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HOW THE ARBITRATION-AT-ALL-COSTS REGIME IGNORES AND DISTORTS SETTLED LAW

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Introduction

There is widespread recognition among commentators that a majority of Justices on the U.S. Supreme Court hold pre-dispute binding arbitration in exceptionally high regard and that in recent years the Court has greatly expanded the reach of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*[2] The wisdom of FAA case law is the subject of great debate, but one issue not widely discussed is how the Court's arbitration preference has led it and lower courts to ignore or rewrite a number of black letter rules that apply in other areas of law. Put another way, the drive to favor and expand the use of arbitration clauses has displaced or distorted a number of long-standing legal principles.

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[2] *See, e.g.*, Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 113 (2011) ("Through its doctrine, the Court has moved the FAA from a limited role to a major source of regulation of both state and federal judges. . . .[T]he Court's purposeful interpretation of the FAA has turned it into a new pillar."); Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining In Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385, 386 (2007) ("One problem with the FAA has resulted largely from the common law; that is, how courts, led by the Supreme Court since the early 1980's, have broadly interpreted, and, arguably, misinterpreted the FAA as constituting a national policy favoring arbitration, and as a body of substantive law that preempts state law and that applies in state and federal courts to a broad range of statutory, employment, and consumer claims."); David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J. L. & POL'Y 129, 153 (2004) ("It is an open secret that the 'national policy favoring arbitration' was not the creation of Congress in enacting the FAA in 1925, but is rather an 'edifice of [the Court's] own creation' starting in the 1980s."); 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, 854 (2002) ("[T]he Court's current judicial philosophy is in favor of a broad application of arbitration agreements to statutory claims under federal statutes.")

For example, in a variety of settings the U.S. Supreme Court has enunciated a strong presumption against federal preemption of state law. In cases decided under the FAA, however, the Supreme Court has never mentioned or acknowledged the presumption against preemption, even when its FAA decisions have preempted laws in areas traditionally governed by the States, such as the law of contracts.[3] Similarly, a long-standing rule of law applicable to a wide range of constitutional rights provides that waivers of such rights must be voluntary, knowing, and intelligent.[4] Yet in arbitration cases, courts regularly find waivers of the constitutional right to a jury trial on the basis of fine-print clauses that are buried in adhesion contracts and that consumers and employees rarely read, let alone understand. Indeed, the Supreme Court has instructed that if there is any doubt as to whether an arbitration clause waives a party's right to a jury with respect to a particular claim, courts should indulge in a presumption that construes contracts in favor of requiring arbitration if possible.[5] In other words, contrary to established legal principles, the Court finds a presumption in favor of the waiver of a constitutional right.

This Paper discusses in detail the casting aside of these and other long-standing rules. First, we provide a brief overview of the FAA to emphasize that the modern, expansive sweep of

[3] In the recent case of *PLIVA v. Mensing*, writing for the Supreme Court, Justice Thomas contended the structure of the Constitution "suggests that federal law should be understood to impliedly repeal conflicting state law." 131 S.Ct. 2567, 2580 (2011) (holding that federal regulations governing drug labeling requirements preempted state law tort actions alleging generic drug manufacturers had failed to warn of medical risks). Therefore, according to Justice Thomas, "courts should not train to find ways to reconcile federal law with seemingly conflicting state law." Id. This section of the opinion, however, was not joined by Justice Kennedy. Taken together with the dissent articulating continued "respect for the States as independent sovereigns in our federal system" despite the majority's "invent[ing of] new principles of pre-emption law out of thin air," a five justice majority still adheres to the presumption against preemption of state law. *Id.* at 2582, 2591-92 (Sotomayor, J., dissenting).

[4] *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

[5] *See, e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (holding that a consumer contract for termite prevention services can be subject to arbitration under the FAA); *see also id.* at 283 (O'Conner, J., concurring) ("Yet, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.")

the law is far from the modest purpose that Congress had when passing the law in the early twentieth century. We then turn in Part II to a discussion of the various legal principles that the Court's FAA jurisprudence calls into question, including federal preemption of state laws, waiver of constitutional rights, basic contract doctrines, and the delineation between substantive and procedural laws.

I. The Supreme Court Has Expanded the Scope of the FAA.

The Supreme Court's recent arbitration jurisprudence significantly departs from the congressional intent motivating the FAA. An abundance of scholarship establishes that the Congress that passed the FAA had fairly modest goals for the statute. For example, the principal author of the Act—who had also been the principal author of the New York Arbitration Act upon which the FAA was based and who was the lead witness in advocating for the Act—repeatedly stated that the Act was not intended to deal with statutory claims.[6] In addition, the Act was intended to apply only to disputes between sophisticated commercial parties of relatively equal bargaining power.[7] Nevertheless, in recent decades, the Supreme Court has dramatically

[6] Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. Of Subcomms. On the Judiciary, 68th Cong. (1924) (statement of Julius Cohen); Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281(1926) ("[Arbitration] is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact–quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like.").

[7] *See, e.g.*, *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (holding that a consumer contract for termite prevention services can be subject to arbitration under the FAA); Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1316-1319 (2011) (discussing statements made during hearings on the law, which "show that the reformers drafted, and that Congress intended to pass, an Act that applied to arbitration agreements between merchants with relatively equal bargaining power"); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641 (1996)("When Congress passed the FAA in 1925, it intended only to require federal courts to accept arbitration agreements that had been voluntarily entered into by two parties of relatively equal bargaining power in arms' length transactions."). For general background on this shift, 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 (2006);

reinterpreted and expanded the reach of the FAA. In a series of cases, the Court has found new rules and powers in the Act, often ones that preempt state laws or contradict earlier rulings of the Court, repeatedly bringing more types of disputes into arbitration with fewer checks and limitations.

This was not always the Court's trajectory. For example, in the 1953 case of *Wilko v. Swan*,[8] the Supreme Court considered the intersection of the Securities Act of 1933[9] with the FAA[10] and concluded that claims under the Securities Act could not be the subject of pre-dispute binding arbitration agreements.[11] Similarly, in *Alexander v. Gardner-Denver Co.*,[12] the Court held that claims involving the civil rights statutes for employees could not be the subject of pre-dispute binding arbitration clauses.[13] If an employee was required under the terms of a collective bargaining agreement to submit an employment discrimination dispute to arbitration, she maintained her statutory right to trial de novo for her discrimination claim.[14]

David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997).

[8] 346 U.S. 427 (1953).

[9] 15 U.S.C.A. § 77a

[10] At the time the case was decided, the law was known as the United States Arbitration Act.

[11] *Id.* at 438. The Court construed the "Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose." *Id.* (Jackson, J., concurring).

[12] 415 U.S. 36 (1974).

[13] *Id.*

[14] *Id.* at 59-60; *see also id.* at 56 ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."). Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. The "deferral rule" requiring employees to engage in arbitration before seeking recourse in court for discrimination claims "is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues." *Id.* The Court "deem[ed] this supposition unlikely." *Id.*

Today's FAA is a remarkably more robust and all-encompassing statute than it was in 1953. The Supreme Court has pronounced a "national policy favoring arbitration,"[15] and in a series of cases decided within the span of a few years, the Court held that the FAA preempts state laws restricting the arbitration of disputes[16] and creates a presumption of the enforceability of arbitration agreements covering a wide variety of statutory claims.[17] The Court also expressly overruled *Wilko*, holding that the right to select a judicial forum may be waived and an agreement to arbitrate Securities Act claims will be enforceable.[18]

Gardner-Denver, too, became a casualty of the Court's changed views toward arbitration, as *Gardner-Denver*'s holding was undone in two subsequent cases. First, the Court held that a statutory claim for age discrimination can be subject to an arbitration agreement enforceable under the FAA.[19] Although Congress provided a judicial forum for claims brought under the Age Discrimination and Employment Act of 1967 (ADEA)[20]—just as the legislature had done in the Title VII context—the Court found nothing in the law prohibiting arbitration as an alternative.[21]

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[15] *Southland Corp. v. Keating*, 465 US. 1, 10 (1984).
[16] *Id.* at 15-16 (judicial forum anti-waiver provision in California Franchise Investment Law held preempted).
[17] With respect to the presumption in favor of arbitration, see *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). With respect to the large number of statutory claims subject to the FAA, see, e.g., *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (claims under the Credit Repair Organization Act may be compelled into arbitration); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991) (enforcing arbitration clause for Age Discrimination in Employment Act claims); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under Racketeer Influenced and Corrupt Organizations Act may be the subject of pre-dispute binding arbitration clauses); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (enforcing arbitration clause to resolve claims under antitrust statutes).
[18] *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions.").
[19] *Gilmer*, 500 U.S. at 26.
[20] 29 U.S.C. § 621 *et seq*.
[21] *Gilmer*, 500 U.S. at 29.

Part of the Court's reasoning distinguished arbitration provisions contained within a collective bargaining agreement.[22] This distinction evaporated when, in the second case marking *Gardner-Denver*'s demise, the Court held that a provision in a collective bargaining agreement requiring union members to arbitrate ADEA claims is enforceable as a matter of law.[23]

In *Circuit City Stores, Inc. v. Adams*,[24] the Supreme Court extended the FAA to provide that almost all employment contracts can be subject to arbitration.[25] Only "contracts of employment of transportation workers," which are expressly exempted under the FAA, are not subject to arbitration.[26] As with some of the Court's similar expansions of the FAA, the great weight of the evidence shows that the Congress that passed the Act never intended this expansion.[27]

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[22] *Id*. at 35 ("[B]ecause the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.")

[23] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

[24] 532 U.S. 105 (2001)

[25] *Id.*

[26] *Id*. at 119.

[27] *Circuit City*, 532 U.S. at 126 (Stevens, J., dissenting) ("neither the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contain any evidence that the proponents of the legislation intended it to apply to agreements affecting employment"); *Id.* at 136 (Souter, J., dissenting) (noting that with the statutory language "Congress showed an intent to exclude to the limit [the Act's] power to cover employment contracts in the first place" while it also "showed its intent to legislate to the hilt over commercial contracts at a more general level"); *see also* Moses, *supra* note 7, at 146-52 (advocating that the Supreme Court "should not, as it did in Circuit City, interpret the Commerce Clause broadly. . . so that the one purpose of the statute–excluding employment agreements from coverage–is completely rewritten by the Court"); Kelly Burton Beam, *Administering Last Rights to Employee Rights: Arbitration Enforcement and Employment Law in the Twenty-First Century*, 40 HOUS. L. REV. 499, 528 (2003) ("The Court's selective use of historical reference. . .allowed the majority to remain willfully ignorant of the fact that the FAA was intended to relieve judicial prejudice against arbitration between merchants and was therefore not intended to cover employment contracts. Consequently, the Court's analysis of whether its textual explanation corresponded with the legislative intent cannot be accurate because the Court was unwilling to assess the Act's true purpose.").

At the same time that the Court has expanded the reach of the FAA, it has also stripped away or substantially limited some of the protections that had earlier been in place to protect against abusive or overreaching arbitration clauses. For example, in 1996 the Supreme Court noted that state law protections against unreasonable contract terms, such as the law of unconscionability, applied to arbitration clauses.[28] But in 2010, the Court held that arbitrators themselves can decide unconscionability challenges to arbitration clauses in many instances.[29] Similarly, in 2011, the Court held that unconscionability challenges cannot be brought against terms that the Court deemed to reflect a "fundamental" attribute of arbitration.[30] One such attribute is that arbitration is bilateral (that is, not on a class action or collective basis), unless the parties agree otherwise. Consequently, a large number of decisions holding class-action bans in arbitration clauses unconscionable under general principles of state contract law and unenforceable in settings where they would prove to be exculpatory no longer had force.[31]

The effect of these decisions is that as the FAA forces more and more cases into arbitration, the protections available to individuals against abusive arbitration clauses have

[28] *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

[29] *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010). In *Rent-A-Center*, the Court held that where an arbitration clause includes a "delegation clause" (a provision providing that challenges to the validity of the arbitration clause should be decided by the arbitrator), the delegation clause shall be enforced unless the party objecting to arbitration can bring an attack (such as unconscionability) against the delegation clause itself. *Id.* at 2780. As an indication of how this decision restricted contract law defenses for weaker parties resisting arbitration clauses, Justice Scalia, writing for a 5-4 majority, noted that the arguments remaining to plaintiffs, which must be narrowly tailored towards the delegation clause alone, would typically be "much more difficult . . .to sustain" than unconscionability arguments aimed at the arbitration clause as a whole. *Id.*

[30] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

[31] *E.g., Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012) (overturning a district court that had refused to compel arbitration where, among other things, it had been proven that a class action ban would mean that only "an infinitesimal" number of consumers could vindicate their rights under a state consumer protection statute); *Feeney v. Dell Inc.*, 466 Mass. 1001 (Mass. 2013) (overturning previous decision in the same case where the Court had struck down a class-action ban in an arbitration clause as unconscionable, in the wake of *Concepcion*); *Schnuerle v. Insight Commc'ns Co., L.P.*, 376 S.W.3d 561 (Ky. 2012) (same).

substantially contracted. The Supreme Court's FAA jurisprudence has evolved in a few short years from a rule that arbitration clauses are as enforceable as other types of contracts "but not more so,"[32] to a "national policy favoring arbitration,"[33] and, even more recently, to a more dramatic and powerful "*emphatic* federal policy in favor of arbitral dispute resolution."[34]

II. The Policy in Favor of Arbitration Has Led to Distortions in the Law.

As the Supreme Court has expanded the FAA in the course of enacting its "emphatic" policy favoring arbitration, it has brought the FAA into conflict with settled principles that apply in a variety of other areas of law. The seeming imperative of enforcing arbitration clauses has led the Supreme Court, and lower courts following its lead, to pen decisions that are not fairly reconcilable with a number of doctrines that apply to nearly all contracts and, in some cases, to most statutes. In short, the Supreme Court's drive to make arbitration clauses more widely enforceable has come at a significant cost to the principled nature of American law.

A. In Implementing a Policy in Favor of Arbitration, the Supreme Court Has Ignored the Presumption Against Federal Preemption of State Laws.

A basic federalism rule in the United States, which the Supreme Court has repeatedly recognized, is that there is a presumption against federal law preempting state law. This is

[32] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).
[33] *Southland Corp. v. Keating*, 465 US. 1, 10 (1984)
[34] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (emphasis added); *see also* Jean. R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?,* 57 STAN. L. REV. 1631 (2005).

especially true in areas of law that are traditionally left to state police powers.[35] The presumption ensures that courts do not unnecessarily disturb the balance between federal and state power.[36] Indeed, the Supreme Court has explicitly acknowledged "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[37] The Court regularly applies the presumption against preemption in a variety of contexts, among them products liability,[38] banking,[39] and others.[40]

Without ever providing any principled reason for doing so, however, the Supreme Court appears to have exempted the FAA from this important background rule of law. There is no particular reason to treat the FAA as a statute with unusually potent preemptive force; the Supreme Court has acknowledged that "[t]he FAA contains no express pre-emptive provision,

[35] *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (holding that the Federal Warehouse Act manifested the intent of Congress to eliminate dual state and federal regulation of any grain warehouse that chose to obtain a federal license and therefore that Illinois Grain Warehouse Act was preempted).
[36] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).
[37] *Rice*, 331 U.S. at 230; *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (where the text of a clause is susceptible to more than one reading, the Court recognizes "a duty to accept the reading that disfavors pre-emption").
[38] *Wyeth v. Levine*, 555 U.S. 555 (2009) (considering the presumption against preemption and holding that federal regulation of drug labeling had not preempted available state law claims for failing to warn about risks associated with an anti-nausea drug); *Bates*, 554 U.S. 431 (2005) (considering presumption against preemption and holding that Federal Insecticide, Fungicide, and Rodenticide Act did not preempt peanut farmers' state law claims for defective design, defective manufacture, negligent testing, breach of express warranty, and violation of Texas Deceptive Trade Practices Act relating to pesticide use).
[39] *Cuomo v. Clearing House Assn., LLC*, 557 U.S. 519 (2009) (holding that the National Bank Act did not preempt a New York Attorney General action against national banks to enforce the State's fair lending laws because states "have always enforced their general laws against national banks–and have enforced their banking-related laws against national banks for at least 85 years"). Long-standing Supreme Court jurisprudence establishes that state regulation of banks is the "rule," not the "exception." *McClellan v. Chipman*, 164 U.S. 347, 357 (1896).
[40] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (considering the presumption against preemption and holding that the Federal Cigarette Labeling and Advertising Act preempts Massachusetts regulations governing outdoor and point-of-sale cigarette advertising).

nor does it reflect a congressional intent to occupy the entire field of arbitration."[41] Yet in case after case, the Supreme Court has held that the FAA preempts various rules of state law without even considering the presumption against preemption.

For example, in the seminal case of *Southland Corp. v. Keating*,[42] the Court considered whether the FAA preempted California's Franchise Investment Law.[43] Southland Corporation was the owner and franchisor of 7-Eleven convenience stores, and the standard franchise agreement included an arbitration provision.[44] Several 7-Eleven franchisees brought individual and class actions in state court against Southland for violations of the Franchise Investment Law.[45] At the time, claims alleging such violations were not arbitrable under state law.[46] In holding that the FAA preempted the California statute–thus mandating arbitration of the state law claims–the Supreme Court never mentioned that California's Franchise Investment Law is presumed not to be preempted.[47]

A few years later, the Court again had occasion to consider the preemption by the FAA of the California Labor Code.[48] The relevant section of the Code provided that a wage collection action could be maintained in court without regard to any private agreement to arbitrate.[49] In a dispute between an employer and employee over commissions on sales of securities, the employer sought to compel arbitration pursuant to an arbitration provision in the Uniform

[41] *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).
[42] 465 U.S. 1 (1984)
[43] *Id.*
[44] *Id.* at 3-4.
[45] *Id.* at 4.
[46] *Id.*
[47] *Id.* The opinion mentions only that the FAA represents "a national policy favoring arbitration." *Id.* at 10.
[48] *Perry v. Thomas*, 482 U.S. 483 (1987).
[49] CAL. LAB. CODE § 229; *Id.* at 484.

Application for Securities Industry Registration form the employee signed.[50] The Supreme Court held that the statute conflicted with the FAA and violated the Supremacy Clause. Accordingly, the Labor Code section was found preempted making the arbitration agreement enforceable.[51] Again, the Court made no mention of the presumption against preemption of state law.[52]

Additional examples of the Supreme Court's abandonment of the anti-preemption presumption in favor of arbitration are numerous. In one case, the Court struck down an Alabama statute that invalidated written, pre-dispute arbitration agreements in the context of a consumer dispute against a termite control company.[53] In another case, the Court struck down a California statute that provided that disputes involving talent scouts should be initially handled by an administrative body with specialized expertise in such disputes.[54] Florida had a rule of law that if the principal purpose of a contract was the commission of a crime, no provision of the contract could be enforced. The Supreme Court held the statute preempted with respect to arbitration clauses,[55] and again made no mention of the anti-preemption presumption.

Probably the most important decision in the Supreme Court's FAA preemption jurisprudence is *AT&T Mobility v. Concepcion,*[56] in which the Court struck down a California rule that any contract term barring consumers from bringing or participating in a class action was

[50] *Id.* at 485.
[51] *Id.* at 491. The Supremacy Clause, U.S. CONST. art. VI, cl. 2, establishes the U.S. Constitution and federal statutes as "the supreme law of the land," and requires "the judges in every state shall be bound thereby."
[52] The opinion does mention the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 489.
[53] *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995)
[54] *Preston v. Ferrer*, 552 U.S. 346 (2008).
[55] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).
[56] 131 S.Ct. 1740 (2011).

unenforceable if the term would be exculpatory with respect to a consumer protection law.[57] The Court struck down the rule despite the large number of similar laws in other states[58] and the Court's acknowledgment that California law would invalidate a term banning class actions whether it was in an arbitration clause or not—in other words, that the California provision was not limited in its application to only arbitration.[59] Again, as in the other arbitration cases preempting state laws, there was no discussion in *Concepcion* of the presumption against preemption.[60]

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[57] *Id.*

[58] *See, e.g., Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008) (Washington law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (Georgia law); *Kristian v. Comcast Corp.*, 446 F.3d 25, 60 (1st Cir. 2006) (federal and Massachusetts antitrust law); *Creighton v. Blockbuster Inc.*, No. 05-482-KI, 2007 WL 1560626, at *3 (D. Or. May 25, 2007) (Oregon law); *Cooper v. QC Fin. Servs., Inc.*, 503 F.Supp.2d 1266, 1290 (D. Ariz. 2007) (Arizona law); *Wong v. T-Mobile USA, Inc.*, No. 05-73922, 2006 WL 2042512, at *5 (E.D. Mich. July 20, 2006) (Michigan law); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1105 (W.D. Mich. 2000) (Michigan law); *Leonard v. Terminix Int'l Co., L.P.*, 854 So.2d 529, 539 (Ala. 2002); *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So.2d 600, 611 (Fla. Dist. Ct. App. 2007); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. Dist. Ct. App. 1999); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274 (Ill. 2006); *Whitney v. Alltel Comm'ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005); *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100-01 (N.J. 2006); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1221 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Schwartz v. Alltel Corp.*, No. 86810, 2006 WL 2243649, at *5 (Ohio Ct. App. June 29, 2006); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1183 (Ohio Ct. App. 2004); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 949-50 (Or. Ct. App. 2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. Ct. 2006); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006, 1008 (Wash. 2007); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 280 (W. Va. 2002); *Coady v. Cross Country Bank*, 729 N.W.2d 732, 748 (Wis. Ct. App. 2007); *cf. Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59-63 (1st Cir. 2007) (class action waiver unenforceable because not knowing and voluntary); *Rollins, Inc. v. Garrett*, 176 F. App'x 968, 968-69, 2006 WL 1024166 (11th Cir. Apr. 19, 2006) (per curiam) (illustrating that arbitrators did not exceed their authority by allowing class-wide arbitration because arbitration clause prohibiting class proceedings would have been unconscionable under Florida law).

[59] The Court characterized California's rule "[r]equiring the availability of classwide arbitration" as "interfere[ing] with fundamental attributes of arbitration." *Concepcion*, 131 S.Ct. at 1748. Writing for the majority in *Concepcion*, Justice Scalia noted that "[a]lthough [the FAA's] saving clause preserves generally applicable contract defenses, nothing in [the statute] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.*

[60] The decision does mention the "liberal federal policy favoring arbitration." *Id.* at 1745.

At bottom, courts have long favored the presumption that federal statutes preempt state laws only in the rarest and most express circumstances. But today's legal landscape suggests the canon has weakened vitality. At least in the context of a state law banning arbitration—and perhaps more broadly—the presumption against preemption has been silently overturned.

B. In Implementing a Policy in Favor of Arbitration, the Supreme Court and Lower Courts Have Abandoned the Presumption Against Waiver of Constitutional Rights.

It is settled law that although individuals may waive constitutional rights, a waiver is effective only when "knowing, voluntary, and intelligent."[61] In other words, courts will not infer the waiver of such rights.[62] This standard has been applied to the Fifth Amendment protection against self-incrimination[63] and the Sixth Amendment right to counsel in a criminal proceeding,[64] among others.[65]

There is little doubt that, in almost all circumstances, courts would decline to enforce a contract containing a waiver of constitutional rights that fails to meet the foregoing standard. Imagine that a fine-print contract provision buried in a stack of lending documents stripped individuals of their constitutional rights to vote, to travel, to freely exercise their religion, to bear arms, or to speak out on matters of public concern. If a bank attempted to enforce such a provision, going to court to seek specific performance to bar a customer from speaking publicly,

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[61] *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F. 2d 255 (2d Cir. 1977).
[62] *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) ("For a waiver of constitutional rights in any context must, at the very least, be clear.").
[63] *Brady v. U.S.*, 397 U.S. 742, 748 (1970); *see also Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing procedural safeguards designed to protect the rights of an accused under the Fifth and Fourteenth Amendments).
[64] *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).
[65] *See, e.g., Walter v. Reno*, 145 F.3d 1032, 1037 (9th Cir. 1998), *cert. denied*, 526 U.S. 1003 (1999) (constitutional due process right to hearing in immigration proceedings); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991), *cert. denied*, 501 U.S. 1253 (1991) (constitutional right to seek elective office).

for example, the court would surely refuse on the grounds that there was no knowing, voluntary and intelligent waiver of the right to free speech.[66]

That result makes the Court's FAA jurisprudence all the more peculiar. Notwithstanding the undisputed understanding of how contracts waiving constitutional rights are normally treated, the Supreme Court's jurisprudence under the FAA has led to a vastly differing outcome. By their very nature, arbitration clauses entail the waiver of a party's Seventh Amendment right to a trial by jury.[67] As one court has put it, the "loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate."[68]

Nonetheless, courts regularly enforce arbitration clauses in settings where there is no meaningful consent.[69] One particularly egregious illustration is *Spring Lake NC, LLC v. Holloway*,[70] where a 92-year-old person with a fourth-grade education, memory problems, and increasing confusion, was held to have "agreed" to an arbitration clause—notwithstanding the

[66] Individuals regularly do waive their right to free speech, such as in non-disparagement clauses included in settlement agreements, but those waivers are only effective when and if they are sufficiently knowing, voluntary and intelligent.

[67] *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001); *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984).

[68] *Pierson*, 742 F.2d at 339. In arbitration, the arbitrator decides the merits of a claim. In *Concepcion*, the Supreme Court used the example of "an ultimate disposition by a jury," as one of the generally applicable doctrine that "disfavors arbitration" and therefore conflicts with the FAA. 131 S. Ct. at 1747.

[69] *See, e.g., Morales v. Sun Constructors*, 541 F.3d 218, 222 (3d Cir. 2008) ("Morales, in essence, requests that this Court create an exception to the objective theory of contract formation where a party is ignorant of the language in which a contract is written. We decline to do so. In the absence of fraud, the fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable."); *Berkeley v. Dillard's, Inc.*, 450 F.3d 775 (8th Cir. 2006) (employee who refused to sign arbitration clause assented to arbitration by continuing employment, when clause so provided); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (arbitration agreement binding when consumer orders product by telephone, the product can be returned within thirty days, and the product arrives with an arbitration agreement included in the papers inside the box); *In re Brown*, 311 B.R. 702, 706 (Bankr. E.D. Pa. 2004) (enforcing an arbitration clause against sick, elderly plaintiffs who "d[id] not know what an Arbitration Agreement is" and received no explanation of papers they were asked to sign containing the arbitration clause)

[70] 110 So.3d 916 (Fla. Dist. Ct. App. 2013).

trial court's factual finding that the individual "could not possibly have understood what she was signing."[71] The case is consistent with a great deal of law under the FAA, where the presence of an arbitration agreement somewhere in fine print is often taken as a waiver of the constitutional right to trial by jury. But the case emphasizes how the law in this area differs sharply from what would be required to constitute a waiver of other constitutional rights. Under the same set of facts, if the plaintiff in Holloway had allegedly waived her constitutional right to a jury trial in the criminal context,[72] or, the right to remain silent,[73] no waiver would be enforced.

It is particularly anomalous that the normal presumption against the waiver of constitutional rights is set aside in the arbitration context because outside of the arbitration setting, the normal requirement of a knowing and intelligent waiver applies to waivers of the Seventh Amendment right.[74] Of interest to this Symposium is that the jury trial right is stated explicitly in certain employment statutes.[75] The majority of the Supreme Court's enormous reverence for arbitration is particularly evident in these settings. In a series of important statutes

[71] *Id.* at 917.

[72] *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir.1994) ("the suspected presence of a mental or emotional instability eliminates any presumption that a written waiver is voluntary, knowing, or intelligent").

[73] *Moore v. Ballone*, 658 F.2d 218, 228-29 (4th Cir. 1981) (where defendant "unambiguously demonstrate[ed] his distorted mental condition" during questioning by police officers and remains "in continuous legal commitment to the state mental hospital," then "[t]he evidence in the record of [his] mental condition, standing alone, should have sufficed for the state court to determine that he could not have knowingly and intelligently waived his rights").

[74] *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 811-12 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."); *Seaboard Lumber Co. v. U.S.*, 903 F.2d 1560, 1563 (Fed. Cir. 1990) ("Waiver requires only that the party waiving such right do so 'voluntarily' and 'knowingly' based on the facts of the case."). For more on how courts interpret the Seventh Amendment's right to a jury trial in the civil context see Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000).

[75] Title VII and the Americans with Disabilities Act expressly provide for the right of a trial by jury. 42 U.S.C. § 1981a(c). Parties may also seek a jury trial for claims brought under the ADEA and the Fair Labor Standards Act (FLSA). *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (following the Congressional directive to interpret the ADEA "in accordance with" the FLSA, the Court found it significant that it is "well established that there was a right to a jury trial in private actions pursuant to the FLSA").

protecting workers, Congress specifically made the important policy choice to provide that key causes of action could be tried to a jury.[76] Notwithstanding this conscious and significant decision by the Congress, the Court has been very quick to find that those statutory rights may be waived in settings where there was no voluntary, knowing or intelligent waiver.[77] It is troubling that the majority effectively is endorsing "unknowing" and "unintelligent" waivers of these rights.

Yet no court has ever articulated a serious or convincing rationale for why the Seventh Amendment right to a jury trial should be accorded reduced or no protection in the arbitration context. Instead, courts simply contend that the FAA ostensibly requires this result.[78] Most scholars, however, have concluded that the waiver of a constitutional right is no less important in the arbitration context. [79] Courts should not deviate from the long-standing rule that waiver of a right will not be inferred merely because an arbitration provision is involved.

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[76] Section 15 of the ADEA was amended by Congress in 1978 and unambiguously states that "a person shall be entitled to a trial by jury." 29 U.S.C. § 626(c)(2); *see also Lehman v. Nakashian*, 453 U.S. 156, 168 (1981) ("Congress expressly provided for jury trials in the section of the Act applicable to private-sector employees."). And it wasn't until 1991 that Congress amended Title VII to include the right to a jury trial found within the statute today. PL 102-166, § 102(c) Nov. 21, 1991, 105 Stat 1071, 1073 (1991); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 250 (1994) ("The 1991 Act is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 an 1964" and "expressly identifies as one of the Act's purposes 'to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.").

[77] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991) (enforcing arbitration clause for Age Discrimination in Employment Act claims).

[78] *See, supra*, note 68.

[79] Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 33 (2003) ("State courts should recognize, though many have not, that those arbitration clauses that eliminate a pre-existing constitutional right to jury trial should be treated like civil jury trial waivers interpreted outside the arbitration context. Thus, to the extent that the state enforces civil jury trial waivers only if they are knowing, voluntary, and intelligent, that same standard should be applied to arbitration clauses.").

The long term implications of this case law could conceivably extend beyond the arbitration context. As set forth above, the Court has been issuing decision after decision giving greater content to the FAA (whose operative section, 9 U.S.C. Section 2, is only a single sentence long) that make it easier and easier for corporations to strip workers of constitutional rights through unknowing "waivers" in arbitration clauses. It does not seem far-fetched to imagine that as the Court becomes increasingly comfortable holding that constitutional rights may be waived in an unknowing and unintelligent manner through hidden fine print contracts, that at some point the Court might also be more open to finding that corporations may strip workers of other constitutional rights (such as the right to speak out on matters of public concern, the right to petition the government, the right to privacy) as well.

C. The Policy in Favor of Arbitration Has Distorted the Law of Contracts.

The Supreme Court's creeping extension of federal arbitration law has also slowly subsumed long-standing principles of contract law. Specifically, the FAA has displaced state law rules regarding contract formation.

States have traditionally governed the law of contracts, which includes, among other things, contract formation.[80] At first blush, one would not expect the FAA to distort or rewrite

[80] *See, e.g., Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) ("Nor can or should courts ignore that issues of contract validity are traditionally matters governed by state law."); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) ("the cases before us, which center upon appellant Northern's claim for damages for breach of contract …, involve a right created by *state* law.…") (emphasis in original), *id*. at 90 (Rehnquist, J. and O'Connor, J., concurring) ("[T]he lawsuit … seeks damages for breach of contract … which are the stuff of traditional actions at common law.… There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims … arise entirely under state law."); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) ("[C]ommercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable. . . ."); *Pan Am. Petroleum Corp. v. Super. Ct.*, 366 U.S. 656, 663 (1961) (contract dispute) ("The suits

state law contract principles, as the Act does not even define the term "contract." Except for those instances where state law targets arbitration clauses for inferior treatment, the Court has properly recognized that it is state law, and not federal law, which governs arbitration clauses.[81] It is unsurprising, then, that somewhat older FAA cases accord express respect to state contract law; in a 1995 case, for example, the Supreme Court stated that principles of state contract law provide the primary source of protection for consumers against corporate overreaching.[82]

One specific area where state law governs is contract formation. The FAA says nothing about when a contract is or is not formed. Under a common contract law principle, contracts that violate criminal laws or are against public policy are illegal and void *ab initio*.[83] Thus, a contract entailing illegality cannot, and will not, be enforced.[84] Such illegal contracts are unenforceable in their entirety.

Nonetheless, the Supreme Court has superimposed on state law contract formation its invented substantive rules of federal arbitration law. *In Prima Paint Corporation v. Food &*

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are thus based upon claims of right arising under state, not federal, law.… The rights as asserted by Cities Service are traditional common-law claims.").

[81] *E.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (in cases involving the FAA, courts "should apply ordinary state-law principles that govern the formation of contracts"); *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) ("the interpretation of private contracts is ordinarily a question of state law").

[82] *See Allied Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281(1995) ("In any event, § 2 [of the FAA] gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'").

[83] *See Thomas v. Ratiner*, 462 So.2d 1157, 1159 (Fla. Dist. Ct. App. 1984) ("The right to contract is subject to the general rule that the agreement must be legal and if either its *formation* or its performance is criminal, tortuous or otherwise opposed to public policy, the contract or bargain is illegal.") (emphasis in original); *see also Wechsler v. Novak*, 26 So.2d 884, 887 (Fla. 1946) ("The doctrine relating to illegal agreements is founded on a regard for the public welfare and therefore each contract must have a lawful purpose.").

[84] *See, e.g.*, *Bovard v. American Horse Enter., Inc.*, 201 Cal.App.3d 832 (Ct. App. 1988) (holding that a contract for sale of a drug paraphernalia manufacturing business was unenforceable).

Conklin Manufacturing Co.,[85] the Court held that the FAA requires that arbitration clauses be treated as though they are separable from the rest of the contract.[86] In other words, even if a contract containing an arbitration clause is unenforceable for some reason (perhaps for fraudulent inducement), courts are to treat the arbitration clause as separate from the remainder of the contract and thus presumptively enforceable notwithstanding the broader contract's problems. Hence, under *Prima Paint*, parties are required to arbitrate their challenges to other contract provisions.[87]

The case of *Buckeye Check Cashing, Inc. v. Cardegna*,[88] which relies on the *Prima Paint* rule, illustrates how the Court's expansion of the substantive federal law of arbitration displaces standard rules of contract law. In *Buckeye*, borrowers brought a putative class action alleging that payday lenders violated state usury laws with the high finance charges associated with payday loans.[89] The underlying contracts contained arbitration provisions that the Florida Supreme Court refused to enforce due to the contract's illegality.[90]

Whereas under state contract law the existence of a valid contract is decided by a court, the U.S. Supreme Court held that the borrowers' claim of an unenforceable usurious contract—a

[85] 388 U.S. 395 (1967).
[86] *Id.* at 403-04.
[87] *Id.*
[88] 546 U.S. 440 (2006). It should be disclosed that one of the authors of this article, Mr. Bland, was the Counsel of Record representing John Cardegna in the *Buckeye* case.
[89] *Id.* at 442.
[90] 894 So.2d 860, 862 (Fla. 2005) (agreeing with the lower court that "[a] party who alleges and offers colorable evidence that a contract is illegal cannot be compelled to arbitrate the threshold issue of the *existence* of the agreement to arbitrate; only a court can make that determination") (emphasis in original; citation omitted).

contract for illegal activity—was to be determined by an arbitrator.[91] Thus, the holding in *Buckeye* conflicts with the ability of state courts to void contracts under state law on grounds that apply, in general, to any other contract provision.[92] This approach gives arbitration provisions a special status above state contract law.[93] The implications of this trend are important. For many years, state law doctrines of unconscionability, duress, and public policy have provided floors of protection for workers and individuals against over-reaching and unfair contract terms. Given the modern reality that an employer may simply say "an employee may not work here unless she signs an acknowledgement agreeing to a large number of fine print legalese terms that the employee will predictably not read," there is a strong argument that there needs to be some protection against abuses of this great power.[94] As the Court's jurisprudence repeatedly chips away at the state laws that protect against over-reaching, contract law threatens to be less of a body of true law–with rules and limits–and more into a device for the powerful drafters of contracts to demand and receive whatever they want.

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[91] The Court saw this as a direct result of the *Prima Paint* rule. *See Buckeye*, 546 U.S. at 448 ("it is true. . . that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void.")

[92] *See Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *see also* Charles Davant IV, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 546 (2001) (noting that "[t]o the extent that a 'federal contract law' exists, it is an amorphous grab bag of principles").

[93] Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 147 (2012) (nothing that "many of the Court's arbitration-law doctrines depart from general contract law so considerably that they achieve a different purpose–one in service of social control, not freedom of contract").

[94] *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 145 (2013) ("Of course, Congress could just outlaw mandatory arbitration clauses in consumer contracts by amending the Federal Arbitration Act to reverse the Supreme Court's over-expansive interpretations. . . ."). Professor Rudin notes that the prioritization of "freedom of contract" principles in case law has not resulted in "courts making a distinction between how they evaluate such a clause in a commercial contract between parties who have apparently engaged in cognizant risk allocation versus how they evaluate in a boilerplate rights deletion scheme." *Id.* at 140.

D. The Policy in Favor of Arbitration Has Distorted the Law Distinguishing Procedural and Substantive Laws.

One final example of how the Supreme Court's drive to expand the use of mandatory arbitration clauses has affected black-letter principles involves the distinction between procedural and substantive laws.

The distinction between procedure and substance is significant in a number of different settings. One area where the distinction is particularly important is cases where federal courts sit in diversity jurisdiction. In that setting, of course, federal law governs procedural issues—one would certainly not expect a U.S. district judge to apply state rules of procedure. But "rules that define the elements of a cause of action, affirmative defenses, presumptions, burdens of proof, and rules that create or preclude liability are . . . obviously substantive" and are governed by state law.[95] So if a plaintiff in a diversity case brings claims under a state statute or using a state common law cause of action, issues such as "the allocation of burden of proof" are decided according to state law, not federal law, because those issues are "substantive in nature."[96]

As with the other areas addressed in the foregoing Parts, however, the normal understanding of procedure versus substance is often abandoned when courts are working to enforce arbitration clauses. In *Parisi v. Goldman, Sachs & Co.*,[97] where the plaintiff alleged that the defendant had violated Title VII by engaging in a pattern or practice of gender

[95] *Computer Econ., Inc. v. Gartner Grp., Inc*., 50 F.Supp.2d 980, 990 (S.D. Cal. 1999).
[96] *See Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010) (citing *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943). *See also James River Ins. Co. v. Kemper Cas. Ins. Co*., 585 F.3d 382, 385 (7th Cir. 2009) ("The allocation of burden of proof (in the sense of burden of persuasion–which side loses a tie) absolutely determines the outcome in cases where the evidence is in equipoise, and by doing so advances the substantive policies of a state. . . ."); *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 879 (10th Cir. 2006) (burden of proof rules are substantive).
[97] 710 F.3d 483 (2d Cir. 2013). Mr. Bland was co-counsel for Ms. Parisi.

discrimination, the employer sought to have the case compelled to individual arbitration.[98] The pattern-or-practice theory is a method by which disparate treatment can be shown; certain types of proof in pattern-or-practice cases give rise to a presumption that shifts the burden of proof to the employer.[99] The district court had refused to enforce the employer's arbitration clause, which banned class actions, on the grounds that "the clause effectively operated as a waiver of a substantive right under Title VII."[100] The district court so reasoned based upon the prevailing law in the Second Circuit, which held that pattern-or-practice claims could be brought only on a class action basis. The Second Circuit overturned the district court, and enforced the arbitration clause, citing the "liberal federal policy in favor of arbitration."[101]

In non-arbitration circumstances, the pattern-or-practice method of proof would undoubtedly be seen as a substantive, rather than procedural, body of law. But because applying the ordinary procedure-substance distinction would have led to the invalidation of an arbitration clause, in this case of first impression, the Second Circuit focused upon the connection between the pattern-or-practice method of proof and class actions, and held that there was no entitlement to bring such claims.[102] Once again, in the area of arbitration, where courts focus on the Supreme Court's emphatic policy in favor of arbitration, the normal rule of law was set aside. A body of law that would have been considered substantive in most settings has been viewed as procedural in this context. The boundaries of this trend are not yet settled, and are currently continuing to

[98] *Id.* at 485.
[99] *Id*. at 487-88.
[100] *Id.* at 485-86.
[101] *Id.* at 488.
[102] *Id.*

evolve, both in the general area of employment law[103] and the intersection of arbitration clauses with substantive employment rights.[104]

Conclusion

For the legal system to operate in a principled manner, its basic rules must be applied with consistency and reason. In too many instances, however, the Supreme Court's enthusiasm for arbitration has led it and lower courts to abandon core and otherwise trans-substantive legal principles—or, at least, to cut odd, arbitration-sized holes in them. This Paper has highlighted a few of the principles and their respective holes, and it is clear that the Court has placed arbitration upon its own pedestal. Much as critics described the American legal system of the 1890s as a system in which "The Railroad Always Wins," it seems fair today to criticize our legal system as one where "Arbitration Always Wins."

[103] *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). In *Dukes*, the defense relied on—and the court was persuaded by—an argument that the Rules Enabling Act, which states that the rules of civil procedure "shall not abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b), prevented the use of Federal Rule 23 (governing class actions) to abridge their right to litigate statutory defenses to employment discrimination claims. *Dukes*, 131 S.Ct. at 2561.

[104] See D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 356-57 (5th Cir. 2013) (overturning the decision of the NLRB that an employer violated the National Labor Relations Act ("NLRA") by requiring its employees to sign an arbitration agreement that precluded the filing of joint, class, or collective claims because "the NLRA does not grant employees the substantive right to adjudicate claims collectively" and override the FAA).

FAA Preemption After *Concepcion*

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FAA Preemption After *Concepcion*

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In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the Federal Arbitration Act ("FAA") preempted California's use of unconscionability doctrine to invalidate an arbitration clause containing a class arbitration waiver.[1] Much has been written on *Concepcion*, with most (but not all) focusing on its impact on the availability of class actions.[2] While I touch on that issue in this Article, my main focus here is on a different issue: the implications of *Concepcion* for FAA preemption doctrine more generally. *Concepcion* was the Supreme Court's first decision interpreting the savings clause in FAA section 2, which provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[3] Commentators have expressed disparate views on the scope of the savings clause after *Concepcion*, including some who have suggested that unconscionability may no longer be available as a ground for refusing to enforce arbitration agreements.[4] Courts have disagreed and have applied *Concepcion* more narrowly.[5] In my view, the courts (largely) have it right. This Article will explain why.

Initially, Part I addresses some misconceptions about *Concepcion*. *Concepcion* is beyond doubt a very important (not to mention controversial) decision. But in several respects, the impact of *Concepcion* has been overstated. First, prior to *Concepcion*, a number of courts had held that class arbitration waivers were enforceable as a matter of state law, at least under some circumstances. *Concepcion* may have had little effect on the enforceability of arbitration clauses in those states. Second, despite predictions of a "tsunami" of businesses switching to arbitration after *Concepcion*, the use of arbitration clauses in several types of standard form contracts has increased only slightly. Third, at least some of the preemption holdings courts have attributed to *Concepcion* are due, not to *Concepcion*, but instead to well-established law predating *Concepcion*. Again, my purpose here is not to deny the importance of the decision in *Concepcion*, but rather to focus discussion on the actual effects of the case.

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[1] 131 S. Ct. 1740, 1750 (2011).

[2] *See, e.g.*, Myriam E. Gilles & Gary B. Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012); Jean R. Sternlight, *Tsunami:* AT&T Mobility v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703 (2012); *see also Perspectives on the Current State of Arbitration Law*, 60 U. KAN. L. REV. 723 (2012); *U.S. Law in the Wake of* AT&T Mobility v. Concepcion, 4 YB. ON ARB. & MEDIATION 1 (2012).

[3] 9 U.S.C. § 2.

[4] *See infra* text accompanying notes 64-65.

[5] *See infra* text accompanying notes 69-78.

Part II then examines the implications of *Concepcion* for FAA preemption doctrine.[6] It takes the decision and analysis in *Concepcion* as given and applies that analysis to other possible uses of unconscionability doctrine. I suggest a narrow view of FAA preemption after *Concepcion*, under which states can continue to use unconscionability doctrine to police the fairness of arbitration agreements unless the state rule is inconsistent with "fundamental attributes of arbitration," as illustrated by the particular examples given by the Court. In fact, *Concepcion* might herald a narrowing of FAA preemption, at least to the extent it suggests that state laws may impose some conditions on the enforceability of arbitration agreements.

Finally, Part III addresses the outer limits of FAA preemption. Even if the Supreme Court were to hold that unconscionability is no longer available as a ground for challenging the enforceability of arbitration agreements, courts retain some ability to police the fairness of "arbitration" agreements—at least when those agreements are so one-sided as not to constitute "arbitration" (in which event the FAA would not apply). Thus, if the agreement does not provide for a neutral decision maker, or if it establishes a sham dispute resolution process, it would not be subject to the FAA and could be invalidated under state law.

I. Misconceptions About *Concepcion*

Without doubt, *Concepcion* is an important decision. It federalizes the rules on the enforceability of arbitration clauses with class arbitration waivers, overriding cases in a number of states holding such provisions unenforceable as unconscionable. The potential policy implications of the decision are important and should be analyzed and debated. But in several respects, *Concepcion* is being blamed for effects that either it did not cause or that have not occurred. This part highlights some of these misconceptions about *Concepcion*.

A. *Concepcion* and State Rules on Class Arbitration Waivers

As noted above, the decision in *Concepcion* federalized the rules governing the enforceability of arbitration clauses with class arbitration waivers, resulting in the preemption of state rules invalidating such provisions.[7] Commentators have decried the effect of *Concepcion* on state autonomy and federalism.[8]

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[6] For a more global perspective on *Concepcion*, see PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION 79-100 (2012).

[7] *See infra* text accompanying notes 50-63.

[8] *E.g.*, George A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 AM. REV. INT'L ARB. 551, 569 (2011) ("[T]he majority in *Concepcion* simply had insufficient evidence of discriminatory intent or effect to justify barring California from applying its standard unconscionability doctrine to class-arbitration waivers and that, in ruling as it did, exacted an unjustifiably high price in federalism terms."); Jill Gross, AT&T Mobility *and FAA Over-Preemption*, 4 Y.B. ON ARB. & MEDIATION 25, 25 (2012) ("[T]he Court's decision in AT&T Mobility LLC v. Concepcion expands the FAA preemption doctrine beyond its prior boundaries, signaling how far the Court is willing to go to support arbitration clauses at the expense of states' rights and the values of federalism."); Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 393 (2011) (arguing that *Concepcion* "is an extraordinary augmentation of the central power at the expense of states"); Maureen A. Weston, *The Death of Class Actions After* Concepcion, 60 U. KAN. L. REV. 767, 794 (2012) ("*Concepcion* … improperly guts the FAA savings clause and violates the reserved role under the FAA for states to hold arbitration clauses to the standards required for all contracts.").

But to evaluate properly the effect of *Concepcion*, we need to examine both what the world looked like before *Concepcion* and what it would have looked like had *Concepcion* been decided the other way. Before *Concepcion*, the states were split over the enforceability of class arbitration waivers. While a number of states invalidated such provisions, many held arbitration clauses with class arbitration waivers enforceable as a matter of state law.[9] If the Supreme Court had upheld the California rule at issue in *Concepcion*, the rules in states enforcing class arbitration waivers as a matter of state law would not have changed. A decision affirming the California Supreme Court in *Concepcion* would not have federalized the rules governing class arbitration waivers. It would not have made class arbitration waivers unenforceable in every state. Instead, states would have been free either to uphold or invalidate arbitration clauses with class arbitration waivers as a matter of state law.

This counterfactual has two implications. First, in a significant number of states, class arbitration waivers were enforceable without regard to how *Concepcion* was decided, at least under some circumstances. In those states that upheld the provisions as a matter of state law prior to *Concepcion* (or would have done so regardless of how *Concepcion* came out), *Concepcion* did not cause arbitration clauses with class arbitration waivers to be enforceable. True, the decision prevents those states from changing their rules if they want to. And perhaps those states would have ruled differently had the cases they were deciding been stronger on the facts. But if not, *Concepcion* had little effect on the enforceability of class arbitration waivers in those states.

To illustrate the point, consider the report issued by Public Citizen and the National Association of Consumer Advocates on the first anniversary of *Concepcion*.[10] The report identified seventy-six cases from eighteen jurisdictions in which "judges cited *Concepcion* and held that class action bans within arbitration clauses were enforceable."[11] Of the eighteen jurisdictions, however, eight (and possibly ten) might have reached the same result as a matter of state law even without the decision in *Concepcion*.[12] Attributing the dismissals of the class actions in those states to *Concepcion* potentially overstates the effect of the decision.

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[9] For a high-end estimate, see Alan Kaplinsky, The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers 36 (Feb. 23, 2011), *available at* www.law.gwu.edu/News/2010-2011Events/Documents/Kaplinsky-%20Submission%20-%20Outline.pdf ("Courts applying the laws of 26 states and the District of Columbia) have held that class action waivers are enforceable under state law, at least when the arbitration agreement neither imposes higher arbitration costs on the consumer nor limits the remedies that can be awarded in arbitration …."). The parties in *Concepcion* agreed that states had adopted varying approaches prior to *Concepcion*, although they disagreed about how to classify the decisions of some of the states. *Compare* Petition for Writ of Certiorari. 21-22 & 63a-69, AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010) (No. 09-893) *with* Respondents' Brief in Opposition 10-11, AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010) (No. 09-893).

[10] Public Citizen & National Association of Consumer Advocates, Justice Denied — One Year Later: The Harms to Consumers from the Supreme Court's *Concepcion* Decision Are Plainly Evident (Apr. 2012).

[11] *Id.* at 4.

[12] *Id.* at 32-34 app. Of the jurisdictions listed, the following are identified by Kaplinsky, *supra* note 9, as having cases that upheld class arbitration waivers prior to *Concepcion*: Colorado, D.C., Georgia, Illinois, Louisiana, Missouri, New York, Ohio, Oklahoma, and Tennessee. The respondents in *Concepcion* objected to two of the states (Georgia and Illinois) on the list. *See supra* note 9. Barely twenty percent (16 of 76) the decisions identified in the Public Citizen/NACA report were from these ten jurisdictions, which is not surprising: if the jurisdiction previously had upheld class arbitration waivers as a matter of state law, there would be little incentive to litigate the issue further in that jurisdiction. By comparison, close to half of the decisions (35 of 76) were from courts in California, where prior to *Concepcion* courts had refused to enforce class arbitration waivers.

Second, if the justification for enacting the Arbitration Fairness Act ("AFA") is to reverse *Concepcion*,[13] the Act is overbroad. Reversing *Concepcion* would require returning the enforceability of class arbitration waivers back to the states (as it was before the decision), which is not what the AFA does.[14] Indeed, to the extent *Concepcion* is criticized on federalism grounds, the AFA is subject to the same criticisms.[15] *Concepcion* adopted a uniform federal rule permitting arbitration clauses with class arbitration waivers; the AFA would adopt a uniform federal rule prohibiting pre-dispute arbitration clauses (both with and without class arbitration waivers). The AFA is no friendlier to federalism and federalism values than is the FAA[16]

B. *Concepcion* and the Use of Arbitration Clauses

After *Concepcion* was decided, a number of commentators predicted that soon all businesses would include arbitration clauses with class arbitration waivers in their consumer, employment, and other standard form contracts.[17] Every business would switch, according to these commentators, because there is no reason not to.[18] Every business wants to avoid class

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[13] *E.g.*, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in Courts Against Corporations (Apr. 27, 2011), http://www.franken.senate.gov/?p=press_release&id=1466 (Sen. Blumenthal) ("The Arbitration Fairness Act would reverse this decision [i.e., *Concepcion*] and restore the long-held rights of consumers to hold corporations accountable for their misdeeds.").

[14] Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong., 1st Sess. (2013).

[15] Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSBLOG (Sep. 13, 2011, 11:46 AM), http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act/. For an article that fails to recognize this point, see Edward P. Boyle & David N. Cinotti, *Beyond Nondiscrimination*: AT&T Mobility LLC v. Concepcion *and the Further Federalization of U.S. Arbitration Law*, 12 PEPP. DISP. RESOL. L.J. 373, 396 (2012) ("The effect that *Concepcion* has on federalism may be used as an argument in favor of undoing the Court's decision through legislative action. Congress can use its Commerce Clause power to make class action waivers, or consumer arbitration agreements in general, unenforceable under the FAA…. In addition to citing the effect that *Concepcion* may have on classwide dispute resolution, proponents of change may employ federalism arguments to support the call for amendments to the FAA.").

[16] For an alternative proposal that would protect federalism values, see Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards A Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 181-82 (2012) ("Congress should amend the FAA to remove adhesion pre-dispute employment and consumer arbitration agreements from the scope of the statute…. This proposal would turn the AFA on its head and differ from it in one critical respect. Rather than invalidate all such pre-dispute arbitration agreements, it would leave their regulation to the states. Doing so would promote federalism values and allow the states to serve as more accountable laboratories for the evolution of non-commercial arbitration involving the types of disputes that can affect all segments of society.").

[17] *See, e.g.*, Ian Millhiser, *Supreme Court Nukes Consumers' Rights In Most Pro-Corporate Decision Since Citizens United*, THINKPROGRESS: JUSTICE (Apr. 27, 2011), *available at* http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers/ ("After *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action."); Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON. (Nov. 7, 2010), *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/06/INA41G6I3I.DTL ("Once given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to such provisions [arbitration agreements with class waivers].").

[18] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377 (2005).

actions, and it is cheap and easy for businesses to change their standard form contracts to include an arbitration clause with a class arbitration waiver.[19]

So far, however, that has not happened. Some businesses, particularly large consumer technology companies, have started using arbitration clauses.[20] But the predicted "tsunami" has not yet appeared.[21]

Bo Rutledge and I examined changes in the dispute resolution provisions in franchise agreements since *Concepcion*, and found that "[t]he use of arbitration clauses in franchise agreements has increased since *Concepcion*, but not dramatically, and most franchisors have not switched to arbitration."[22] Prior to *Concepcion*, 40.3% of a sample of major franchisors used arbitration clauses. By the end of 2013, that percentage had increased to 46.3%—the same level as in 1999.[23] Moreover, of the four franchisors switching to arbitration since *Concepcion*, three had previously used arbitration clauses and switched away from arbitration; the fourth had previously used arbitration to resolve some but not all disputes with franchisees.[24]

A preliminary report on the use of arbitration clauses in consumer financial services contracts released by the Consumer Financial Protection Bureau ("CFPB") in December 2013 makes similar findings.[25] According to the CFPB, "[t]he incidence of arbitration clauses in credit card contracts has increased since *Concepcion*, but only slightly," with five credit card issuers switching to arbitration since *Concepcion* and three switching away.[26] Banks switched to arbitration somewhat more frequently for their checking account agreements, with 47.7% of large banks using arbitration clauses as of summer 2013, an increase from 39.8% the previous year.[27] Even so, as of summer 2013, "only 7.7% of banks use arbitration clauses for their checking account contracts" and only "44.4% of bank insured deposits are subject to arbitration."[28]

Professor Rutledge and I consider two possible explanations for the limited move to arbitration since *Concepcion*. One possibility is that standard form contracts are "sticky"—i.e., resistant to change—even when a rational party would make the change.[29] Another possibility is that there are, in fact, reasons for parties not to use arbitration clauses (such as limited appeal

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[19] Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses* After AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825, 846 (2012).
[20] Peter B. Rutledge & Christopher R. Drahozal, *Sticky Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. ___ (forthcoming 2014).
[21] *See* Gilles & Friedman, *supra* note 2, at 629.
[22] Rutledge & Drahozal, *supra* note 20, at __.
[23] *Id.* at __ & n.145.
[24] *Id.* at __.
[25] *See* Consumer Financial Protection Bureau, Arbitration Study Preliminary Results 54-57 (Dec. 12, 2013), *available at* http://www.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.
[26] *Id.* at 54. The CFPB reported "no additional issuers switching to arbitration between December 31, 2012, and June 30, 2013." *Id.* at 54 n.125.
[27] *Id.* at 56. Data on changes between the date of the decision in *Concepcion* and summer 2012 were unavailable.
[28] *Id.* at 25-26.
[29] *See, e.g.*, G. MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 32-44 (2012); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard Form Contracts*, 88 N.Y.U. L. REV. 240 (2013).

rights), so that parties that face little perceived risk of a class action may have decided that an arbitration clause is not worth the cost.[30] We find some evidence supporting both possible explanations,[31] although more research remains necessary.

C. *Concepcion* and Other FAA Preemption Cases

Finally, some courts have cited *Concepcion* as requiring them to change their prior FAA preemption decisions when, in fact, the preemption doctrine on which the courts relied was established long before *Concepcion*. The best example is the Ninth Circuit's decision in *Ferguson v. Corinthian Colleges, Inc.*[32] In *Ferguson*, the Court of Appeals overruled circuit precedent applying the California Supreme Court's *Broughton-Cruz* doctrine to find state law public injunction claims not subject to arbitration,[33] holding instead that the doctrine was preempted by the FAA[34] In so holding, the Ninth Circuit stated that it was overruling its prior precedent because "it is clearly irreconcilable with intervening Supreme Court authority"—i.e., *Concepcion*, among others.[35]

The Ninth Circuit first relied on the Court's statement in *Concepcion* that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[36] But nothing in this statement reflects any change in the law or anything at all new about FAA preemption doctrine in *Concepcion*. While it certainly is an accurate statement of the law, it is an accurate statement of well-established law, settled long before *Concepcion*.

The Court of Appeals then cited *Marmet Health Care Center, Inc. v. Brown*, in which the Supreme Court summarily reversed a decision of the West Virginia Supreme Court that recognized a new and unsupported exception to the FAA.[37] But nothing in *Marmet Health Care Center* was new or revolutionary, either. Indeed, the whole point of a summary reversal is that the decision below was so obviously incorrect that it should be reversed without the need for oral argument.[38] By definition, a Supreme Court summary reversal involves the application of well-settled law.

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[30] *See* Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. 276, 300 (2009) ("[A]rbitration clauses bundle a variety of characteristics — including but not limited to acting as a class action waiver — into a single means of dispute resolution. Not all drafting parties will agree to arbitration, even if they might prefer individual arbitrations to class actions.").

[31] Rutledge & Drahozal, *supra* note 20, at __.

[32] 733 F.3d 928 (9th Cir. 2013).

[33] *See* Broughton v. Cigna Healthplans of California, 988 P.2d 67, 77-78 (Cal. 1999); Cruz v. PacifiCare Health Systems, Inc., 66 P.3d 1167, 1164-65 (Cal. 2003).

[34] *Ferguson*, 733 F.3d at 937 (overruling Davis v. O'Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007)).

[35] *Id.* A Ninth Circuit panel had previously concluded that "*Broughton–Cruz* rule does not survive *Concepcion*" in Kilgore v. Keybank, N.A., 673 F.3d 947, 960 (9th Cir. 2012). But the Ninth Circuit vacated that decision and held en banc that, on its facts, *Kilgore* did not implicate the *Broughton-Cruz* doctrine because it did not involve a public injunction. Kilgore v. KeyBank, Nat. Ass'n, 718 F.3d 1052, 1061 (9th Cir. 2013) (en banc).

[36] *Ferguson*, 733 F.3d at 934 (quoting *Concepcion*, 131 S. Ct. at 1747).

[37] 132 S. Ct. 1201 (2012) (per curiam).

[38] *See, e.g.*, Mireles v. Waco, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) (explaining that summary reversal "is a rare and exceptional disposition, usually reserved by th[e] Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error") (quoting EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 350 (9th ed. 2007)) (internal quotations omitted).

None of this is to say that the Ninth Circuit decision in *Ferguson* is wrong on the merits. To the contrary, I have long taken the position that *Broughton* and *Cruz* are preempted by the FAA.[39] My point here is that nothing in *Concepcion* changed FAA preemption law so as to require the Ninth Circuit to overrule its prior precedent. Presumably the Ninth Circuit panel was seeking to avoid the need for en banc review by relying on *Concepcion* as "intervening" Supreme Court precedent.[40] But while *Concepcion* was "intervening" in the sense that it was decided after the prior Ninth Circuit case and before *Ferguson*, again, nothing in *Concepcion* changed FAA preemption doctrine.[41] The prior case was wrong when it was decided, and the Ninth Circuit in *Ferguson* was simply correcting its previous error.

Interestingly, the Ninth Circuit had previously used an "intervening" Supreme Court case to justify reversing prior circuit precedent when deciding whether Title VII claims were arbitrable. In *Duffield v. Robertson Stephens & Co.*, a panel of the Ninth Circuit held that Title VII claims were not arbitrable, based on a strained reading of federal law.[42] After the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*, which construed the employment exception of the FAA narrowly,[43] a different panel held in *EEOC v. Luce, Forward, Hamilton & Scripps* that *Circuit City* had implicitly overruled *Duffield*.[44] The reasoning in *Luce* was clearly wrong—*Circuit City* did not address whether federal statutory claims could be arbitrated. But the result was correct,[45] and brought Ninth Circuit law on the arbitrability of Title VII claims in line with every other circuit to have addressed the issue.[46] Eventually, the en banc Ninth Circuit rejected the reasoning in both *Duffield* and the panel's decision in *Luce*, ruling that Title VII claims were arbitrable but without justifying its decision as required by *Circuit City*.[47]

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[39] Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 416 (2004).

[40] *See, e.g.*, United States v. Easterday, 564 F.3d 1004, 1010-11 (9th Cir. 2008) ("[E]n banc review is not required to overturn a case where 'intervening Supreme Court authority is clearly irreconcilable with our prior circuit authority.'") (quoting Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003)).

[41] The only other intervening Supreme Court case addressing FAA preemption (that was not a summary reversal) was Preston v. Ferrer, 552 U.S. 346 (2008), which likewise added little to the doctrine (and was not even cited by the Ninth Circuit in *Ferguson*). Later in its opinion, the Ninth Circuit in *Ferguson* did cite Justice Kagan's dissent in American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting), as identifying "other ways" in which the *Broughton-Cruz* doctrine "is flawed." *Ferguson*, 733 F.3d at 935-36. The point made by Justice Kagan in her dissent ― that state policies are subservient to federal ones under the Supremacy Clause ― likewise breaks no new ground (although it seems to have been forgotten by some courts in arbitration cases). Even so, again it was not *Concepcion* that was responsible.

[42] Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1192-99 (9th Cir. 1998) (construing Civil Rights Act of 1991, Pub. L. 102-166, § 118).

[43] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).

[44] 303 F3d 994, 996 (9th Cir.), *reh'g en banc granted*, 319 F.3d 1091 (9th Cir. 2003).

[45] Indeed, the Supreme Court subsequently rejected the Ninth Circuit's statutory interpretation in 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 259 n.6 (2009).

[46] EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 748-49 (9th Cir. 2003) (en banc).

[47] *Id.* at 744-45.

II. *Concepcion* and FAA Preemption

Concepcion is the Supreme Court's first decision interpreting the savings clause of FAA section 2,[48] under which arbitration agreements are enforceable "save upon such grounds as exist in law or in equity for the revocation of any contract."[49] This Part first describes the Court's reasoning in *Concepcion*, and then sets out the implications of that reasoning both for other applications of state unconscionability doctrine and for state statutes that regulate arbitration.

A. An Overview of *Concepcion* and General Contract Law Defenses

The Supreme Court's reasoning in *Concepcion* consists of three steps: (1) recognizing that the savings clause is subject to some limit; (2) setting out a test for when that limit is exceeded; and (3) applying the test to the California rule conditioning the enforceability of arbitration clauses on the availability of class arbitration (as the Supreme Court characterized the rule in *Concepcion*).

Initially, the *Concepcion* Court properly recognized that there must be some limit on the use of general contract defenses to invalidate arbitration clauses. Stated otherwise, invalidating an arbitration clause based on a rule labeled as a general contract defense alone does not always preserve the rule from preemption by the FAA.[50] Even the respondents in *Concepcion* conceded as much, acknowledging that "in light of the text and structure of Section 2, the 'grounds' available under the savings clause should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'"[51] Respondents gave as examples "a statute reviving the ouster doctrine," "a rule forbidding jury-trial waivers," and "a law mandating that arbitrators follow the court system's rules of evidence, even when parties have chosen more flexible procedures."[52]

In its opinion, the Court largely adopted the respondents' approach, changing the formulation of the test to whether the condition imposed by the court "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[53] It also cited respondents' examples of a "rule classifying as unconscionable arbitration agreements that failed to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by

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[48] The Court has addressed the savings clause in dicta, in both Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987) ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what … the state legislature cannot."); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 n.3 (1996) (same).

[49] 9 U.S.C. § 2.

[50] Another limit, touched on but not discussed at length by the Court, is that the application of the general contract law defense must not discriminate against arbitration. 131 S. Ct. at 1746-47; *see* Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 U.C.L.A. L. REV. 1189 (2011); Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233 (2011); *see also infra* text accompanying notes 86-88.

[51] Resp. Br. 33, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893) (quoting Carter v. SCC Odin Operating Co., 927 N.E. 2d 1207, 1220 (Ill. 2010)).

[52] *Id.* at 33-34.

[53] 131 S. Ct. at 1748.

a jury (perhaps termed 'a panel of twelve lay arbitrators' to help avoid preemption)."[54] To those examples, the Court added a third, "obvious illustration": a "case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery." [55]

So far, the Court's opinion in *Concepcion* is a narrow one (as measured by its impact on FAA preemption doctrine). The Court did not adopt an all-purpose interpretation of the section 2 savings clause. It certainly did not accept Justice Thomas's much narrower interpretation of the savings clause as precluding courts altogether from using unconscionability doctrine to invalidate arbitration clauses.[56] Instead, the Court recognized (consistent with respondents' brief) that the savings clause is subject to at least some limit and set out a test for determining when that limit has been exceeded.[57]

The remaining question was whether the California rule conditioning enforcement of an arbitration clause on the availability of class arbitration was enough like the examples above to be preempted. This was where the Court and the respondents disagreed. The Court stated that "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[58] As such, "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[59]

Conditioning the enforceability of arbitration agreements on the availability of class arbitration would frustrate both of these goals: expeditious dispute resolution and enforcing the parties' agreement to arbitrate.[60] The Court gave three reasons: (1) "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"; (2) "class arbitration requires procedural formality"; and (3) "class arbitration greatly increases risk to defendants" of aberrational awards that cannot be reviewed in court.[61] The mere fact that parties might agree to particular procedures, the Court continued, did not save state rules requiring such procedures from preemption.[62] Finally, the Court rejected the dissent's argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system," concluding that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[63]

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[54] *Id.* at 1747.
[55] *Id.*
[56] *See infra* text accompanying notes 64-65.
[57] 131 S. Ct. at 1747-48.
[58] *Id.* at 1747.
[59] *Id.*
[60] An alternative rationale that might have avoided some of the broader readings of *Concepcion* was that relied on by the dissenting Justices in Green Tree Fin'l Corp. v. Bazzle, 539 U.S. 444, 458-59 (2003) (Rehnquist, C.J., dissenting) (arguing that class arbitration was inconsistent with parties' agreement as to how arbitrator would be selected).
[61] 131 S. Ct. at 1751-52.
[62] The Court does suggest that if the parties agreed to class arbitration, it would be consistent with the FAA to enforce that agreement. *See id.* at 1750-51 ("The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.").
[63] *Id.* at 1753.

B. Implications of *Concepcion* for Preemption of State Unconscionability Doctrine

On its facts, the Supreme Court in *Concepcion* held that application of unconscionability doctrine to invalidate an arbitration clause with a class arbitration waiver was preempted. The question here is the extent to which other applications of unconscionability doctrine also are preempted under *Concepcion*.

Some commentators have suggested that unconscionability doctrine may no longer be available at all after *Concepcion*.[64] I disagree. Nothing in the majority opinion in *Concepcion* suggests that unconscionability is never available as a ground for refusing to enforce an arbitration agreement under FAA section 2. Instead, the Court held the California rule at issue in the case—which conditioned enforcement of the clause on the availability of class arbitration—to be preempted only because it "interfere[d] with fundamental attributes of arbitration."[65] As such, there is every reason to believe that, under *Concepcion*, the FAA does not preempt at least some applications of unconscionability doctrine.

A slightly narrower (but still very broad) way to read *Concepcion* is that any state contract law defense that conditions enforcement of an arbitration clause on some procedure that makes arbitration less expeditious is preempted.[66] Under that interpretation, many applications of unconscionability doctrine would be preempted because (1) most would, to some degree at least, make arbitration less expeditious; and (2) all would be inconsistent with the parties' agreement. But such an interpretation, in my view, ignores the context in which the discussion of the FAA's purposes arises. That context is the Court's identification of other examples of state rules that would be preempted by the FAA, even given the savings clause—rules conditioning the enforceability of an arbitration agreement on the use of a jury, court-monitored discovery, and the Federal Rules of Evidence. It is not simply that those procedures make arbitration less expeditious than it otherwise would be; it is that they are inconsistent with the "fundamental attributes of arbitration" in ways analogous to the examples given by the Court.[67]

So viewed, the question then is what, if any, other applications of unconscionability doctrine "interfere[] with fundamental attributes of arbitration" so as to be preempted?[68] The California Supreme Court got it partly right on the facts of *Sonic-Calabasas A, Inc. v. Moreno*.[69] Certainly it was correct to repudiate its prior case law, which conditioned the enforceability of an

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[64] *See* Stipanowich, *supra* note 8, at 380 ("In the wake of Conception, one wonders what if anything is left of the doctrine of unconscionability in the realm of arbitration agreements."); Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion*: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. ___ (forthcoming 2013) (arguing that "the potentially boundless reach of *Concepcion*" "threatens to jeopardize a bevy of facially neutral contract laws merely because they are applied to arbitration agreements").

[65] 131 S. Ct. at 1748.

[66] Sura & DeRise, *supra* note 64, at __-__.

[67] Others have suggested that the problem in *Concepcion* is that the California rule required procedures inconsistent with bilateral arbitration. *See* Jacob Johnson, Barras v. BB&T*: Charting A Clear Path to Apply* Concepcion *Through A Quagmire of Divergent Approaches*, 64 MERCER L. REV. 591, 600-01 (2013) (citing cases). But that standard also would not be consistent with the illustrations relied on by the Court. None of those rules changes bilateral arbitration to class arbitration; it is some other "fundamental attribute of arbitration" they are inconsistent with.

[68] 131 S. Ct. at 1748.

[69] 311 P.3d 184 (Cal. 2013).

arbitration agreement on the parties first participating in an administrative hearing before the Labor Commissioner (a "Berman hearing").[70] Such a rule interferes with a fundamental attribute of arbitration by requiring the parties to appear before another decision maker before proceeding to arbitration.[71] But the court's attempted modification of its rule, so that a comparison between arbitration and a Berman hearing is only a factor in evaluating unconscionability, does not save it from preemption.[72] To the extent the court is simply reimposing its prior condition on a case-by-case basis, the rule should still be preempted.

Many other common applications of unconscionability doctrine, in my view, do not fail the "fundamental attributes" standard and so would not be preempted under *Concepcion*. For example, the decision in *Chavarria v. Ralphs Grocery Co.*[73] (like the decision in *Hooters of America, Inc. v. Phillips*[74]) conditioned enforcement of the arbitration agreement on the appointment of neutral arbitrators—which, if anything, is *itself* a fundamental attribute of arbitration, and certainly does not interfere with a fundamental attribute of arbitration. Under *Concepcion*, the decisions in *Ralph's Grocery* and *Hooters* would not be preempted.[75]

Courts have held arbitration agreements unconscionable because they impose excessive costs on consumers or employees or because they require the arbitration hearing to be held at a location inconvenient for the consumer or employee.[76] Conditioning the enforcement of an arbitration agreement on reasonable (or even subsidized) cost-sharing would not seem to be inconsistent with any fundamental attribute of arbitration.[77] While the parties in the aggregate typically bear the costs of arbitration, no fundamental attribute of arbitration dictates how those costs should be allocated between the parties. The same should be true about the hearing location, which also is not a fundamental attribute of arbitration. As such, neither of these applications of unconscionability doctrine should be preempted under *Concepcion*.[78]

A more difficult line of cases are those holding arbitration agreements with nondisclosure provisions—i.e., contract provisions precluding the parties from disclosing the existence of the arbitration and such like—to be unconscionable.[79] Confidentiality (or, more precisely, privacy) certainly is a fundamental attribute of arbitration, as the Court noted in *Concepcion*.[80] Even so,

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[70] *Id.* at 200.
[71] *Cf.* Preston v. Ferrer, 552 U.S. 346 (2008).
[72] 311 P.3d at 206-07.
[73] 733 F.3d 916 (9th Cir. 2013).
[74] 173 F.3d 933 (4th Cir. 1999).
[75] Moreover, as discussed *infra* Part III, cases like the *Hooters* case likely would come out the same way even if unconscionability were no longer available as a ground for challenging arbitration agreements. Thus, I strongly disagree with the suggestion by Sura and DeRise that "there is even a plausible case that *Hooters* may no longer be valid after *Concepcion*, despite its extreme underlying facts." Sura & DeRise, *supra* note 64, at __.
[76] *See* Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 750-52 (2006) (citing cases re excessive costs); Sura & DeRise, *supra* note 64, at __ (citing cases re location of hearing).
[77] *See* In re Checking Account Overdraft Litigation, 685 F.3d 1269, 1277-79 (11th Cir. 2012) (holding that FAA does not preempt South Carolina's application of unconscionability doctrine to invalidate fee-shifting provision).
[78] For a contrary view, see Sura & DeRise, *supra* note 64, at __.
[79] *E.g.*, Schnuerle v. Insight Comm'ns Co., 376 S.W.3d 561, 578 (Ky. 2012) (concluding that "we are not persuaded that *Concepcion* compels that we uphold the confidentiality agreement in this case").
[80] *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. Kan. L. Rev. 1211, 1211, 1214 (2006) ("Arbitration is private but not confidential.… Privacy … does not ensure confidentiality of arbitration proceedings. Information about and learned through domestic arbitration may become public unless the parties contractually

under U.S. law, the privacy of arbitration typically does not extend to precluding a party's disclosure of the existence of the arbitration or even its outcome.[81] Instead, it means that non-parties can be excluded from the hearing and that the arbitrator and arbitration provider cannot disclose information about the proceeding.[82] Indeed, the whole reason contracts with arbitration clauses include separate nondisclosure provisions is that the default view of arbitration—its fundamental attributes—does not extend as far as the nondisclosure agreements would require. Accordingly, while a much closer case, there is a good argument that these cases are not preempted under *Concepcion*, either.

A final application of unconscionability doctrine of note are cases that invalidate an arbitration clause that excludes (i.e., carves out) certain claims or remedies (potentially including punitive damages) or that requires one party but not the other to arbitrate.[83] The argument here is that conditioning the enforceability of an arbitration agreement on arbitrating claims or remedies that the parties did not agree to arbitrate (those carved out) is inconsistent with a fundamental attribute of arbitration: that the agreement to arbitrate be based on the parties' consent. If the parties have not agreed to arbitrate a claim, the FAA does not require them to arbitrate.[84] On this view, invalidating an arbitration agreement because the parties have agreed to arbitrate certain claims or remedies but not others is inconsistent with the consensual nature of arbitration.[85] On the other hand, nothing in the FAA precludes states from requiring parties to arbitrate claims that they have not agreed to arbitrate—to require true "mandatory" arbitration of particular claims. (There are potential constitutional limits on mandatory arbitration, but that is a different issue.) The counterargument, then, is that the FAA does not preempt such a condition.

Alternatively, these sorts of mutuality requirements could be (and, in many cases, should be) held preempted because they discriminate against arbitration. No state requires that all contracts be "mutual" in the sense that both sides undertake equal obligations (indeed, that would be contrary to the whole idea of exchange).[86] So a special mutuality requirement applied to

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require that this information remain confidential. Arbitration is therefore not entirely secret."); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. Kan. L. Rev. 1255, 1260 (2006) ("A crucial distinction … must be drawn between the 'privacy' of the arbitral proceeding and the 'confidentiality' of the proceeding.").

[81] The law of some other jurisdictions takes a broader, default understanding of the confidentiality of the arbitration process. *See, e.g.*, Esso Australia Resources Ltd. v. Plowman, 183 C.L.R. 10 (Austr. 1995).

[82] *E.g.*, Reuben, *supra* note 79, at 1260.

[83] *See* Erin O'Hara O'Connor & Christopher R. Drahozal, *Carve-Outs and Contractual Procedure* (2013), *available at* www.ssrn.com; Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537 (2002).

[84] *See, e.g.*, Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 681 (2010) (stating that "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion'") (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

[85] Arguably, the enforceability of provisions limiting the award of punitive damages in arbitration depends on how they are characterized: if they are seen as waivers of punitive damages rather than exclusions of punitive damages awards from arbitration the case for avoiding FAA preemption might be stronger. Indeed, the Supreme Court has indicated that a state rule denying arbitrators the authority to award punitive damages would be preempted. *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56-57 (1995). That said, in any event the arbitrators rather than a court would likely need to decide how to characterize the punitive damages provisions. *See* PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 407 (2003).

[86] Drahozal, *supra* note 82, at 538-39.

arbitration clauses would single out arbitration and be preempted as discriminatory.[87] Further, such a rule probably should be preempted even if imposed under the guise of unconscionability doctrine. If so, a court would not need to resolve whether such a mutuality requirement is preempted under *Concepcion*'s "fundamental attributes of arbitration" test.[88]

In short, properly construed, *Concepcion* has only limited implications for the preemption by the F.A.A of other applications of unconscionability doctrine. *Concepcion*'s preemption holding is limited to the use of unconscionability doctrine to invalidate arbitration clauses on grounds similar to the illustrations given by the Court. There may be other grounds for holding that the FAA preempts state attempts to regulate arbitration. But those grounds are not properly attributed to *Concepcion*.

C. Implications of *Concepcion* for State Statutes Regulating Arbitration

On its facts, *Concepcion* deals with the savings clause of FAA section 2—i.e., it involves the application of a general contract law defense to invalidate an arbitration clause. But the decision may have implications for FAA preemption of state statutes that invalidate arbitration clauses as well.[89]

The Court does not indicate in *Concepcion* whether its analysis provides the only limitation on the use of general contract defenses under the savings clause.[90] Nor does it explain how its analysis fits into or affects FAA preemption analysis more generally. That said, it would seem to follow that if an application of a general contract law defense is preempted despite the savings clause, a state statute invalidating an arbitration clause for that same reason would also be preempted. On this view, the FAA would preempt a state statute that, like the California rule at issue in *Concepcion*, "condition[s] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."[91]

But, at least as I understood FAA preemption, such an implication already had been established long before *Concepcion*. Thus, I stated in 2004 that "if the state rule precludes the parties from arbitrating disputes they otherwise have agreed to arbitrate, in whole or in part,

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[87] Drahozal, *supra* note 39, at 411 n.138; *see* Easter v. Compucredit Corp., 08-CV-1041, 2009 WL 499384, at *3 (W.D. Ark. Feb. 27, 2009) ("find[ing] that the Arkansas law requiring independent mutuality in an arbitration clause is preempted by the FAA"); *see also* THI of New Mexico at Hobbs Ctr., LLC v. Patton, 2014 WL 292660, at *6 (10th Cir. Jan. 28, 2014) (invalidating mutuality requirement as contrary to Supreme Court precedent holding that "[a] court may not invalidate an arbitration agreement on the ground that arbitration is an inferior means of dispute resolution"). *But see* Noohi v. Toll Bros., 708 F.3d 599, 611-13 (4th Cir. 2013) (rejecting argument that FAA preempts Maryland requirement of separate consideration for arbitration agreement).

[88] One difference in relying on a discrimination theory to hold mutuality requirements preempted by the FAA is that the same sort of analysis would not necessarily apply to decisions holding punitive damages waivers unconscionable.

[89] I am not referring here to state statutes that invalidate arbitration clauses on the basis of codified "general contract defenses," such as Article 2 of the Uniform Commercial Code, but rather state statutes that invalidate arbitration clauses explicitly.

[90] As noted above, presumably the FAA would also preempt discriminatory applications of general contract defenses. *See supra* text accompanying note 86-88.

[91] 131 S. Ct. at 1744.

conditionally or unconditionally, the FAA preempts the state rule."[92] The authority for the "conditionally" part of the statement was the Supreme Court's decision in *Doctor's Associates, Inc. v. Casarotto*, in which the Court held that the FAA preempted a Montana statute that made an arbitration clause "unenforceable unless '[n]otice that [the] contract is subject to arbitration' is 'typed in underlined letters on the first page of the contract.'"[93] If a state statute conditioning the enforceability of an arbitration clause on conspicuous disclosure is preempted under *Doctor's Associates*, it would seem to follow that a state statute conditioning enforceability on the availability of class arbitration would be preempted as well. If anything, the hypothetical statute based on *Concepcion* is more intrusive on the parties' agreement to arbitrate than the one in *Doctor's Associates*. Yet while *Concepcion* implicitly held such a state statute to be preempted, it seemed to have to work a lot harder at it than the Court did in *Doctor's Associates*.[94]

So how to reconcile *Concepcion* with *Doctor's Associates*? One possibility is that *Concepcion* was a more difficult case only because it involved application of a general contract defense. On this view, the decision in *Concepcion* would have been a much easier in which to find preemption had it been a state statute rather than unconscionability doctrine that conditioned enforceability on the availability of class arbitration.

Alternatively, it may be that I previously read too much into the Court's decision in *Doctor's Associates*, and that not every state statute that precludes the parties from arbitrating only "conditionally" is preempted under that case. If so, perhaps *Concepcion* suggests that the scope of FAA preemption is narrower than previously perceived. At the very least, it raises questions about whether a state statute that makes an arbitration agreement conditionally enforceable necessarily is preempted by the FAA.

Footnote 6 in the *Concepcion* opinion also raises questions about the reach of *Doctor's Associates*. In that footnote, the Court states:

> Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.[95]

It is not clear what this footnote means. (It is, of course, only dicta, because the issue was not before the Court in *Concepcion*.) In *Doctor's Associates*, the Court held that a state statute requiring arbitration clauses to be highlighted is preempted.[96] Given that it is the arbitration clause itself that operates as a "class action waiver"—it removes the case from the possibility of

[92] Drahozal, *supra* note 39, at 415 (emphasis added).
[93] 517 U.S. 681, 683 (1986) (quoting Mont. Code Ann. § 27-5-114(4)).
[94] *Doctor's Associates* was an 8-1 opinion, written by Justice Ginsburg, with only Justice Thomas dissenting (on the ground that the FAA does not apply in state court).
[95] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 n. 6 (2011).
[96] 517 U.S. at 688.

a class action in court—requiring conspicuous disclosure of a class action waiver arguably is simply inconsistent with the decision in *Doctor's Associates*.[97]

Alternatively, perhaps by "class-action-waiver provisions" the court means provisions other than the arbitration clause that waive the availability of class actions—in other words, class arbitration waivers.[98] Maybe the footnote means that states can require conspicuous disclosure of contract provisions other than the arbitration clause itself without being preempted by the FAA.

Or maybe the disclosure has to be of class waivers generally—i.e., both arbitral and non-arbitral class waivers. That would be consistent with the position taken in the law professors amicus brief (in support of petitioner) in *Concepcion*, which stated: "For example, a state-law rule requiring particularized notice (e.g., minimum font size, boldface type) for jury-trial waivers in any contract would fall within Section 2's savings clause because it would be 'grounds . . . for the revocation of any contract.'"[99] This latter interpretation would adopt the "doubling out" rationale for avoiding FAA preemption—i.e., states can regulate a provision in an arbitration clause as long as they also regulate comparable provisions that are not in an arbitration clause.[100] But the Court rejected, implicitly if not explicitly, precisely such a rationale for upholding the California rule at issue in *Concepcion*.[101]

At bottom, *Concepcion* raises more questions than it answers about its application to state statutes rather than general contract law defenses.

III. An Outside Limit on FAA Preemption: "To Settle by *Arbitration*"[102]

But perhaps I am wrong and *Concepcion* in fact restricts application of unconscionability doctrine much more broadly than I argue above. Or else maybe some day the Supreme Court will accept Justice Thomas's argument in his *Concepcion* concurrence that "[c]ontract defenses unrelated to the making of the agreement—such as public policy [and including unconscionability]—could not be the basis for declining to enforce an arbitration clause."[103] In

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[97] *See* Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 875-76 (2012) (describing footnote 6 in *Concepcion* as "a truly embarrassing moment of judicial amnesia" and concluding that "any attempted distinction [between the *Concepcion* and *Doctor's Associates*] seems doomed to unpersuasiveness").

[98] *Concepcion*, 131 S. Ct. at 1750 n. 6.

[99] Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner 8 n.2, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (No. 09-893).

[100] *See* Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 754 n.127 (1999) ("If the test is whether law 'singles out' arbitration, does that mean law becomes consistent with the FAA by 'doubling out' arbitration, i.e., precluding enforcement of arbitration agreements as just one other type of contract? If so, the FAA can be evaded just by finding some obscure, trivial type of contract and making it, along with arbitration agreements, unenforceable.").

[101] Respondents argued, alternatively, that the California rule should be upheld as "applicable to all dispute-resolution contracts" because it also would apply to non-arbitral class waivers. *Concepcion*, 131 S. Ct. at 1746. The Court, after identifying a requirement of court-supervised discovery as preempted, stated: "In practice, of course, the [discovery] rule would have a disproportionate impact on arbitration agreements, but it would presumably apply to contracts purporting to restrict discovery in litigation as well." *Id.* at 1747-48.

[102] 9 U.S.C. § 2.

[103] *Concepcion*, 131 S. Ct. at 1754. Justice Thomas based his argument on a textual interpretation of the savings clause of FAA section 2, which he construed as coextensive with language in FAA section 4 requiring a court to

either case, an important legal limitation on abusive arbitration clauses would no longer be available.

But regardless of how courts interpret the savings clause of FAA section 2, the scope of the FAA itself establishes an outside limit on FAA preemption: if the FAA does not apply, it cannot preempt state law.[104] By its terms, the FAA makes enforceable pre-dispute agreements "to settle *by arbitration* a controversy thereafter arising out of such contract or transaction" and post-dispute agreements "to submit *to arbitration* an existing controversy."[105] If the parties agree to a process that is not "arbitration," the FAA does not apply and state law rather than federal law will determine the enforceability of the agreement.

The FAA itself does not define "arbitration." But an essential element of other definitions is that for a process to be "arbitration," it must involve a decision by a neutral decision maker.[106] If a dispute resolution process does not specify a neutral decision maker, it is not arbitration and the FAA does not apply.[107] Accordingly, the dispute resolution process in the well known *Hooters* case, in which the business set up a one-sided procedure in which it got to define the pool of prospective arbitrators, likely would not be considered "arbitration" within the meaning of the FAA.[108] Likewise, the arbitrator selection process in the recent *Ralph's Grocery* case, in which the respondent always got to pick the arbitrator, would not be arbitration.[109] In neither case did the parties' dispute resolution process result in a decision by a neutral decision maker.

In addition, a number of courts have refused to enforce "sham" arbitration awards, awards arising from processes that look like arbitration but that are not, in substance, processes for resolving disputes. For example, a series of federal and state court cases have refused to enforce purported arbitral awards when the "arbitration" was a sham, nothing more than an

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send a dispute to arbitration "upon being satisfied that the *making of the agreement for arbitration* … is not in issue." 9 U.S.C. § 4 (emphasis added). But if FAA section 4 means what Justice Thomas says it means, there was no need for him to address the language of the FAA section 2 savings clause. *Concepcion* was a federal court case, and section 4 controls the district court's authority to compel arbitration. If section 4 did not permit the district court to consider unconscionability as a defense, the court had to compel arbitration without regard to the language of the savings clause. For a debate over the meaning of FAA sections 2 and 4 in this regard, compare David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 399-408 (2012) with Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2062-64 (2011); and Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 NW. U.L. REV. COLLOQUY 53 (2011).

[104] The Supreme Court has consistently rejected other arguments for limiting the scope of the FAA based on the interstate commerce nexus required for application of the Act. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003) (per curiam).

[105] 9 U.S.C. § 2 (emphasis added).

[106] *See* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "arbitration" as "[a] method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding"). The federal circuits are divided on whether courts should look to federal common law or state law for the definition of "arbitration" under the FAA *See* Bakoss v. Certain Underwriters at Lloyds of London, 707 F.3d 140, 143-44 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 155 (U.S. 2013) (looking to federal common law for definition of "arbitration" under FAA, but recognizing circuit split on whether federal law or state law applies).

[107] Cf. Cheng-Canindin v. Renaissance Hotel Assocs., 57 Cal. Rptr. 2d 867 (Cal. Ct. App. 1996) (holding dispute resolution process was not "arbitration" within the meaning of California law; stating: "All of this authority confirms our strong view that a third party decision maker and some degree of impartiality must exist for a dispute resolution mechanism to constitute arbitration").

[108] 173 F.3d 933 (4th Cir. 1999).

[109] 733 F.3d 916 (9th Cir. 2013).

attempt to evade state law restrictions on structured settlements.[110] Under the reasoning of such cases, a dispute resolution clause that includes an exceedingly short statute of limitations on filing claims or requires payment of excessive fees might be held to be a sham and thus not arbitration within the meaning of the FAA.[111]

Obviously, both these sets of circumstances (non-neutral decision makers and "sham" arbitration) involve extreme facts and arise only rarely. But at least in those rare cases, courts remain able to prevent enforcement of abusive arbitration clauses, whether or not unconscionability is available as a possible defense.

IV. Conclusion

Concepcion is an important case for its holding that the FAA preempts application of state unconscionability doctrine to invalidate an arbitration clause with a class arbitration waiver. But in a number of respects, the effect of *Concepcion* has been overstated, including its effect on application of state unconscionability doctrine as applied to arbitration clauses. *Concepcion* does not preempt all or even most state unconscionability doctrine as applied to arbitration agreements. Properly construed, *Concepcion* preempts state unconscionability doctrine only when that doctrine conditions enforcement of arbitration agreements on procedures inconsistent with "fundamental attributes of arbitration" of the sort illustrated in *Concepcion* itself—such as the use of juries, court-monitored discovery, evidentiary rules, and, of course, class arbitration.[112] If, however, the Supreme Court were to construe *Concepcion* more broadly (or eliminate application of unconscionability to invalidate arbitration clauses altogether), courts would retain some residual authority to police the fairness of arbitration clauses, but only by finding a dispute resolution process not to be arbitration at all.

[110] *See* Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 567 F.3d 754, 754 n.2 (5th Cir. 2009) (per curiam) ("[W]e join numerous state and federal courts concluding that a sham arbitration cannot be used as a device to bring about an otherwise unlawful transfer.") (citing cases).

[111] *Cf.* American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2314 (Kagan, J., dissenting) ("The agreement might set outlandish filing fees or establish an absurd (*e.g.*, one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum."). The argument suggested here is not, however, coextensive with the vindication-of-rights theory addressed in *Amex* (hence the "sufficiently extreme case" modifier).

[112] *Concepcion*, 131 S. Ct. at 1748.