohen & Dayton, *supra* note 28, at 281.

Similarly, Professor Wesley Sturges, who has been described as the “leading writer on the arbitration statutes,”¹⁷⁵ observed in a 1928 law review article discussing the FAA and various similar state statutes: “It should not be overlooked that the statutes which embrace future-disputes clauses . . . are predicated upon a written agreement of the parties. They do not ‘compel’ arbitration in absence of such agreement.”¹⁷⁶ The writing limitation thus appears to be designed to register choice, not merely to evidence it.

Satisfying the requirements of an arbitration statute also registers a choice in a somewhat different sense—a choice to proceed pursuant to statutory arbitration as opposed to common law arbitration. In a law review article by Professor Sturges and a student co-author, Richard Reckson, the authors note that state statutes similar to the FAA were not intended to displace common law arbitration.¹⁷⁷ Instead, these statutes simply added a second method of arbitration; parties are free to choose one or the other.¹⁷⁸ How is that choice exercised? According to the authors:

The parties’ first step in exercising their choice is of course their consummation of their arbitration agreement. If that agreement does not meet the statutory requirements generally it will not engage the statute. If they accomplish an arbitration agreement which does qualify under the statute it seems best to conclude that they have elected to arbitrate under the statute

. . .¹⁷⁹

The article notes that “as the parties’ agreement is the very warrant for their arbitration both at common law and under the statutes, so should their agreement be deemed the initial indicator in each case whether they have undertaken arbitration at common law or under the statute.”¹⁸⁰ In other words, compliance with the formal specifications in the statute is to be taken as a way of signaling a choice to proceed under a statute, instead of the common law.¹⁸¹

175. *Halvorson Mason Corp. v. Emerick Constr. Co.*, 745 P.2d 1221, 1224 (Or. 1987).

176. Wesley A. Sturges, *Arbitration Under the New North Carolina Arbitration Statute—The Uniform Arbitration Act*, 6 N.C. L. REV. 363, 370 n.7 (1928).

177. Wesley A. Sturges & Richard E. Reckson, *Common-Law and Statutory Arbitration: Problems Arising From Their Coexistence*, 46 MINN. L. REV. 819, 826 (1962) (“There is near consensus of American decisions on the precise point that the arbitration statutes of the different jurisdictions do not displace common-law arbitration.”).

178. *See id.* at 830.

179. *Id.* (footnote omitted).

180. *Id.* at 830-31.

181. *See* Wesley A. Sturges, *Arbitration Under the New Pennsylvania Arbitration Statute*, 76 U. PA. L. REV. 345, 350 (1928) (noting that, with respect to the writing requirement in the Pennsylvania arbitration statute, an agreement in writing gives rise to

In sum, Congress could have made the FAA applicable to all contracts, whether written or not, but chose not to do so. Instead, Congress determined that the most informal of methods of contract formation—oral—would not suffice to trigger the application of the FAA. A consumer contract formed on-line does not sufficiently register choice or convey formality and seriousness;¹⁸² it should not trigger the application of the FAA.

Further, given that the Court has held that state law can impose no enhanced notice requirements on arbitration provisions,¹⁸³ and given that section 2 imposes no formality beyond a written form, the “written” limitation is the only mechanism available to provide any sort of consumer protection under the FAA. It should, accordingly, be enforced with diligence.

IV. E-SIGN AND THE FAA “WRITTEN” LIMITATION

The FAA casts a shadow over state efforts to regulate arbitration. E-SIGN, in turn, casts its own shadow over efforts to regulate electronic commerce. In this section of the Article, I focus on E-SIGN. While I acknowledge strong arguments that E-SIGN requires that “written” in the FAA be read to include all electronically displayed text, I take a contrary position.

In Part IV.A, I provide a brief overview of E-SIGN and a brief discussion of the argument that E-SIGN mandates that “written” in the FAA include all electronically displayed text (an argument with which I disagree). In Part IV.B, I describe the crucial and relevant ways in which Internet access has changed since the passage of E-SIGN in 2000. Finally, in Part IV.C, I advance a number of arguments as to why E-SIGN does not invariably require that “written” in the FAA be read to include all electronically displayed text.

A. Overview of E-SIGN

E-SIGN was enacted in 2000.¹⁸⁴ The Act provides in part that for transactions in interstate commerce:

an inference of intent to proceed under statutory arbitration and an agreement not in writing gives rise to an inference of intent to proceed under common law arbitration rules).

182. See discussion *supra* Part III.B.2.

183. See discussion *supra* Part II.B.

184. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (codified at 15 U.S.C. §§ 7001-7031 (2000)). For a discussion and analysis of E-SIGN, see generally Mike Watson, Comment, *E-Commerce and E-Law; Is Everything E-Okay? Analysis of the Electronic Signatures in Global and National Commerce Act*, 53 BAYLOR L. REV. 803 (2001).

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to [an interstate] transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.¹⁸⁵

States have the ability to modify these provisions, subject to some fairly stringent constraints: the states may either adopt the Uniform Electronic Transactions Act¹⁸⁶ (UETA) or provide alternate procedures or requirements that meet certain guidelines set forth in E-SIGN.¹⁸⁷

The purposes of E-SIGN, according to the House Judiciary Committee Report accompanying the bill, are:

(1) to permit and encourage the continued expansion of electronic commerce through the operation of free market forces rather than proscriptive governmental mandates and regulations;

(2) to promote public confidence in the validity, integrity, and reliability of electronic commerce and online government under Federal law;

(3) to facilitate and promote electronic commerce by clarifying the legal status of electronic records and electronic signatures in the context of writing and signing requirements imposed by law;

(4) to facilitate the ability of private parties engaged in interstate transactions to agree among themselves on the terms and conditions on which they use and accept electronic signatures and electronic records; and

(5) to promote the development of a consistent national legal infrastructure necessary to support electronic commerce at the Federal and State levels within existing areas of jurisdiction.¹⁸⁸

There are strong arguments that E-SIGN requires that “written” and “writing” in the FAA be read to include all electronic contracts. To the extent that an arbitration provision in a consumer Internet contract is pushed outside of the scope of enforceability because it is in electronic and not written form, E-SIGN would seem to be implicated. Further,

185. 15 U.S.C. § 7001(a) (2000).

186. UNIF. ELEC. TRANSACTIONS ACT, 7A U.L.A. 225 (2002).

187. 15 U.S.C. § 7002.

188. H.R. REP. NO. 106-341, pt. 2, at 2-3 (1999).

some commentators have urged that E-SIGN was designed to create “parity” between electronic and written documents.¹⁸⁹

As an initial matter, I note that it is not entirely clear how the concept of “parity” plays out when it comes to legislation like the Proposed State Arbitration Law. States clearly have the ability to regulate arbitration provisions in written contracts in *intrastate* commerce,¹⁹⁰ and a state can mandate that such arbitration provisions be conspicuous.¹⁹¹ The Proposed State Arbitration Law is such legislation. The Proposed State Arbitration Law does create parity—it treats electronic arbitration agreements in consumer transactions the exact same way that it treats all written arbitration agreements in intrastate consumer transactions. Nonetheless, there seems to be something approaching consensus that E-SIGN requires that “written” in the FAA be read to include electronic contracts. Indeed, Professor Jean Braucher has stated that E-SIGN was largely intended to foreclose a narrow interpretation of “written” in the FAA.¹⁹² Professor Braucher has argued that the “need to make electronic contracts enforceable,” the supposed purpose of E-SIGN, was really just a “cover story” for various interested industries and trade groups.¹⁹³ According to Professor Braucher, one of the true purposes of these industries and trade groups in pushing for E-SIGN and UETA was to insure that courts not use the “written” language of the FAA as a simple way to avoid enforcement of arbitration provisions.¹⁹⁴

At least two courts have interpreted E-SIGN as requiring “written” in the FAA to include electronic contracts, although interestingly each court displayed ambivalence towards electronic contracting by ultimately refusing to enforce the arbitration agreement before it. In *Specht v. Netscape Communications Corp.*, the U.S. Court of Appeals for the Second Circuit assessed an arbitration provision in a software license agreement provided to users in downloadable electronic form.¹⁹⁵ The

189. Robert A. Wittie & Jane K. Winn, *Electronic Records and Signatures Under the Federal E-SIGN Legislation and the UETA*, 56 BUS. LAW. 293, 297-98 (2000) (discussing how E-SIGN creates parity between electronic and non-electronic signatures and documents).

190. See 9 U.S.C. § 2 (limiting the scope of the FAA to transactions in interstate commerce).

191. Cf. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“The FAA . . . displaces the Montana [notice] statute with respect to arbitration agreements covered by the Act.” (emphasis added)).

192. See Jean Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*, 2001 WIS. L. REV. 527, 528-29.

193. *Id.*

194. *Id.*

195. *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002).

court noted that “the parties [did] not dispute, nor could they,” that the arbitration agreement was a “‘written provision’ despite being provided to users in a downloadable electronic form.”¹⁹⁶ The matter, according to the court, “ha[d] been settled by” E-SIGN.¹⁹⁷

Similarly, in *Campbell v. General Dynamics Government Systems Corp.*, the U.S. Court of Appeals for the First Circuit assessed an arbitration agreement that had been provided to employees of General Dynamics through e-mail.¹⁹⁸ When a former employee sued the company, alleging that his firing had violated the Americans with Disabilities Act (ADA), General Dynamics argued that the arbitration agreement barred the lawsuit.¹⁹⁹ The former employee opposed General Dynamic’s motion to compel arbitration by arguing, first, that the “e-mail communication [containing the arbitration provision was] not a writing and, therefore, . . . did not satisfy the ‘written provision’” of section 2 of the FAA; and second, that the e-mail failed to give adequate notice of the arbitration agreement.²⁰⁰ The Court held that E-SIGN

definitively resolves the issue . . . as to whether an e-mail agreement to arbitrate is unenforceable under the FAA because it does not satisfy the FAA’s “written provision” requirement. By its plain terms, the E-S[IGN] Act prohibits any interpretation of the FAA’s “written provision” that would preclude giving legal effect to an agreement solely on the basis that it was in electronic form.²⁰¹

However, after concluding that E-SIGN requires that “written” be read to include contracts in electronic form, the respective courts in each of these cases went on to refuse to enforce the arbitration agreement at issue. And the refusal was, in both cases, for reasons directly related to the electronic format in which the respective arbitration agreements were presented. In *Specht*, the court determined that a “reasonably prudent” offeree would not have known of the license terms that included the arbitration provision.²⁰² The contractual nature of the website was not obvious, and computer users would have to have scrolled down on the computer screen to see the terms—something which they had no particular reason to do.²⁰³ The court concluded that “where consumers are urged to download free software at the immediate click of a button, a

196. *Id.* at 26 n.11.

197. *Id.*

198. *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 407 F.3d 546, 556 (1st Cir. 2005).

199. *Id.* at 549.

200. *Id.*

201. *Id.* at 556 (citations omitted).

202. *Specht*, 306 F.3d at 30.

203. *Id.* at 31-32.

reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.”²⁰⁴ Despite the court’s assertion that E-SIGN mandated a conclusion that the arbitration provision was a “written provision” even though in electronic form, the court refused to enforce the agreement for reasons directly relating to that electronic format. As the court noted, the transactional circumstances at issue could not “be fully analogized to those in the paper world of arm’s-length bargaining.”²⁰⁵

In *Campbell* the court also found the arbitration provision at issue unenforceable. As in *Specht*, the court’s reasons for refusing to enforce the agreement were directly related to the very nature of the electronic communication. The court noted that the enforceability of an agreement to arbitrate an ADA claim is determined by “whether, under the totality of the circumstances, the employer’s communications to its employees afforded ‘some minimal level of notice’ sufficient to apprise those employees that continued employment would effect a waiver of the right to pursue the claim in [court].”²⁰⁶ The court described this burden as “relatively light.”²⁰⁷ However, the court held that the e-mail communication at issue in *Campbell* did not meet that burden. The court noted that it could “easily . . . envision circumstances in which a straightforward e-mail, explicitly delineating an arbitration agreement,” could provide the requisite notice.²⁰⁸ But the court went on to observe that although e-mail was used for all manner of intracompany communication, the record did not “suggest that e-mail was a traditional means either for conveying contractually binding terms or for effectuating waivers of employees’ legal rights.”²⁰⁹ Thus, both *Specht* and *Campbell* demonstrate that E-SIGN does not prohibit consequences from flowing from the fact that a communication or document is in electronic form, nor does E-SIGN shield any particular electronic format from scrutiny.

B. Internet Access Has Changed Dramatically in Relevant Respects Since E-SIGN Was Enacted

E-SIGN made considerable sense given the prevailing assumptions about Internet access that existed at the time of E-SIGN’s passage in 2000. The basic paradigm was of a computer user sitting in front of a

204. *Id.* at 32.

205. *Id.*

206. *Campbell*, 407 F.3d at 555.

207. *Id.*

208. *Id.* at 555-56.

209. *Id.* at 557. The court also noted that the communication required no response from the employee to indicate receipt. *Id.* at 556-57.

desktop computer that was attached to a printer and a monitor. And the screens on those monitors were both improving in resolution and growing in size. For instance, in the mid- to late-1990s, monitor sizes were increasing, with fourteen-inch monitors giving way to larger seventeen- and nineteen-inch screens.²¹⁰ Laptops existed, of course, but wireless Internet access was comparatively rare, so that a person accessing the Internet was almost certainly sitting at a desk. In this environment, analogizing the Internet to the printed world was quite logical. First, the screens were impressively large (and growing). Second, accessing the Internet usually involved the seriousness of sitting at a desk. And third, the presumed access to a printer made creating a material and permanent document a simple and relatively easy-to-exercise option.

Even before the ink was dry on E-SIGN (or the pixels were formulated), the technological environment began to change rapidly, and in ways that put the basic premises of E-SIGN under serious pressure. While desktop computers dominated the market at the time E-SIGN was passed in 2000, by 2005 laptop and notebook computers were outselling desktop computers on a consistent basis,²¹¹ and the gap has only grown since.²¹² Mobile computing generally means smaller screens and significantly reduced access to a printer.

Additionally, the tail end of the twentieth century saw the introduction of a number of new devices for accessing the Internet that were quite different from the traditional desktop computer. One, introduced in 1998, was a telephone (landline, not cellular) through which the Internet could be accessed.²¹³ Its screen was only 7.4 inches, and was not of particularly good quality.²¹⁴ It was one marker, however, in the beginning of a trend.

The Internet can now be accessed through an astonishing array of devices. In late June, 2007, Apple introduced a cell phone with a small

210. Andy Santoni, *Monitor Suppliers Shifting to Larger Screen Sizes*, INFOWORLD, Sept. 15, 1997, at 31, 31.

211. Jonathan Sidener, *Lapping the Competition*, SAN DIEGO UNION-TRIB., July 25, 2005, at E1 (reporting that laptop sales increased from approximately forty-three percent of the retail market for computers in the second quarter of 2004 to approximately fifty-two percent of the market in the second quarter of 2005).

212. See Jay Greene & Cliff Edwards, *Desktops Are So Twentieth Century*, BUS. WK., Dec. 18, 2006, at 46, 46 (noting that for the twelve-month period ending in October, 2006, desktop sales dropped five percent while sales of laptops increased by thirty-five percent).

213. Howard Millman, *iPhone Easy to Grasp but Weak in Screen Quality*, INFOWORLD, Mar. 16, 1998, at 92, 92. To avoid confusion, I note that this device introduced in the late 1990s had an identical name—iPhone—to a different device introduced to much fanfare at the time of the writing of this Article—the Apple iPhone.

214. *Id.*

screen through which the Internet could be accessed.²¹⁵ Apple's cell phone, the iPhone, joined a number of other handheld devices that could access the Internet.²¹⁶ And a "new category of ultra-mini PCs . . . is threatening to make computers as portable as cell phones."²¹⁷

Further, in the late 1990's, the technology behind what were then known as "cellular modems" (through which the Internet can be accessed wirelessly) was still in its infancy.²¹⁸ The earliest such modem was introduced in 1995.²¹⁹ In the late 1990s, although the technology was improving, these devices were still "limited by technological drawbacks" such as the lack of standards for wireless data transmission, a high power consumption rate for the modems, and slow transmission speeds.²²⁰

In contrast to the state of affairs in the late 1990s, wireless Internet access is now ubiquitous and is being offered for free in a number of places (and projections show within a decade, half the country will have access to free wireless Internet service).²²¹ It may be that in the late 1990's the Internet was replicating the written world as its model. In 2008, the model is probably that of a cell phone (or something *sui generis*). The ability to store and print documents is no longer a central feature of the Internet experience, and the likelihood that documents in the context of consumer contracts will be reduced to hard copy is probably relatively small (and almost certainly decreasing).

Other trends that affect how consumers view electronic text were also only in their infancy at the time E-SIGN was drafted. The practice of "texting" through a cell phone did not take off in the United States until after 1998, and its popularity has grown enormously and very quickly.²²² This now ubiquitous form of communication, occurring on the very phones through which users will increasingly access websites on the Internet, is surely affecting the way consumers view "text" in cyberspace.

Neither of the two previously discussed cases in which the court held that E-SIGN applied to the FAA's "written" limitation had any need to

215. See Apple, iPhone Technical Specifications, <http://www.apple.com/iphone/specs.html> (last visited Feb. 21, 2008).

216. Readers can view any one of a number of manufacturers' websites to find an array of devices. See, e.g., Palm, Products, <http://www.palm.com/us/products/> (last visited Feb. 21, 2008) (listing several phones, hand held devices, and small computers that can be used for web browsing).

217. Lev Grossman, *The Hyperconnected*, TIME, Apr. 16, 2007, at 54, 56.

218. CHRISTOS J.P. MOSCHOVITIS, ET AL., HISTORY OF THE INTERNET 221 (1999).

219. *Id.*

220. *Id.* (describing the state of affairs in 1997).

221. Grossman, *supra* note 217, at 56.

222. Stewart, *supra* note 110, at 165. In June of 2001, approximately thirty million text messages were sent in the United States; in 2003, fourteen billion were sent; in 2004, twenty-five billion were sent; and in 2005, an estimated forty-five billion were sent. *Id.*

take into account the technological shift that has occurred since E-SIGN's passage. The complaint in *Specht* was filed in mid-2000, at the very height of the paradigm on which E-SIGN was based.²²³ Similarly, the relevant e-mail communication in *Campbell* occurred in early 2001 (and in a workplace setting).²²⁴ In other words, the assumptions underlying E-SIGN were still valid in each of these two cases. But those assumptions no longer hold true.

Congress acted precipitously, legislating based on a paradigm that was already beginning to recede and give way to the next one as E-SIGN was promulgated. By waiting, Congress could have permitted the states to try different approaches to dealing with issues raised by electronic contracting and changes in technology.²²⁵ Further, “[w]aiting would also have allowed e-commerce to develop, both giving free rein to nonlegislative solutions and clearly identifying whatever problems remained.”²²⁶ This does not, of course, mean that E-SIGN can be ignored.

However, it does mean that Congress should reconsider some aspects of E-SIGN, including the range of E-SIGN's applicability. Congress did explicitly except certain types of contracts from E-SIGN's coverage.²²⁷ The exceptions are to be revisited by the Secretary of Commerce.²²⁸ For example, the statute excepts from E-SIGN's coverage contracts governed by statutes or laws governing the “creation and execution of wills, codicils, or testamentary trusts,”²²⁹ contracts governed by statutes or laws governing various matters of family law,²³⁰ and contracts governed by UCC provisions on negotiable instruments and secured transactions.²³¹ The seriousness of arbitration provisions and the importance of the “written” limitation in the FAA make contracts under the FAA a logical and appropriate exception from E-SIGN's coverage, as well.

223. See Class Action Complaint at 1, *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (No. 00 Civ. 4871), 2000 WL 34500748 (complaint filed on June 30, 2000).

224. *Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 547-48 (1st Cir. 2005).

225. See Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 VAND. L. REV. 309, 361 (2002) (“Perhaps, given time, the courts and the state legislatures would have settled on a single successful formula for dealing with electronic signatures.”).

226. *Id.* at 362.

227. 15 U.S.C. § 7003 (2000).

228. *Id.* § 7003(c)(1).

229. *Id.* § 7003(a)(1).

230. *Id.* § 7003(a)(2).

231. *Id.* § 7003(a)(3) (exempting from E-SIGN all sections of the UCC except for those relating to sales and leases of goods).

Beyond providing a reason for an outright amendment of E-SIGN, the shifting technological paradigm also counsels that courts should be very cautious in applying E-SIGN where its applicability is uncertain. In the next section I turn to a number of arguments as to why courts should not interpret E-SIGN to mean that “written” in the FAA must include electronically displayed text in consumer Internet transactions.

C. E-SIGN Does Not Mandate That Electronically Displayed Text on a Website Be Deemed “Written” for Purposes of the FAA

In this section of the Article, I present three arguments that E-SIGN does not mandate that electronically displayed text on a website be deemed “written” for purposes of the FAA. The first argument deals with the scope of E-SIGN; the second argument deals with the proper application of E-SIGN; and the third argument deals with the consumer protection provisions of E-SIGN.

1. The FAA Does Not Require a “Writing”

E-SIGN appears to apply only to “requirement[s] that contracts or other records be written, signed, or in nonelectronic form.”²³² The FAA’s limitation to written arbitration provisions is not such a requirement. On first blush, the statement that the FAA does not require a writing may seem strange. It may seem strange on all subsequent blushes, as well. But the FAA no more requires a writing than it requires an arbitration provision be in interstate commerce. There are *consequences*, of course, that flow from whether a provision is in writing or not (just as there are consequences that flow from whether a provision is in an interstate as opposed to an intrastate transaction). An arbitration provision that is written and in interstate commerce is within the scope of section 2. It is subject to enforcement if it passes scrutiny under a limited range of state laws—i.e., those grounds that exist under state law “for the revocation of any contract,”²³³ which, as noted, includes things like duress, fraud, and unconscionability.²³⁴ But if an arbitration provision is not in writing, or not in interstate commerce, it is not rendered unenforceable. Instead, it is outside the scope of the FAA and is simply subject to a fuller panoply of state law. Its enforceability will be decided according to that state law.²³⁵

232. *Id.* § 7001(b)(1) (2000).

233. 9 U.S.C. § 2 (2000).

234. *See* discussion *supra* Part II.B.

235. *Cf.* *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-73 (1995) (noting that by adopting a broader interpretation of the language in section 2, the Court was declining to “carv[e] out an important statutory niche in which a State remains free to apply its antiarbitration law or policy”); *Chung v. President Enters., Corp.*, 943 F.2d 225,

The “written” and “interstate” limitations are like a switch on a railroad track. If the arbitration agreement is both in writing and in interstate commerce, it heads down one track towards potential enforcement. If it is not in writing or not in interstate commerce, it heads down a different track. Indeed, to the extent that the “written” proviso is designed to draw the line between the state sphere and the federal sphere of regulation, the “written” limitation is not a requirement at all, but merely a form of federalism calibration, and therefore not affected by E-SIGN.

There are a number of analogous situations in which a writing is not required and yet the existence of a writing still has consequences. For instance, section 2-316 of the UCC describes how to exclude the implied warranty of merchantability: “to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous.”²³⁶ Section 2-316 does not require that a disclaimer be in writing, but there is a consequence to a disclaimer being in written form—it will only be enforced if it is conspicuous. Similarly, the Magnuson-Moss Warranty Act (MMWA),²³⁷ provides that if a seller of consumer goods provides a written warranty about the goods, then a number of consequences follow. For instance, a supplier of a consumer good offering a written warranty must adequately describe and designate the warranty offered,²³⁸ and is restricted in its ability to disclaim or limit certain warranties.²³⁹ Although there are consequences that flow from offering a written warranty, the MMWA does not *require* a writing.²⁴⁰ A court could find, of course, that a statement on a website is a “writing” for purposes of the MMWA.²⁴¹ However, the matter would not be resolved by E-SIGN, rather it would be resolved by assessing the purpose of the rule in the MMWA.²⁴²

229 (2d Cir. 1991) (finding that because the arbitration clause was written, in interstate commerce, and a valid agreement, federal law, and not New York law, applied).

236. U.C.C. § 2-316(2) (2002) (amended 2003).

237. 15 U.S.C. §§ 2301-2312 (2000).

238. *Id.* § 2303(a).

239. *Id.* § 2308.

240. See 2 BARKLEY CLARK & CHRISTOPHER SMITH, *THE LAW OF PRODUCT WARRANTIES* § 16.1 (2d ed. 2002) (“The Magnuson-Moss Warranty Act . . . does not require any business to offer a written warranty on a consumer product. Once the decision is made to offer a written warranty, however, it must comply with the [MMWA’s] designation and substantive requirements.”).

241. See, e.g., *In re McDonald’s French Fries Litig.*, 503 F. Supp. 2d 953, 958 (N.D. Ill. 2007) (assuming, at least for purposes of a motion to dismiss, that representations made on a consumer website could constitute a written warranty under the MMWA).

242. See *id.* (reaching the apparent conclusion, without reference to E-SIGN, that information on a website was a written warranty for purposes of the MMWA).

I acknowledge that there is a strong argument that the FAA requires a writing. One might say simply that the FAA requires that an arbitration provision be in writing to satisfy section 2 and to trigger the coverage of the statute. But I believe reading the “requirement” language to cover only those things a statute makes mandatory (i.e., things that *must* be true of a record for the record to have any enforceability or validity), not those things which merely have a consequence, is more apt. First, the reference in E-SIGN is to a requirement that a contract “be” in writing, and this use of the imperative connotes a mandatory requirement. Second, the FAA defines “requirement” as follows: “The term ‘requirement’ includes a prohibition.”²⁴³ While this is not a fully illuminating definition, it does give a sense that “requirement” indicates something that carries some finality, and not merely a consequence.²⁴⁴

2. E-SIGN Only Bars a Refusal to Enforce a Contract or Document Solely Because It Is in Electronic Form

To the extent the FAA is deemed to be a statute that requires a writing, there is a second argument as to why E-SIGN is not necessarily dispositive. E-SIGN does not by its terms rewrite any statute—it does not purport to change every use of the word “written” or “writing” into a more medium-neutral form like “record.” Instead, E-SIGN is results-oriented and operates, at least per the language of the statute, by preventing an electronic document or contract from being found invalid, ineffective, or unenforceable “solely” because it is in electronic form.²⁴⁵

First, consider the possibility that courts begin to conclude that, in the context of a consumer transaction, arbitration provisions on a website do not sufficiently register choice and accordingly are not “written” for purposes of the FAA. These courts would not be reaching that determination *solely* because the words on an Internet website are in electronic form but rather because of relevant defects with one particular type of electronically displayed text in a specific context. To be sure, courts may not, consistent with E-SIGN, hold that all documents in electronic form are excluded from the definition of “written.” However, that does not mean that courts cannot assess the content and form of specific types of electronically displayed text.

243. 15 U.S.C. § 7006(10).

244. One of the House committee reports accompanying the E-SIGN legislation does characterize the need for a writing in the FAA as a “requirement.” H.R. REP. NO. 106-341, pt. 1, at 9 (1999) (“Under current law, the [FAA] generally requires that arbitration agreements need to be in writing to be enforceable.”). As I argue later, the legislative history is far from clear as to the impact of E-SIGN on the FAA. See *infra* notes 262-66 and accompanying text.

245. 15 U.S.C. § 7001(a).

Further, if a consumer Internet contract is deemed not to be “written” for purposes of the FAA, the result is not nonenforcement. The result is that the provision is subject to the full panoply of state law. State law might provide for full enforcement of arbitration agreements in electronic form. That would be the case for any state that has adopted the Revised Uniform Arbitration Act²⁴⁶ (RUAA), for example. The RUAA provides for enforcement of arbitration agreements contained in a “record”²⁴⁷—a term defined broadly enough to cover virtually all electronically displayed text.²⁴⁸ But a state does not have to take the approach of the RUAA and could, instead adopt the Proposed State Arbitration Law.

What would be the result of finding text on a website in consumer transactions not to be “written” for purposes of the FAA in a state that adopts the Proposed State Arbitration Law? If an arbitration provision is conspicuous, it will be enforced under the Proposed State Arbitration Law.²⁴⁹ If, however, the arbitration provision is not conspicuous, it will not be enforced. But such nonenforcement does not run afoul of E-SIGN because the electronic form of the arbitration provision would not be the *sole* reason for nonenforcement. Instead, the reason (or at least one reason) for nonenforcement is the failure of the arbitration

246. UNIF. ARB. ACT (amended 2002), 7 U.L.A. 1 (2005).

247. *Id.* § 6(a), 7 U.L.A. at 22 (“An agreement contained in a *record* to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.” (emphasis added)).

248. *See id.* § 1(6), 7 U.L.A. at 10 (defining “[r]ecord” as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.”).

249. Presumably, a state law along the lines of the Proposed State Arbitration Law would be applied in federal courts as well as state courts. “[F]ederal courts sitting in diversity apply state substantive law and federal procedural law.” *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996). The proper characterization of arbitration laws as procedural or substantive is a close one. With respect to the FAA, the Court has held that section 2 is substantive in nature. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (holding that Section 2 is federal substantive law that is applicable in state courts as well as federal courts). However, the Court has strongly indicated that other provisions of the FAA are procedural in nature. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) (characterizing sections 3 and 4 of the FAA as procedural rules applying only to the federal courts). The Proposed State Arbitration Law is closely analogous to section 2 of the FAA in that, like section 2, it provides for the general enforceability of a certain type of arbitration provision. With respect to contracts beyond the scope of section 2, there should be no bar to the application of state substantive law in federal courts. *Cf. Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) (indicating that for a contract not within section 2 of the FAA, state law should apply to determine the contract’s enforceability). The Proposed State Arbitration Law does not conflict with section 2. It simply provides substantive law in an area where federal law does not apply.

provision to satisfy the Proposed State Arbitration Law's requirement for conspicuousness. It is true that were the inconspicuous arbitration provision in a written form it would probably be enforced under the FAA. But, to use an analogy from tort law, the electronic status of the arbitration provision is not the "proximate cause" of nonenforcement.²⁵⁰ And it is certainly not the sole cause of nonenforcement. E-SIGN is thus, at least arguably, not relevant. There may be circumstances where an arbitration provision would be denied enforceability, effect, or validity solely because it is in electronic form. In such a situation, E-SIGN would be activated to prevent that result and the provision would be enforced. However, E-SIGN does not automatically replace every reference to "writing" with the term "record."

The House Commerce Committee Report accompanying the E-SIGN legislation provides some (admittedly oblique) support for the reading that E-SIGN does not automatically make all electronically displayed text "written" for purposes of the FAA. The House Report explicitly refers to the FAA and notes that E-SIGN would make it possible to electronically execute a valid agreement that included an arbitration provision.²⁵¹ On the surface, this would seem like a blow to the argument I am pressing (at least to the extent that we put any weight on legislative history). In fact, it is not. The House Report is actually referencing only arbitration provisions in brokerage account agreements.²⁵² The report notes that the problem is dealt with, not by the general provisions of E-SIGN (which were in Title I in the draft of E-SIGN to which the report is referring²⁵³), but rather through "Title III of the bill."²⁵⁴ Title III consisted of suggested amendments that would have explicitly and specifically applied to the Securities Exchange Act of 1934.²⁵⁵ Therefore, it is possible that the Commerce Committee recognized that the general language of E-SIGN was not sufficient to alter the meaning of "written" in the FAA.

250. See 57A AM. JUR. 2D *Negligence* § 411 (2004) (noting that establishing proximate cause requires showing that a defendant's conduct "is that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury." (footnotes omitted)). The failure to comply with a state notice requirement, such as the Proposed State Arbitration Law, could thus be classed as an "efficient, intervening cause."

251. H.R. REP. NO. 106-341, pt. 1, at 9 (1999).

252. *Id.*

253. *Id.* at 2-3.

254. *Id.* at 9.

255. *Id.* at 4-5.

3. *Applicability of E-SIGN's Consumer Protection Provisions*

The consumer protection provisions in E-SIGN are also relevant, and may blunt E-SIGN's impact when it comes to arbitration provisions in consumer Internet transactions. E-SIGN provides a number of consumer protections that apply to statutes that "require[] that information relating to a transaction or transactions in or affecting interstate . . . commerce be provided or made available to a consumer in writing."²⁵⁶ As I discuss later, there is some doubt as to whether the FAA was intended to apply to consumer transactions at all.²⁵⁷ But to the extent it does,²⁵⁸ the FAA is arguably a statute that "requires that information relating to a transaction . . . be provided or made available to a consumer in writing."²⁵⁹ An arbitration provision is "information," especially given the broad definition that E-SIGN gives to that word.²⁶⁰ To the extent that the FAA is a statute requiring a written disclosure to consumers, then an electronic record will satisfy the requirement that information be provided in writing only if there is compliance with a number of consumer protection provisions.²⁶¹

For instance, a consumer must affirmatively assent to the use of records instead of writings,²⁶² a consumer must be given a conspicuous disclosure statement of various consumer rights,²⁶³ and a consumer must be informed of the "hardware and software requirements for access to and retention of the electronic records."²⁶⁴ As Professor Jane Winn has noted, it is likely that "any merchant entering into an agreement with a consumer that includes an arbitration agreement must comply" with these consumer protections.²⁶⁵ If these requirements are not satisfied, an arbitration provision in electronic form should not be considered a "written agreement."²⁶⁶

256. 15 U.S.C. § 7001(c)(1) (2000).

257. See *infra* Part V.B.

258. See Jane K. Winn, *Electronic Commerce Law: 2001 Developments*, 57 BUS. LAW. 541, 566 (2001) (noting that enforcement of arbitration provisions in consumer transactions has become more certain in the last several years).

259. 15 U.S.C. § 7001(c)(1).

260. *Id.* § 7006(7) ("['I]nformation' means data, text, images, sounds, codes, computer programs, software, databases, or the like.").

261. *Id.* § 7001(c)(1).

262. *Id.* § 7001(c)(1)(A).

263. *Id.* § 7001(c)(1)(B).

264. *Id.* § 7001(c)(1)(C)(i).

265. Winn, *supra* note 258, at 568.

266. See 15 U.S.C. § 7001(c)(1); see also Winn, *supra* note 258, at 568-69 (arguing that a merchant who has failed to comply with the required consumer protections will not have obtained a written contract and that an electronic arbitration provision under such circumstances will not be enforceable). E-SIGN indicates that one particular type of

To summarize, while I acknowledge several arguments that E-SIGN requires that “written” in the FAA be read to include electronic documents, there are a number of reasons why E-SIGN will not and should not always have this effect, especially in the consumer context. And given that the technological landscape on which E-SIGN was based has shifted, courts should read E-SIGN, where possible, in a limited way.

V. INTERPRETING “WRITTEN” TO HELP RESTORE CONGRESS’ ORIGINAL INTENT REGARDING THE FAA

A. *Rebalancing the Federal-State Relationship in Regulating Arbitration Agreements*

The FAA was designed to split the regulation of arbitration provisions between state and federal law. This design is demonstrated by the limited scope of section 2 and by the savings clause. It is possible that Congress had in mind that the FAA would apply only in the federal courts and hence leave a fairly robust role for state law.²⁶⁷ It is also possible that Congress had in mind that the FAA would cover a significant share of arbitration provisions.²⁶⁸

But it seems unlikely that Congress intended that the FAA would govern virtually *all* arbitration provisions. That is, even if Congress saw the FAA as more than just a procedural statute for the federal courts, a Congress legislating prior to the New Deal would not have considered the scope of the Commerce Clause to be as nearly all encompassing as the Supreme Court has since held.²⁶⁹ Thus, Congress may have thought the FAA would cover arbitration provisions only in the federal courts, or it may have thought the FAA would cover arbitration provisions within the reach of the Commerce Clause as that reach was then understood. But Congress almost certainly did not intend the current lopsided balance between the respective roles for state and federal law, especially given that the FAA developed out of, and built upon, state law

failure to comply with E-SIGN’s consumer protection provisions—a failure to obtain consent in a manner that “reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent”—does not by itself make a contract unenforceable. 15 U.S.C. § 7001(c)(3); *id.* § 7001(c)(1)(C)(ii).

267. See *Southland Corp. v. Keating*, 465 U.S. 1, 21-36 (1984) (O’Connor, J., dissenting) (arguing that the legislative history and the structure of the FAA demonstrate that the Act was intended only to apply in federal courts).

268. The Court has generally accepted this position. See discussion *supra* Part II.A.

269. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995) (conceding that “[t]he pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case”).

developments in arbitration,²⁷⁰ and given that contract and consumer protection laws are traditionally within the province of the states.²⁷¹ Limiting the scope of the FAA through the “written” limitation is one way to restore a meaningful role for states in the regulation of arbitration provisions.

B. Consumer Transactions and the FAA

Ensuring state law some space in the area of consumer protection as it relates to arbitration provisions, either through explicit amendment to E-SIGN or through a comparatively narrow judicial reading of “written,” is particularly appropriate. As others have ably discussed, the legislative history of the FAA indicates that Congress did not contemplate that the FAA would apply to transactions between consumers and merchants.²⁷² Similarly, in a statement before the subcommittee considering the FAA, Julius Henry Cohen noted that the rule of revocability came about because:

at the time this [common law] rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them. And the courts said, “If you let the people sign away their rights, the powerful people will come in and take away the rights of the weaker ones.”²⁷³

Although according to Cohen such a situation still existed “to a certain extent” at the time of the passage of the FAA, he argued that “people are protected to-day [sic] [in 1924] as never before.”²⁷⁴ Cohen noted, for example, that there was protection against arbitration provisions in insurance contracts because a governmental “insurance department”

270. See discussion *supra* Part I.B.

271. See Moses, *supra* note 152, at 156.

272. See *id.* at 106-08 (assessing the legislative history and concluding that the hearings during which the FAA was debated “make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations”); Sternlight, *supra* note 132, at 1636 (noting that “to the limited extent that the possibility of [arbitration provisions in consumer and other similar transactions] was considered by Congress in 1925, when it passed the FAA, those few who spoke on the issue made clear that they did not view such a use of arbitration as appropriate”); Linda Alle-Murphy, Comment, *Are Compulsory Arbitration Clauses in Consumer Contracts Enforceable? A Contractual Analysis*, 75 TEMP. L. REV. 125, 137-40 (2002) (reviewing legislative history of the FAA and concluding that the Act was designed to protect consumers).

273. *Joint Arbitration Hearings*, *supra* note 7, at 15 (statement of Julius Henry Cohen, Member, American Bar Association Committee on Commerce, Trade, and Commercial Law; General Counsel, New York State Chamber of Commerce).

274. *Id.*

would have to approve inclusion of the term.²⁷⁵ He noted that bills of lading were also governed by legislation that limited the terms a shipper could include in a bill of lading.²⁷⁶ Cohen thus seems to have had in mind that the FAA would apply between sophisticated entities or, at least, in areas that were highly regulated. Cohen observed, for example, that arbitration “is a remedy peculiarly suited to the disposition of the ordinary disputes *between merchants* as to questions of fact.”²⁷⁷

Given that consumer transactions are not highly regulated it may be appropriate to provide states with the ability to regulate at least some arbitration provisions in consumer transactions. Arbitration provisions in consumer Internet transactions are a particularly appropriate place to give states that authority.

CONCLUSION

The FAA’s limitation to written provisions is one of the last ways through which space for meaningful state regulation of arbitration provisions can be secured. Reading the word “written” to exclude electronically displayed text is consistent with the meaning given to that word in commercial circles and is true to the purposes of the FAA’s “written” limitation. E-SIGN is not an impediment to such a reading.

Judicial interpretation of “written” along the lines I urge would ensure that the states have a vibrant role in protecting consumers when it comes to arbitration provisions in cyberspace. If the states perform poorly in this regard, or if their actions unduly endanger electronic commerce, then Congress has the power to easily remove this last vestige of space. But state law should, at the very least, be allowed to have a go of it.

275. *Id.*

276. *Id.* The then-existing Uniform Bills of Lading Act set forth the terms of a bill of lading and governed the ability of the carrier to include additional terms. UNIF. BILLS OF LADING ACT §§ 2-3 (superseded by U.C.C. art. 7 (1962)(amended 2003)), 3A U.L.A. app. I at 62-63 (2002).

277. *Id.* (emphasis added).

