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THE UNWRITTEN FEDERAL ARBITRATION ACT

*Anthony J. Sebok**

INTRODUCTION

The historical roots of the Federal Arbitration Act (FAA) cast a long shadow over contemporary controversies in arbitration law and policy. Many excellent scholars extensively covered the complex history and meaning behind the FAA's passage.¹

Regardless of the specific content of that history, its cumulative effect has been that most controversies about arbitration obsess over the conflict between "arbitration" and some body of law outside of arbitration, usually in the form of federal judges supplanting their authority for arbitrators or (and more recently) state or federal law limiting the scope of arbitration. In the latter case, critics of arbitration have turned to various doctrines, such as state contract law's unconscionability doctrine² or federal law's vindication of rights doctrine,³ to cabin the reach of arbitration.

The connection between the FAA's early history and the conflict between arbitration and nonarbitration has jurisprudential roots in the now discredited idea that legal processes had to possess a certain form for them to qualify as law at all, and that form was the classic formalist conception of adjudication before a court under the control

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1. See, e.g., Imre Szalai, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 179–85, 188–89 (2013); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1946–53 (2014); Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2943–44, 2949–51 (2015); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969–94 (1999).

2. See, e.g., David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387 (2012); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 107–13 (2012). But see Richard Frankel, *Conception and Mis-Conception: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. DISP. RESOL. 225.

3. See, e.g., Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375 (2014); Ramona L. Lampley, *The Price of Justice: An Analysis of the Costs That Are Appropriately Considered in a Cost-Based Vindication of Statutory Rights Defense to an Arbitration Agreement*, 2013 B.Y.U. L. REV. 825; Rebecca Wolf, "To a Hammer Everything Looks Like a Nail": *The Supreme Court's Misapplication of the Vindication of Rights Doctrine*, 21 AM. U. J. GENDER SOC. POL'Y & L. 951, 971–92 (2013).

of a judge and in the hands of lawyers. As recent scholarship has noted, the Progressive Movement, which was closely connected with jurisprudential critiques of formalism, had a hand in promoting arbitration in the early twentieth century.⁴ It is ironic that so many modern skeptics of the current state of arbitration are on the liberal side of the political spectrum and are associated with positions that can be traced back to legal realism and the rise of the New Deal.⁵ Although much of the legislative pressure for the adoption of the FAA came from commercial lawyers and business elites, it should not be forgotten that much of the intellectual support that was invoked to advocate for it came from legal scholars who believed that a broader definition of law—one that encompassed more than adjudication in a courtroom—could help bring the benefits of the rule of law to economically and politically disadvantaged parts of society, such as workers and consumers.⁶

This Article argues that the roots of arbitration, which are planted in a jurisprudence that takes many different sources of law, including a state's own public policy, seriously, are worth recalling in an era when the U.S. Supreme Court has aggressively protected arbitration from any erosion caused by the forces of nonarbitration. Others have vigorously argued that the U.S. Supreme Court has taken a number of wrong turns in its interpretation of the FAA's scope, and this Article cannot, and does not, pretend to add to those claims or even try to evaluate them. This Article's goal is more modest: arguing that within the FAA's sweep, there is room for states to combat the suppression of arbitration by demanding that some contracts (e.g., consumer contracts of adhesion) be "pro-arbitration" by prohibiting assignment and consolidation waivers.

II. *AT&T MOBILITY V. CONCEPCION*

In *AT&T Mobility LLC v. Concepcion*,⁷ the plaintiff-consumers claimed that AT&T Mobility, their cellular phone service provider, engaged in consumer fraud when it charged them \$30 in sales tax for two phones that had been advertised as free.⁸ The plaintiffs' contract of sale included a mandatory arbitration agreement with many provisions, including an agreement not to pursue remedies through class-wide litigation or arbitration. In 2005, the plaintiffs filed a suit against

4. See, e.g., Aragaki, *supra* note 1, at 2002–04; Kessler, *supra* note 1, at 2945.

5. See Aragaki, *supra* note 1, at 2002–04.

6. See Kessler, *supra* note 1, at 2960–66.

7. 563 U.S. 333 (2011).

8. *Id.* at 337.

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AT&T in federal court, which was later consolidated into a class action.⁹ In 2008, AT&T moved to compel individual arbitration under the terms of the contract.¹⁰ The district court refused, holding that the arbitration agreement was unenforceable because, in part, the class action waiver rendered the contract unconscionable under California's *Discover Bank v. Superior Court*¹¹ rule, and the Ninth Circuit affirmed.¹² AT&T appealed to the U.S. Supreme Court, and, in 2011, the Court reversed the Ninth Circuit and essentially held that the *Discover Bank* rule was preempted by the FAA.¹³

As David Horton, Professor of Law at UC Davis School of Law, noted: "The unconscionability doctrine has emerged as the primary check on drafter overreaching" in consumer arbitration litigation.¹⁴ The other leading candidate for a check on drafter overreach is the effective vindication rule, which has proven somewhat ineffective in the hands of the current U.S. Supreme Court.¹⁵ As discussed *infra*, other possible grounds to void arbitration decisions (e.g., void as to public policy) have also not offered much protection in the area of consumer arbitration.¹⁶

The outcome in *Concepcion* can be understood to be as much a result of the long war against the class action in U.S. political circles as it is a decision specific to federal arbitration law or federal preemption

9. See Class Action Complaint for: (1) Violation of California Code of Regulations Section 1585(b)(6); and (2) Violation of California Business and Professions Code Section 17200 et. seq. at 2–5, *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181 (2005) (No. 05 CV 1167 JM (AJB)), 2005 WL 1802719.

10. Memorandum of Points & Authorities in Support of Defendant AT&T Mobility LLC's Motion To Compel Arbitration & To Dismiss Claims of Concepcion Plaintiffs Pursuant to the Fed. Arbitration Act at 1, *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008), 2008 WL 2073400.

11. 113 P.3d 1100 (Cal. 2005).

12. See *Laster*, 2008 WL 5216255, at *7–9; see *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854 (9th Cir. 2009) (citing *Discover Bank*, 113 P.3d at 1108) ("[*Discover Bank* held] that class action waivers were at least sometimes unconscionable under California law."), *rev'd and remanded sub nom. Concepcion*, 563 U.S. 333.

13. *Concepcion*, 563 U.S. at 351–52.

14. Horton, *supra* note 2, at 388 ("The Supreme Court has repeatedly acknowledged that lower courts can invoke unconscionability to invalidate one-sided arbitration provisions, and dozens (perhaps hundreds) of judges have done exactly that." (footnote omitted)); see Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1439–41, 1440 fig.1 (2008); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–98 (2004).

15. The vindication of rights doctrine, which only applies to claims brought under federal law, was significantly limited in the context of protecting class actions in *American Express Co. v. Italian Colors Restaurant (AMEX)*, 133 S. Ct. 2304 (2013).

16. See *infra* Section III and accompanying text.

law.¹⁷ Nevertheless, it is a decision rooted in a certain history concerning the FAA, and the logic behind Justice Scalia's plurality opinion is noteworthy because of what it taught us about the hidden assumptions in the current Court's understanding of the substantive law of arbitration's sources.

The argument between Justice Scalia, who wrote the plurality opinion, and Justice Breyer, who wrote for the four-person dissent, begins with each adopting a methodological position that is counterintuitive based on where each wanted to end up.¹⁸ At the beginning of his opinion, Justice Scalia took pains to reject the view that "the overriding goal of the Arbitration Act was . . . to 'ensure judicial enforcement of privately made agreements to arbitrate.'" ¹⁹ Instead, Justice Scalia argued that "our cases place it beyond dispute that the FAA was designed to promote arbitration."²⁰ Dissenting, Justice Breyer stressed that, in earlier cases, the Court rejected the view that Congress's "primary objective was to guarantee [arbitration's] particular procedural advantages" and emphasized that Congress passed the FAA to "'ensur[e] judicial enforcement' of arbitration agreements."²¹

Justice Scalia's position would have made more sense had he been writing a decision that only enforced a class action waiver—that is, the right to participate in litigation through a representative plaintiff. As the American Antitrust Institute noted in its amicus brief filed on behalf of the respondents, class arbitration is almost always a superior form of arbitration in consumer cases.²² Even in the specific case presented before the Court, in which AT&T promised consumers a one-way cost shifting of "reasonable" expenses and a minimum recovery of \$7500 if they prevailed in arbitration, the economic case for any attorney or claimholder who invested hundreds of thousands of dollars to prove the claim against AT&T was missing; thus, except for the

17. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375–77 (2005) (predicting and explaining that arbitration waivers have the potential to erode class actions).

18. Therefore, I am not discussing Justice Thomas's concurrence, which expressed his view that except for a defect in contract formation (e.g., fraud, duress, or mutual mistake), Section 2 of the FAA preempts all other generally applicable state contract law. See *Concepcion*, 563 U.S. at 352–55 (Thomas, J., concurring).

19. See *id.* at 359 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

20. *Id.*

21. *Id.* at 1757–58 (Breyer, J., dissenting).

22. Brief of Am. Antitrust Inst. as Amicus Curiae in Support of Respondents at 19, *Concepcion*, 563 U.S. 333 (No. 09-893), 2010 WL 3973888 (arguing that class arbitration may be the best "available method[] for the fair and efficient adjudication of [consumers'] controvers[ies].") (quoting AM. ARBITRATION ASS'N, SUPP. R. FOR CLASS ARB. 4(b)).

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most ministerial of errors, valid consumer claims would be left unarbitrated.²³

Although it is true that the plaintiffs, and many of their amici, would have preferred a rule that preserved both the right to class litigation and class arbitration, Justice Breyer noted that the rule announced by the majority in *Concepcion* provided corporations with a mechanism to avoid class arbitrations: “In general[,] agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate.”²⁴ Given this fact, the majority opinion made no sense if, as Justice Scalia kept saying, the point of the FAA was to promote arbitration.

On the other hand, Justice Breyer’s strategy in *Concepcion* appeared, at least on the surface, to embrace a perspective that was a traditional *bête noire* for critics of mandatory consumer arbitration. As Professor Hiro Aragaki has noted, the history of the U.S. Supreme Court’s arbitration jurisprudence has been an arc toward placing the right to contract above all other competing values (what Aragaki calls “the Contract Model”).²⁵ In the first historical phase, referred to as the “freedom of contract” phase, the Court “gradually disabled” courts and legislatures from limiting what could be arbitrated or when arbitration agreements were valid.²⁶ This involved broadening the potential reach of arbitration into conduct exclusively regulated by federal (public) law²⁷ and state (private) law.²⁸ Aragaki argued that as

23. See *Concepcion*, 563 U.S. at 337; see also Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 *LAW & CONTEMP. PROBS.* 75, 75 (2004) (noting that arbitration clauses are designed to prevent arbitration).

24. See *Concepcion*, 563 U.S. at 365 (Breyer, J., dissenting). The suppressive effect of the class arbitration waiver on arbitration in consumer cases has been widely discussed. See, e.g., Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 *NOTRE DAME L. REV.* 825, 829 (2012) (arguing that AT&T’s arbitration agreement and other similar bilateral arbitration agreements “appear designed to give judges comfort that the claimant will be able to vindicate its rights, thereby enabling courts to enforce those agreements”); David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 *U. COLO. L. REV.* 459, 494 (2014) (reviewing the reasons leading up to the adoption of AT&T’s class arbitration waiver).

25. Aragaki, *supra* note 1, at 1945 (“On this view, private ordering in dispute resolution was not just one of many important objectives behind the statute; instead, it reflected Congress’s overriding objective.”).

26. *Id.* at 1952–53.

27. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24–26 (1991); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 225–26 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

28. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684–88 (1996); *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

the Contract Model evolved and strengthened, the Court endorsed the idea that the FAA's purpose was not only to allow parties to choose which legal disputes were moved out of litigation but to allow parties to choose the content of their arbitral procedures without any interference from law outside of the FAA. He called this second stage of the Court's contractarian arbitration jurisprudence the "freedom of contract procedure" phase.²⁹

Aragaki's claim that "[p]rior to [*Concepcion*], the Court had never invoked the contract model to justify freedom of contract procedure" may be dramatic; however, he is correct that the real issue in *Concepcion* was whether California could prohibit consumers selling, *ex ante*, their right to participate in class arbitrations.³⁰ It is true that until *Concepcion*, there had been an understanding as to what the Court meant in *Volt Information Sciences, Inc. v. Board of Trustees*³¹ when it said: "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."³² It meant that the states could mandate certain rules of procedure for arbitration unless they interfered with the FAA, in which case they would be preempted under Section 2.³³

Christopher Drahozal, Associate Dean at the University of Kansas School of Law, noted that there are multiple ways to interpret the meaning of "interference" in the context of state regulation of arbitral processes.³⁴ Although reasonable minds may differ on which interpretation should be the law, it is quite likely that until *Concepcion*, the leading theory was some version of what Drahozal called "the RUAA Theory," which was based on the view of FAA preemption used by the drafters of the Revised Uniform Arbitration Act (RUAA) in the late 1990s.³⁵

In Drahozal's view, the RUAA Theory held that a state law, which purported to regulate how arbitration was conducted, was preempted

29. Aragaki, *supra* note 1, at 1956.

30. *See id.* It would seem that some of the Court's preemption decisions prior to 2011 straddled the line between substantive contract law and arbitral procedure. If it was not procedure, what was at issue in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010)?

31. 489 U.S. 468 (1989).

32. *Id.* at 476.

33. *See* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 *IND. L.J.* 393, 416-18 (2004).

34. *See id.* at 417-20.

35. *Id.* at 417-18; Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 *J. DISP. RESOL.* 67, 67-80 (providing a description of how the drafting committee of the RUAA "defin[ed] . . . the areas of the substantive law of arbitration in which the states are free to regulate, the [FAA] notwithstanding").

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if the state law conflicted with the arbitration agreement's terms addressing "the most essential dimensions of the commercial arbitration process"—that is, that 'go to the essence of the agreement to arbitrate and the role of the judiciary in holding parties to those agreements.'"³⁶ Therefore, the key distinction was between procedural rules that affected the essence of arbitration as a process (which were preempted) and that effected the process but were consistent with it (which the states were free to design as they saw fit). Stephen Hayford, the Academic Advisor to the drafters of the RUAA who worked on this question, called the latter "procedural rules," such as "prehearing discovery, consolidation of claims, and arbitrator immunity."³⁷ In Hayford's opinion, rules covering these issues of procedure were even less likely to be deemed essential to arbitration than certain other rules covering borderline issues, such as the authority of arbitrators to award punitive damages, the standards for arbitrator disclosure of conflicts of interest, the authority of the courts and arbitrators to direct provisional remedies, and the right of parties to representation by an attorney.³⁸ In his opinion, neither the borderline rules nor the procedural rules "[went] to the essence of the agreement to arbitrate or effectuation of the results of the process."³⁹ For that reason, he explained that when it came to procedural rules, the U.S. Supreme Court should defer to the "state arbitration act, provided [its] rules are intended to foster the arbitration process and do not conflict with the seminal directive of the FAA that otherwise valid contractual agreements to arbitrate are enforceable."⁴⁰

Aragaki's claim that *Concepcion* marked the shift to the freedom of contract procedure version of the contract model must be read against the possibility that the RUAA Theory is still accepted by the Court. If Aragaki is correct, then any valid contract-based agreement between private parties concerning arbitral procedures would preempt any conflicting state law and would only be limited by the FAA. As Hayford noted, the contract model put tremendous pressure on rules regarding so-called borderline issues.⁴¹ In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,⁴² the Court stated (in dicta) that a state law limiting the availability of punitive damages in arbitration would be pre-

36. Drahozal, *supra* note 33, at 417 (quoting Hayford, *supra* note 35, at 75).

37. Hayford, *supra* note 35, at 76.

38. *See id.*

39. *Id.* at 75.

40. *Id.* at 76.

41. *Id.* at 75–76.

42. 514 U.S. 52 (1995).

empted by a private arbitral agreement allowing an arbitrator in that state to award punitive damages.⁴³

Drahozal argued that decisions like *Mastrobuono* evidenced the validity of a FAA preemption theory that he called the “Pro-Contract Theory.” According to the Pro-Contract Theory, any state law concerning arbitration is preempted if it conflicts with a provision in the arbitration agreement.⁴⁴ The Pro-Contract Theory removes the state’s independent power to use its arbitration laws in ways that are consistent with the FAA but in conflict with the choices of the parties to the arbitration agreement.

The Pro-Contract Theory is similar to the RUAA Theory, only broader. Under the Pro-Contract Theory, any state law that conflicts with a term in the parties’ arbitration agreement (by singling out arbitration) is preempted. By comparison, under the RUAA Theory, only state laws that conflict with a term “essential” to arbitration are preempted.⁴⁵

Aragaki’s freedom of contract procedure and Drahozal’s Pro-Contract Theory are quite similar. Why did Justice Breyer who, in *Concepcion*, wanted to help California prevent parties from waiving their right to class arbitration, begin with an argument that shared the same premises as the contractarian arguments of those who would have found that AT&T and the *Concepcions* could agree to any arbitration procedure they wanted, including one that was only bilateral?

The easiest and most obvious answer is that Justice Breyer did not have much choice. There is no statute of general application that prohibits the waiver of a consumer’s right to participate in any form of an aggregate proceeding.⁴⁶ The California Arbitration Act, like the Uniform Arbitration Act (UAA) that California did not adopt, does not have many mandatory provisions beyond what is required by the

43. *Id.* at 58 (“[I]f contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration.”); see 624 Art Holdings, LLC v. Berry-Hill Galleries, Inc., No. 6500452011, 2012 WL 10008044, at *16 (N.Y. Sup. Ct. June 7, 2012) (finding that “the Supreme Court’s 1995 decision in *Mastrobuono* . . . implicitly preempted the *Garrity* rule” that state law can prohibit punitive damages in arbitration).

44. Drahozal, *supra* note 33, at 419. Stephen Ware predicted the Court’s direction with regard to punitive damages by one year. See Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 *FORDHAM L. REV.* 529 (1994).

45. Drahozal, *supra* note 33, at 419.

46. The plaintiffs in *Concepcion* argued that the waiver violated Section 1668 of the California Civil Code. See CAL. CIV. CODE. § 1668 (West 2011) (prohibiting contracts that are “against the policy of the law”); see *id.* § 1670.5 (providing the remedies for an unconscionable contract or contract clause).

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FAA.⁴⁷ But, it does have a few. For example, arbitrators must conform to ethics standards established by the state,⁴⁸ and, in effect, the right to legal representation cannot be waived.⁴⁹ Further, although the California Arbitration Act has a provision on consolidation, its requirements are able to be waived.⁵⁰ So, the question of whether California could prohibit class arbitration waivers within the power it had under the RUAA Theory was moot.⁵¹

III. PUBLIC POLICY AS AN ALTERNATIVE GROUND

Could Justice Breyer have looked to another ground, such as public policy, to void the agreement between AT&T and the Concepcions? Although it is true that public policy has been invoked to vacate arbitration awards,⁵² it is not obvious how this would have helped the plaintiffs in *Concepcion* who wanted the court to dismiss a motion to compel arbitration. Still, this may be a formalist distinction; after all,

47. See CAL. CIV. PROC. CODE §§ 1280–94.2 (West 2015); Richard Chernick, *Witnesses in Arbitration—California Arbitration Act*, MEDIATE (Oct. 2015), <http://www.mediate.com/articles/ChernickRbl20151023.cfm> (referring to Sections 1282.2, 1283.05, and 12831.1 of the California Civil Procedure Code as part of the California Arbitration Act).

48. *Id.* § 1281.85(c) (“The ethics requirements and standards of this chapter are nonnegotiable and shall not be waived.”).

49. See *id.* § 1282.4(a) (“A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under this title. A waiver of this right may be revoked; but if a party revokes that waiver, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney.”). In other words, the right to be represented by an attorney can always be revived by a consumer, subject to “fair notice” to the party on the other side. The UAA flatly prohibits waiver of representation by an attorney. See Section 4(b)(4): “the right under . . . of a party to an agreement to arbitrate to be represented by a lawyer at any proceeding or hearing” is a nonwaivable provision except in the context of labor disputes. UNIF. ARBITRATION ACT § 4(b)(4) (UNIF. LAW COMM’N 2012).

50. CAL. CIV. PROC. CODE § 1281.3.

51. Christopher Drahozal has suggested that *Doctor’s Associates Inc. v. Casarotto*, 517 U.S. 681 (1996), clearly settled this question. See Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 153, 169 (2014) (suggesting that the FAA impliedly preempted statutory prohibition of class arbitration waivers in *Doctor’s Associates*, which was established “long before *Concepcion*”).

However, it is not clear at all that a state law requiring the minimum notice to establish a valid contract to arbitrate (a gateway issue) reveals very much about what Hayford called rules concerning borderline or procedural issues. Further, as Drahozal admitted: “Footnote 6 in the *Concepcion* opinion also raises questions about the reach of *Doctor’s Associates*.” *Id.* at 170. Others have treated Justice Scalia’s footnote 6 less charitably. See, e.g., Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 KAN. L. REV. 795, 875 (2014) (describing footnote 6 as “a truly embarrassing moment of judicial amnesia” and noting that the law at issue in *Doctor’s Associates* was almost identical to “the hypothetical state disclosure law suggested [in footnote 6] as an acceptable policing alternative to *Discover Bank’s* unconscionability doctrine”).

52. Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 635 (2009).

one can imagine a party asking a court to reject a motion under Section 4 to compel arbitration for the same reasons that it might ask a court to vacate an award under Section 10.

One possible and easy response to the question posed *supra* is that public policy's role as a constraint on arbitration was severely reduced in *Hall Street Associates, L.L.C. v. Mattel, Inc.*⁵³ *Hall* only concerned whether parties could expand the Court's ability to review an arbitration award under Section 10. The Court rejected the parties' effort to alter Section 10 by contract; interestingly, this position is in tension with the Contract Model.⁵⁴ But, that does not mean that public policy has no role to play either in Section 10 or outside of it.⁵⁵ As Alan Rau of Texas Law has argued, it would be a mistake to extrapolate the Court's skeptical words regarding challenges based on "manifest disregard" to mean that law challenging violations of public policy is no longer viable. "[N]o, clearly not: Since externalities—negative social effects—necessarily limit every exercise of contractual autonomy, vacatur for violation of 'public policy' is . . . necessary However rarely successful, it must somehow be made to fit within the architecture of our law of arbitration."⁵⁶ Post-*Hall* cases have confirmed this.⁵⁷

A public policy challenge to arbitration can be based on either federal or state law.⁵⁸ The rationale behind it is that "no court will lend its aid to one who founds a cause of action upon an immoral or illegal act" and "that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements."⁵⁹ Because it is the public's interest that is taken into consideration, not the interests of the parties to the contract, the measure of that interest must be based on "some explicit public policy" that is "well defined and dominant."⁶⁰ The public pol-

53. 552 U.S. 576 (2008).

54. *See id.* at 586.

55. *See, e.g.,* Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1110–11 (2d Cir. 1980).

56. Alan Scott Rau, *Hall Street Associates, L.L.C. v. Mattel, Inc.: Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 501–02 (2006) (footnote omitted); *see* Kenneth R. Davis, *The End of an Error: Replacing "Manifest Disregard" with a New Framework for Reviewing Arbitration Award*, 60 CLEV. ST. L. REV. 87 (2012).

57. *See, e.g.,* Chase Bank USA, N.A. v. Hale, 859 N.Y.S.2d 342, 351 (Sup. Ct. 2008).

58. *See, e.g.,* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987) (evaluating the public policy exception based on federal law); *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1025 (10th Cir. 1993) (evaluating the public policy exception based on state law).

59. *United Paperworkers*, 484 U.S. at 42.

60. *Id.* at 43 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 766 (1983)).

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icy is “ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”⁶¹

The idea that, as a matter of public policy, courts will not enforce private agreements that would weaken or undermine the enforcement of state or federal law has been part of federal arbitration law since the U.S. Supreme Court’s decision in *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers*,⁶² in which the Court held that an arbitration award that would violate Title VII cannot be enforced.⁶³ In that case, the Court used the phrase “legal precedents,” and, logically, this could include not only common law precedent but even basic legal principles, like the rule of law, due process, or fairness. This is illustrated in *In re Brisman v. Hebrew Academy of the Five Towns & Rockaway*.⁶⁴ In *Brisman* the court held that because the award implemented by a religious court “set[] a precedent that will impact and limit the ability of private schools to make and enforce routine employment decisions,” public policy required the award to be set aside despite the two parties agreement to subject this issue to arbitration by a religious court.⁶⁵ In *Kovacs v. Kovacs*⁶⁶ and *Lang v. Levi*,⁶⁷ the courts stated that they would enforce arbitration agreements that deviated from Maryland’s Uniform Arbitration Act as long as the parties agreed to the deviations and if those deviations did not violate “notions of basic fairness or due process.”⁶⁸ In

61. *Id.* (quoting *W.R. Grace & Co.*, 461 U.S. at 766).

62. 461 U.S. 757 (1983).

63. *See, e.g.*, *Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665, 671–72 (11th Cir. 1988) (holding that “public policy . . . prohibit[s] Delta from entering into . . . a contract” in which it “agreed to submit to arbitration the question as to whether it should authorize operation of aircraft by pilots while they are drunk”); *see also* *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1150–52 (10th Cir. 2007); *Seymour*, 988 F.2d at 1023.

64. 887 N.Y.S.2d 414 (Sup. Ct. 2008), *rev’d* 895 N.Y.S.2d 482 (App. Div. 2010).

65. *Id.* at 419. *See generally* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1241, 1287–1303 (2011) (arguing that the courts should “adopt a balancing approach” that accounts for “the central institutional role played by religious arbitration”); Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 *FORDHAM L. REV.* 427, 441 (2006) (discussing the motivations for turning to religious arbitration).

66. 633 A.2d 425 (Md. Ct. Spec. App. 1993).

67. 16 A.3d 980 (Md. Ct. Spec. App. 2011).

68. *See Lang*, 16 A.3d at 990 (quoting *Kovacs*, 633 A.2d at 433). Although rare, there may be circumstances in which fundamental religious doctrine conflicts with the state’s notions of basic fairness or due process. At least one commentator has suggested that in religious arbitration, this conflict should be resolved in favor of religion over state public policy. *See* Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 *YALE L.J.* 2994, 3014 (2015).

Maryland, this principle has been repeated outside the context of religious arbitration.⁶⁹

Public policy arguments against arbitration awards are indistinguishable from unconscionability arguments when they rely on nonstatutory grounds. As Horton noted: “there is a razor-thin line between substantive unconscionability and state public policy.”⁷⁰ Certainly, no serious argument could be made that an arbitration agreement, which called for a coin flip to decide the legal issue in dispute, is enforceable even if carefully negotiated between equals.⁷¹ It is not clear why this is the case. In *Penn v. Ryan’s Family Steak Houses*,⁷² the U.S. Court of Appeals for the Seventh Circuit used the example of a coin flip to illustrate the sort of contract that no person could reasonably be presumed to have consented to in an adhesion contract—in other words, it suggested that a coin flip would render an arbitration contract void due to unconscionability.⁷³ In a case in which two parties agreed to settle a dispute with a coin toss, the court stated: “Although coin tossing has been used to settle disputes for several thousand years and, in fact, is still commonly practiced today, we cannot sanction its use as an ‘alternative dispute resolution’ method in our courts of law (or equity) . . . [we] feel that it violates public policy.”⁷⁴ Still, even if the use of a coin toss is the method agreed to by contracting parties, other courts rationalize their refusal to enforce the resolution of legal disputes by a coin toss on the ground that it is not a form of arbitration intended by Congress.⁷⁵

The reason that parties cannot contract for arbitration by coin toss is the same regardless of whether it is labeled as an unconscionable

69. See, e.g., *MCR of Am., Inc. v. Greene*, 811 A.2d 331, 345 (Md. Ct. Spec. App. 2002) (“A court may ‘set aside an [arbitration] award where the proceedings lacked fundamental fairness.’” (alteration in original) (quoting *Parks v. Sombke*, 732 A.2d 907, 911 (Md. Ct. Spec. App. 1999))).

70. David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1269 (2013).

71. “Nevertheless, I conclude that we must enforce the arbitration agreement according to its terms. . . . I would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl.” *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *overruled by Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (9th Cir. 2003), *as recognized in Hall St. Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

72. 269 F.3d 753 (7th Cir. 2001).

73. *Id.* at 759; see *Collier v. Real Time Staffing Servs., Inc.*, No. 11 C 6209, 2012 WL 1204715, at *3 (N.D. Ill. Apr. 11, 2012); *Easterly v. Heritage Christian Schs., Inc.*, No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099, at *2 (S.D. Ind. Aug. 26, 2009).

74. *Kandalepas v. Economou*, 547 N.E.2d 496, 498 (Ill. App. Ct. 1989).

75. See, e.g., *Advanced Bodycare Sols., LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1239 n.3 (11th Cir. 2008) (“The parties could not contract for a binding coin flip, with the winner to receive an award of his choice, and expect the agreement to be enforced under the FAA.”).

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contract or a contract against public policy: the state wants to suppress this specific private bargain and has the legal power to do so by withholding the aid of the courts to enforce that bargain. The substantive values the state pursues may vary at a certain level of detail, but that variation has nothing to do with which label the courts use to describe the legal justification for the state's pursuit of those values. For example, in the context of religious arbitration, the state will allow a wide range of practices by religious tribunals but will draw the line at arbitrator selection controlled by only one party.⁷⁶ As noted *supra*, the basis for rejecting a contract in which the parties allowed unilateral arbitration selection would be public policy (i.e., violating notions of "basic fairness or due process").⁷⁷ The same contract term would be rejected in a contract of adhesion on the grounds that it was an unconscionable term, and, therefore, the contract was void.⁷⁸ Although in the former case the contracting parties were in a nonconsumer relationship, and, in the latter case, the contracting parties were in an employment relationship, this does not explain why the regulation of the contract term in the former case was under the court's power to refuse to enforce contracts that violate public policy, and the regulation of the contract term in the latter case was grounded in contract law's unconscionability doctrine. Both legal theories seem to do exactly the same thing.

In *Concepcion*, which dealt with consumer contracts, Justice Scalia noticed the near equivalence of unconscionability and public policy arguments. His opinion broadly swept across both. Justice Scalia explained why the *Discover Bank* rule was preempted, stating that the rule was rooted in "California's unconscionability doctrine and California's [public] policy against exculpation."⁷⁹ Justice Scalia then went on to treat these two rationales as identical in each of the examples he offered in his "parade of horrors."⁸⁰ Justice Scalia even

76. See Michael C. Grossman, Note, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 189 (2007) (discussing the potential conflicts between the FAA and the UAA with regard to selecting an arbitrator in religious arbitration). Another example is the exclusion of witnesses based on gender and religious status. See Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, 37 VT. L. REV. 157, 187 (2012).

77. See *supra* notes 68–69 and accompanying text.

78. See, e.g., *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) (holding that an arbitration contract that "contain[ed] a provision that unilaterally assign[ed] one party . . . the power to select the arbitrator whenever an employee [brought] a claim" was unconscionable).

79. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

80. *Id.* at 343.

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. . . .

reached back to the conventional history of the FAA to emphasize that the *Discover Bank* rule was really nothing more than a reprise of the early courts' invocation of "public policy" to justify their hostility to arbitration.⁸¹

California courts' responses to Justice Scalia's comments on public policy are worth reviewing. In *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic I*),⁸² the California Supreme Court held that an employer's arbitration agreement, which required employees to waive the right to participate in a nonbinding administrative hearing process created by the California legislature to protect employees and assist them in recovering unpaid wages (the so-called "Berman hearing") was against public policy and unconscionable.⁸³ After *Concepcion*, the court partly reversed itself and held that *Concepcion* established that the FAA preempted any public policy basis for prohibiting the waiver but that the plaintiff could, under certain circumstances, still prove that the waiver was unconscionable.⁸⁴ The California Supreme Court conceded that *Concepcion* limited public policy arguments the same way that it limited unconscionability arguments: "an administrative scheme to effectuate state policies unrelated to the agreement's enforceability" is preempted if it interferes with the "fundamental attribute[s] of arbitration."⁸⁵ It also held out the possibility that some other aspects of the law establishing the Berman hearing, which were also waived in the arbitration agreement, did not interfere with the fundamental attributes of arbitration, yet they were so important that their waiver was unconscionable.⁸⁶

Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid preemption).

Id. at 341–42

81. *Id.* "Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *Id.* at 342 (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

82. 247 P.3d 130 (Cal. 2001), *vacated*, 132 S. Ct. 496 (2011).

83. *Id.* at 146, 152.

84. *Sonic-Calabasas A, Inc. v. Moreno* (*Sonic II*), 311 P.3d 184, 192–94 (Cal. 2013).

85. *Id.* at 199–200.

86. *See id.* at 207.

Our unconscionability analysis does not pose an obstacle to the FAA's objectives any more than if the Legislature were to enact a statute requiring any dispute resolution mechanism, including arbitration, used in lieu of the Berman procedures to have features that mitigate risks and costs for wage claimants, so long as those features do not interfere with fundamental attributes of arbitration.

Id.

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Justice Chin, who dissented in *Sonic I* and anticipated that the court's public policy argument would run afoul of FAA preemption, dissented, in part, from the court's efforts to save unconscionability by making it about something other than California's public policy with regard to the role arbitration played in labor disputes.

In any event, I disagree with the majority that, so long as states and their courts do not interfere with fundamental attributes of arbitration, *Concepcion* allows them to invalidate arbitration agreements as unconscionable based on a policy judgment that the arbitration procedure is not adequately affordable and accessible. Under the majority's narrow reading of *Concepcion*, the FAA's savings clause permits states, for policy reasons, to impose all sorts of arbitration procedures that are not within the terms of the parties' arbitration agreement, so long as those procedures do not interfere with fundamental attributes of arbitration.⁸⁷

*Sonic-Calabasas A, Inc. v. Moreno (Sonic II)*⁸⁸ illustrates why Justice Breyer threw his lot in with the Contract Model in *Concepcion*. Just as Justice Chin characterized the Berman laws as an expression of California's policy goals relating to labor law, Justice Scalia characterized the *Discover Bank* rule as an expression of California's "policy preferences" with regard to consumer litigation. According to Justice Scalia, the unconscionability rationale for the rule was that no consumer would knowingly agree to exculpate a company when making a contract, but it is clear that he thought the true rationale for the rule was the public policy goal of making it more likely that low-value claims were pursued.⁸⁹ This goal, he said, was not only *unrelated* to the goals of arbitration, but it was inimical to them.⁹⁰ Faced with these series of hurdles, it is not surprising that Justice Breyer sought to attack the class action waiver by claiming that it offended the FAA's "primary objective . . . to secure the 'enforcement' of agreements to arbitrate."⁹¹ An "agreement to arbitrate" is a contract, and, as such, its validity as a contract is first and foremost a matter of general state law. By invoking the FAA's dependence on contract law outside of

87. *Id.* at 233 (Chin, J., concurring in part and dissenting in part) (second and fourth emphasis added) (citation omitted).

88. 311 P.3d 184 (Cal. 2013).

89. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 321 (2011). This conclusion is strengthened by Justice Scalia's characterization of his *Concepcion* opinion in *American Express Co. v. Italian Colors Restaurant (AMEX)*, 133 S. Ct 2304, 2307 (2013) ("[We] specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'" (quoting *Concepcion*, 563 U.S. at 351)).

90. See *Concepcion*, 563 U.S. at 346 ("California's *Discover Bank* rule similarly interferes with arbitration.").

91. See *id.* at 1758 (Breyer, J., dissenting) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

itself, Justice Breyer was hoping that the California Supreme Court's interpretation of its own contract law might have earned the U.S. Supreme Court's deference.

IV. STATE ARBITRATION PUBLIC POLICY

Claiming to love arbitration contracts so much that the contract between AT&T and the Concepcions needed to be voided due to its formation was, in some way, a flawed strategy that carried many risks, the chief among them being that it seemed obviously pretextual. Yet, the alternate strategy—claiming that the contract between AT&T and the Concepcions violated public policy—bore its own risks, particularly, as I described *supra*, that outside the very limited concerns of basic fairness or due process, efforts to void arbitration contracts based on public policy ran into the same preemption hurdle that doomed the unconscionability argument in *Concepcion*.⁹²

As suggested *supra*, Justice Scalia's insistence in *Concepcion* that the FAA's goal was to promote arbitration was driven by a dynamic that was unique to the facts of the case.⁹³ If California contract law held that, as a matter of general state contract law, consumer contracts needed to preserve the possibility to aggregate litigation and the preservation of that possibility interfered with the "fundamental attributes of arbitration," then California contract law was preempted. This conclusion depended on identifying the fundamental attributes of arbitration and elevating those attributes above those contained in private agreements and produced according to proconsumer contract principles. This is why Justice Scalia emphatically rejected any reading of *Dean Witter Reynolds Inc. v. Byrd*⁹⁴ that gave priority to the "enforcement of private agreements" over the "encouragement of efficient and speedy dispute resolution."⁹⁵ Justice Scalia was implying that if he had to pick the fundamental attributes of arbitration, he would pick efficient and speedy dispute resolution. But, in *Concepcion*, the Court did not need to choose between efficient and speedy dispute resolution or the sanctity of private agreements because (according to Justice Scalia) the AT&T contract was a private agreement that already promoted efficient and speedy dispute resolution. As Justice Scalia observed: "In the present case, . . . those 'two goals' [identified in *Dean Witter*] do not conflict" with each other.⁹⁶

92. See *supra* notes 70–91 and accompanying text.

93. See *supra* notes 20–24 and accompanying text.

94. 470 U.S. 213 (1985).

95. See *Concepcion*, 563 U.S. at 345 (quoting *Dean Witter*, 470 U.S. at 221).

96. *Id.*

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What is not clear from *Concepcion* is whether Justice Scalia held a Panglossian view that freedom of contract and the fundamental attributes of arbitration could *never* conflict. If the two ends were in conflict, how should that conflict be resolved? One answer is found in *Volt*, in which the Court upheld contract terms that, like in *Dean Witter*, would have slowed down arbitration (by permitting a stay under state law chosen by the parties). The Court held that as long as the rules chosen by the parties did not “undermine the goals and policies of the FAA,” the parties’ choice would be enforced, “even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.”⁹⁷ In other words, freedom of contract consistent with the fundamental attributes of arbitration was the overriding goal of Congress. Parties have a large range of freedom in their choice of arbitration rules, but their freedom is not boundless.⁹⁸ Similar to states, parties cannot contract in a way that interferes with the fundamental attributes of arbitration.

In practice, it is not clear how much of a constraint *Volt* places on arbitration procedures. In *Concepcion*, Justice Scalia noted that the parties had been free to sign a contract agreeing to arbitrate pursuant to the *Discover Bank* rule, “the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation.”⁹⁹ This suggests that parties are free to agree to arbitration procedures that, if imposed by the state, would “interfere[] with arbitration.”¹⁰⁰ Apparently, when private parties agree to allow class arbitration, to conduct arbitration pursuant to the Federal Rules of Evidence, or to a discovery process that rivals litigation, they are agreeing not to interfere with arbitration. According to Justice Scalia, when private parties mutually adopt measures that states are forbidden to impose, what “[they] have agreed to is not arbitration as envisioned by the FAA,”¹⁰¹ yet it still constitutes *arbitration* as the term is used in the FAA.

97. See *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 478–79 (1989).

98. This seems inconsistent with the statement in *Kyocera Corp. v. Prudential-Bache Trade Services* that parties “have *complete* freedom to contractually modify the arbitration process by designing whatever procedures and systems they think will best meet their needs.” 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (emphasis added).

99. See *Concepcion*, 563 U.S. at 351.

100. See *id.* at 1750. This truly elevates form over substance. If the parties choose to allow class arbitration, presumably that choice does not interfere with arbitration. But, if the parties choose “the *Discover Bank* rule” by incorporating state contract doctrine into their agreement, that does interfere with arbitration. See, e.g., *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 195 (Ct. App. 2014) (“[T]he entire preemption analysis of *Concepcion* is based on a conflict or inconsistency between the *Discover Bank* rule and the FAA.”), *rev’d*, 136 S. Ct. 463 (2015).

101. *Concepcion*, 563 U.S. at 346.

Leaving aside the fact that the term arbitration seemed to have a core and penumbral meaning to Justice Scalia, his decision to champion the fundamental attributes of arbitration over, or at least to the same degree as, the freedom of parties to choose their own arbitration procedures must have had some limit. As the U.S. Court of Appeals for the Eleventh Circuit stated in *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*:¹⁰²

The presence of an award does not by itself make a procedure “arbitration” if the procedures that produce the award bear no resemblance to classic arbitration. The parties could not contract for a binding coin flip, with the winner to receive an award of his choice, and expect the agreement to be enforced under the FAA.¹⁰³

Arguably, cases like *Advanced Bodycare Solutions* map out the limit beyond which parties’ choices will conflict with, and therefore be limited by, the FAA. Consequently, the doctrine of public policy will then inform the “floor” beneath which no private contract can fall and still be considered arbitration.

However, it is important to note that the norms entailed by the public policy doctrine will be thicker than what has been conceded by pro-arbitration forces if they are to ensure that the procedures chosen are in fact *arbitral*. In both federal and state systems, the conventional view of public policy is that it is “ascertained ‘by reference to the laws and legal precedents.’”¹⁰⁴ The conventional view is inadequate because the question posed is: What is arbitration? This question cannot be answered by only looking to the text of the FAA and cases interpreting it.¹⁰⁵ Moreover, Rau’s suggestion that “externalities—negative social effects—necessarily limit every exercise of contractual autonomy” is also an unsatisfactory definition of public policy in this context because the question to be answered depends on the meaning of arbitration, not the effects it has on other spheres of social life.¹⁰⁶

An adequate theory of public policy is available to the courts despite the fact that it must be constructed out of disparate cases that are often seen in isolation from each other.¹⁰⁷ The handful of cases assert-

102. 524 F.3d 1235 (11th Cir. 2008).

103. *Id.* at 1239 n.3.

104. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace & Co. v. Local Union 759, Int’l Union of the United Rubber Workers*, 461 U.S. 757, 766 (1983)).

105. This point is forcefully made in Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2855–57, 2864 (2015).

106. See Rau, *supra* note 56, at 501.

107. See Resnik, *supra* note 105, at 2810–11, for an example of how to do this using the Constitution.

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ing limits based on “basic notions of fairness or due process” to religious arbitral process are connected to the handful of cases that assert, without much analysis, that arbitral processes cannot consist of a coin flip.¹⁰⁸ It should not matter whether the material for developing this theory comes out of cases finding the limit in the unconscionability doctrine, public policy, or the definition of the term “arbitration.”¹⁰⁹

Horton’s argument that *Concepcion* threatens the states’ power to pursue their own public policy goals in the face of privately negotiated arbitration contracts provides a strong foundation for a theory of public policy that can solve the dilemma that results when the two goals set out in *Dean Witter* conflict.¹¹⁰ Horton argued that until *Concepcion*, states promoted public policy in numerous ways, including a version of: (1) the vindication of rights doctrine;¹¹¹ (2) prohibiting arbitration in child custody, foreclosure, and certain probate disputes;¹¹² (3) the substantive unconscionability doctrine;¹¹³ and (4) the refusal to permit class action and class arbitration waivers in consumer contracts of adhesion.¹¹⁴ Horton has done the important and difficult work of reviewing the theoretical commitments of the FAA’s original advocates and drafters, and he has proven that when the FAA was introduced, “there [was] compelling evidence that a reasonable member of Congress would have understood violation of public policy to be a ‘ground[] . . . for the revocation of any contract.’”¹¹⁵

This Article complements Horton’s argument. It focuses on state public policies different from those he identified, yet still share equal legitimacy and deserve the same (if not more) deference by the courts. In addition to having public policy interests in the enforcement of its

108. See *supra* notes 57–63 and accompanying text (discussing the relevant case law).

109. Drahozal argued that the ultimate backstop to an overbroad reading of FAA preemption after *Concepcion* was the definition of the word “arbitration” itself: “The FAA itself does not define ‘arbitration.’ But an essential element of ‘arbitration’ is that it must involve a decision by a neutral decision maker. If a dispute resolution process does not specify a neutral decision maker, it is not arbitration and the FAA does not apply.” Drahozal, *supra* note 51, at 172 (footnote omitted).

110. See Horton, *supra* note 70, at 1225, 1238–45.

111. *Id.* at 1233–34 (discussing *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003) and *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999)).

112. *Id.* at 1234–35.

113. *Id.* at 1235–36.

114. *Id.* at 1236–37 (discussing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000)).

115. See *id.* at 1255 (second and third alteration in original) (quoting 9 U.S.C. § 2 (2006)).

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laws or the general welfare, a state may have a public policy about arbitration itself. I call this “state arbitration public policy.”¹¹⁶

In one way, a state’s arbitration public policy is obvious—the UAA is a testament to the states’ efforts to make choices about the way that arbitration occurs within their borders. This approach has been considerably narrowed by the adoption of what Horton called the U.S. Supreme Court’s “Total-Preemption Theory.”¹¹⁷ Like the Pro-Contract Theory, the Total-Preemption Theory posits that the “FAA forbids courts from annulling arbitration clauses to further state public policy.”¹¹⁸ By comparison, under the RUAA Theory, “only state laws that conflict with a term ‘essential’ to arbitration are preempted.”¹¹⁹ Moreover, a state’s own judgment about how to improve or promote arbitration is not preempted, even if it annuls an arbitration clause that has been freely negotiated and chosen by the parties, unless it conflicts with an essential arbitration term. Further, the RUAA Theory notes that although a state’s view regarding an essential arbitration term is not superior to the FAA’s, a state can have a view about the correct answer to that question, which it can express in its own arbitration public policy.

A. Example I: Waiver of Representation

This Section provides an example of arbitration public policy at work. As noted *supra*, the UAA, but not the FAA, prohibits waiver of legal representation in arbitration.¹²⁰ This has been inscribed in the law of many states.¹²¹ There is no case law outside the context of religious arbitrations that discusses whether a waiver of counsel in arbitration would be enforceable. Hayford called attorney representation a “borderline” issue, and he conceded that state arbitration law

116. This is not to say that there may not be a parallel approach, which could be called “federal arbitration public policy.” This is, in essence, what Resnik develops in *Diffusing Disputes*. See Resnik, *supra* note 105.

117. See Horton, *supra* note 70, at 1224.

118. *Id.* at 1225.

119. Drahozal, *supra* note 33, at 419.

120. See *supra* note 49 and accompanying text.

121. See, e.g., ALASKA STAT. § 09.43.310 (1962); ARIZ. REV. STAT. ANN. § 12-3004 (2003); ARK. CODE ANN. § 16-108-204 (2006); COLO. REV. STAT. § 13-22-204 (2004); FLA. STAT. § 682.014 (2013); see also, e.g., D.C. CODE § 16-4404 (2001). New York, which did not adopt the UAA, forbids waiver of counsel. N.Y. C.P.L.R. 7506(d) (McKinney 2013). This rule has been confirmed in numerous New York court decisions. See, e.g., *Marracino v. Alexander*, 897 N.Y.S.2d 555, 558–59 (App. Div. 2010); *Volpe v. Cortes*, 792 N.Y.S.2d 536, 537 (App. Div. 2005); *Kahan v. Rosner*, 889 N.Y.S.2d 839, 842–53 (Sup. Ct. 2009). As noted *supra*, California preserves the right to revoke a waiver of counsel in arbitration pending notice to the adverse party coupled with an opportunity to postpone. See CAL. CIV. PROC. CODE § 1282.4 (West 2015); *supra* note 49 and accompanying text.

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prohibiting waivers of legal representation might be preempted by the FAA.¹²² Assume a consumer contract included a waiver of legal representation. What possible purpose could the seller have had other than to allow the seller to exculpate itself from its legal obligations by making it difficult and worthless for the consumer to enforce her legal rights?¹²³ For this reason, a California court, even after *Concepcion*, could follow *Sonic II* and hold that a consumer contract with a waiver of legal representation was void because it was unconscionable. However, the more direct and obvious explanation for prohibiting this waiver is that it conflicts with California public policy as expressed in Section 1282.4 of the California Code of Civil Procedure. Could this argument survive the same sort of challenge raised by AT&T against the *Discover Bank* rule? Imagine a seller arguing that the choice of contract terms agreed to by both parties could not be regulated by Section 1282.4 because Section 1282.4 is a state law that has a “disproportionate impact on arbitration agreements.”¹²⁴ The answer to this argument is that—unless one adopts the Total-Preemption Theory—the *Concepcion* Court did not simply say that all state laws solely affecting arbitration are preempted. As one California state court has noted: “*Concepcion* outlaws discrimination in state policy that is *unfavorable* to arbitration.”¹²⁵ It is hard to see how preserving the option to have representation in arbitration is *unfavorable* to arbitration; in fact, one might think that it is a public policy *favorable* to arbitration based on the judgment that at least some parties (consumers) will be better off preserving their option to have representation, notwithstanding their subjective beliefs to the contrary.

122. Hayford, *supra* note 35, at 75. Given that he wrote this in 2001, his anxiety was prescient.

123. This would be true even if the company also waived its right to legal representation. Its employees may be lawyers or experienced arbitrators, which would allow the company to have the benefit of repeat-player expertise while denying the same to the consumer. See Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?*, 48 UC DAVIS L. REV. 921, 923 n.3, 923–24 (2015).

Also, while the seller might argue that the waiver of representation lowered costs for the consumer by allowing claims against the seller to proceed without the delays and costs that accompany legal representation, there is something deeply dishonest about this argument because it proves too much: on this logic, a complete waiver of rights could be upheld on the theory that it, too, would reduce the costs of claiming for the consumer—to zero—with the result that the consumer would have no possibility of recovery.

124. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011).

125. *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013) (emphasis added); see *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) (citing *Mortensen*, 772 F.3d at 1160).

B. *Example II: Waiver of Collateral Sources that Pay for Representation*

A further example provides a fuller illustration of why arbitration public policy matters. Assuming that the state's public policy interest in arbitration extends to its power to prohibit waivers of representation, the question still remains how to identify the state's public policy. The previous example exploited the fact that the UAA (and, under California law, Section 1282.4) was an explicit legislative command. Conventional public policy analysis instructs courts to refuse to enforce contracts that interfere with the operation of a statute by either securing a prospective waiver to seek the enforcement of the right or a result that essentially negates the enforcement of the right.¹²⁶ It is important to note that the Court recognized public policy as a basis to enforce an arbitration contract when it explained the origins of the vindication of rights doctrine in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹²⁷ Does it follow that since *American Express Co. v. Italian Colors Restaurant (Amex)*¹²⁸ was decided, state arbitration public policy cannot extend to private contract terms that interfere with the state's interest in how arbitration should be conducted in the state?

Imagine that, after *Concepcion*, the State of California decides to promote consumer arbitration. Its stated public policy is its concern that low-value claims are not being brought in arbitration.¹²⁹ Further, assume that the California legislature explicitly states that it has concluded that consumer arbitration is superior to litigation, and, therefore, it wants to encourage consumer arbitration. To this end, California proposes to subsidize individual consumer arbitration, and the Arbitration Legal Aid Service (ALAS) is created. ALAS is staffed by recent law school graduates who are supervised by experienced attorneys, and it is paid for by the state. Assuming that the program is well run and that genuine consumer complaints are pursued, one could imagine that sellers would prefer the way things were before ALAS because they now have to respond to, and potentially compensate, tens of thousands of arbitration demands. Of course,

126. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

127. 473 U.S. 614, 636 (1985). "The 'effective vindication' exception to which respondents allude originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies.'" *Am. Express Co. v. Italian Colors Rest. (Amex)*, 133 S. Ct. 2304, 2310 (2013) (alterations in original) (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19).

128. 133 S. Ct. 2304.

129. See Resnik, *surpa* note 105 at 2892–2915, for comprehensive evidence of this claim.

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sellers could turn to the political process to have ALAS defunded, but imagine instead that companies began to insert an “ALAS waiver” in consumer contracts of adhesion. Similar to the class action and arbitration waivers in *Concepcion*, the waiver would bind the consumer in advance from accepting legal representation through ALAS. Would these waivers be enforceable? This Article offers an answer to this question: the waivers would be void because they violate California’s “arbitration public policy.”

Still, Justice Scalia could have tried to answer this question by treating waivers that give up the right to use the ALAS program like the waivers that gave up the right to use class arbitration in *Concepcion*. As Justice Scalia said in *Amex*, the fact that a contractual waiver guarantees that an arbitration “is not worth the expense involved . . . does not constitute the elimination of the right to pursue that remedy.”¹³⁰ In the case of the ALAS waiver, the argument is less plausible because the likely purpose of the waiver is not just to ensure that the consumer cannot minimize the expense of arbitration by turning to private parties, like other claimants and the lawyers who represent them but, instead, to *interfere* with a government program designed to increase the number of arbitrations in California. Further, this example shows why Justice Scalia’s invocation of *Concepcion* in *Amex* would have been quite problematic.¹³¹ Regardless of whether it is true, as a matter of fact, that class arbitration is a deficient form of arbitration, the collateral source payment of individual arbitration cannot be credibly portrayed as being in tension with the “fundamental attributes of arbitration.” The only thing ALAS does is lower the cost of arbitrating a small value consumer claim by reducing the cost of an *individual* arbitration to near zero. It does not lower the cost of arbitrating a small value consumer claim by making it easier for lawyers to bring, and profit from, class arbitrations.

The ALAS example is designed to do two things. First, it is designed to illustrate how state arbitration public policy can provide courts with a basis to challenge waivers in arbitration contracts that is at least as good (if not superior) to attacks based on the unconscionability doctrine. Second, it is designed to amplify and extend Justice Kagan’s dissent in *Amex*. Although she was discussing the effective-vindication rule, which is specific to the interpretation of federal statutes in coordination with the FAA, her point is equally applicable to

130. *Amex*, 133 S. Ct. at 2311.

131. Resnik, *supra* note 105, at 2875 (noting that *Amex* relied on a state preemption case to decide a federal statutory rights case); *see Amex*, 133 S. Ct. at 2312 (“Truth to tell, our decision in [*Concepcion*] all but resolves this case.”).

state arbitration public policy: “The effective-vindication rule furthers the [FAA]’s goals by ensuring that arbitration remains a real, not faux, method of dispute resolution.”¹³² The effective-vindication rule is not just about protecting federal laws from outright attack through contract terms that prospectively waive the enforcement of those statutes, it also implies a federal public policy that “prefers to litigation . . . arbitration, not de facto immunity.”¹³³ That is why, in *Amex*, Justice Kagan focused on the cumulative effect of all of the waivers and conditions in the arbitration agreement signed by the plaintiff restaurants and American Express. Her point was that federal public policy says, at a minimum, that contracts that leave a party without any “means of vindicating a meritorious claim” in arbitration cannot be enforced.¹³⁴ Although Justice Kagan disagreed with the factual premise behind Justice Scalia’s claim that class arbitration interferes with fundamental attributes of arbitration, her point was that the effective-vindication rule is grounded on a similar theory: the contract drafted by American Express interfered with the FAA—assuming that one of the FAA’s goals is the promotion of the arbitration of federal statutory claims.

Justice Kagan’s argument in *Amex* brings the discussion of state arbitration public policy back to the question of whether the state can have a substantive view about the best ways to organize and promote arbitration. Of course it can. As I have argued, those views are not toothless: they can be the grounds for voiding some private contracts. But, Justice Scalia’s invocation of *Concepcion* in *Amex* is a reminder that the Court wielded *Dean Witter*’s statement that the purpose of the FAA was the “encouragement of efficient and speedy dispute resolution”¹³⁵ as a sword and a shield. In the context of an obstacle preemption argument against a state law whose purpose is unrelated to the promotion of arbitration, this was a powerful weapon that was devastating to California’s unconscionability doctrine as well as its thinly veiled public policy promoting small value claims by consumers. But, in a case in which the question is whether a law expressing California’s arbitration public policy is preempted, assertions like “individual, rather than class, arbitration is a ‘fundamental attribut[e]’ of arbitration”¹³⁶ must be tested against a competing theory of what arbi-

132. See *Amex*, 133 S. Ct. at 2315 (Kagan, J., dissenting); see also Resnik, *supra* note 105, at 2939 (explaining the need to ensure that arbitration remains a fair and equal method of dispute resolution).

133. See *Amex*, 133 S. Ct. at 2315 (Kagan, J., dissenting).

134. See *id.* at 2319 (Kagan, J., dissenting).

135. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011).

136. *Id.* at 362 (Breyer, J., dissenting) (alteration in original) (quoting *id.* at 1748).

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tration is and how it should work. California's views regarding arbitration under the FAA, and arbitration in general, may not persuade a determined U.S. Supreme Court intent on inscribing their idiosyncratic views about civil litigation into federal arbitration law, but it will at least place the debate where it belongs and sharpen it.

V. APPLICATIONS

The most immediate consequence of taking state arbitration public policy seriously and allowing it to have some weight in preemption analysis is that waivers on the consolidation and assignment of consumer arbitration claims may be unenforceable in states expressing the view that policies promoting consolidation and assignment of consumer claims are pro-arbitration.

A. Consolidation

As Justice Kagan noted, the contract at issue in *Amex* prohibited, among other things, the consolidation of arbitration claims.¹³⁷ California precedent holds that consolidation waivers may render a consumer contract of adhesion unconscionable, but, since *Concepcion*, these holdings may be under pressure.¹³⁸ Some consumer credit card agreements prohibit consolidation of claims.¹³⁹ The UAA specifically mentions consolidation and describes the circumstances under which an arbitrator can order consolidation; it also reserves the parties' right to waive consolidation.¹⁴⁰ The question is whether a state can go beyond the UAA and prohibit waivers of consolidation in certain circumstances, such as consumer adhesion contracts.

This Section examines why a state might, based on one case from Minnesota, take the public policy position that arbitration in certain

137. *Amex*, 133 S. Ct. at 2316 (Kagan, J., dissenting).

138. See *Parada v. Superior Court*, 98 Cal. Rptr. 3d 743, 759 (Ct. App. 2009) (“[T]he Arbitration Panel paragraphs and No Consolidation paragraphs in the Atlas Account Agreements are substantively unconscionable to a high degree.”). But see *Trabert v. Consumer Portfolio Servs., Inc.*, 184 Cal. Rptr. 3d 596, 606 (Ct. App. 2015) (questioning the “continuing viability” of *Parada* after *Concepcion*), *vacated by* 356 P.3d 778 (Cal. 2015). Horton suggested that the holding of *Amex* left open the possibility that in cases involving state preemption (which was not at issue in the case) “judges can nullify class arbitration waivers in stricter arbitration clauses: those that include confidentiality provisions, bar joinder or consolidation of claims.” David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 501 (2014).

139. See, e.g., AM. EXPRESS, CARD HOLDER AGREEMENT: PART 2 OF 2, at 5, <https://web.aexp-static.com/us/content/pdf/cardmember-agreements/green/AmericanExpressGreenCard.pdf>; NORDSTROM, CARD HOLDER AGREEMENT, http://about.nordstrom.com/nordstromfashionrewards/pdf/agreement_12-31-09.pdf.

140. UNIF. ARBITRATION ACT § 10 (UNIF. LAW COMM'N 2000); see also N.J. STAT. ANN. § 2A:23B-10 (West 2003).

cases requires the possibility of consolidation. In *Illinois Farmers Insurance Co. v. Glass Service Co.*,¹⁴¹ the Minnesota Supreme Court considered whether to uphold an order to consolidate 5,700 identical “short pay” auto glass insurance claims brought by a single glass repair company.¹⁴² The insurer resisted the consolidation. The court held that “some or all of the claims” could be joined into one proceeding subject to the discretion of the trial judge.¹⁴³

The court recognized that there was a disagreement among courts regarding whether consolidation can be ordered over a party’s objections if the arbitration agreement and the relevant law granting the power to arbitrate did not explicitly allow for consolidation.¹⁴⁴ Then, as is still true now, federal courts took the position that the FAA does not allow judges to order consolidation unless the parties explicitly added that possibility into their contract.¹⁴⁵ Despite this, the plaintiff in *Illinois Farmers Insurance* argued that Minnesota law allowed judges to order consolidation even if the contract was silent on the issue.¹⁴⁶

The court’s argument for interpreting the Minnesota No-Fault Automobile Insurance Act (No-Fault Act)¹⁴⁷ as allowing court-ordered consolidation was based on Minnesota’s understanding of arbitration’s purpose. The No-Fault Act is a detailed scheme intended to resolve legal disputes concerning automobile torts covered by insurance as quickly and efficiently as possible.¹⁴⁸ The No-Fault Act incorporated,

141. 683 N.W.2d 792 (Minn. 2004).

142. *Id.* at 796. A “short pay” claim alleges that an auto insurer pays less for a service than its fair market value based on a flawed reimbursement schedule. See Pete Brush, *Auto Glass Vendors Top Insurers in Minn. High Court*, LAW360 (July 17, 2009, 5:08 PM), <http://www.law360.com/articles/111997/auto-glass-vendors-top-insurers-in-minn-high-court>.

143. *Ill. Farmers Ins.*, 683 N.W.2d at 807.

144. *Id.* at 806. As noted *supra*, Section 10 of the UAA explicitly allows courts to order consolidation under certain circumstances. See *supra* note 140 and accompanying text; see also *Ga. Cas. & Sur. Co. v. Excalibur Reinsurance Corp.*, 4 F. Supp. 3d 1362, 1367–68 (N.D. Ga. 2014) (discussing consolidation under the Georgia Arbitration Code).

145. *United States v. Stein*, 452 F. Supp. 2d 230, 256 n.104 (S.D.N.Y. 2006) (reviewing federal circuit law), *vacated sub nom.* *Stein v. KPMG, LLP*, 486 F.3d 753 (2d Cir. 2007); see, e.g., *Baessler v. Cont’l Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990). Under the FAA, the arbitrator may order consolidation even if the arbitration agreement is silent on whether consolidation is permitted. See, e.g., *Granite State Ins. Co. v. Clearwater Ins. Co.*, No. C 13-2924SI, 2013 WL 4482948, at *2 (N.D. Cal. Aug. 19, 2013) (“[C]onsolidation is a procedural issue . . . for the arbitrator to decide” (quoting *Emp’rs Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 581 (7th Cir. 2006))).

146. *Ill. Farmers Ins.*, 683 N.W.2d at 805.

147. MINN. STAT. §§ 65B.41–71 (2014).

148. Some of the Act’s purposes are “to speed the administration of justice, to ease the burden of litigation on the courts of this state, and to create a system of small claims arbitration to decrease the expense of and to simplify litigation.” MINN. STAT. § 65B.42(4).

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by reference, the Minnesota No-Fault, Comprehensive, or Collisions Damage Automobile Insurance Arbitration Rules (No-Fault Rules).¹⁴⁹ The No-Fault Act, the No-Fault Rules, and the Minnesota UAA¹⁵⁰ did not explicitly discuss consolidation; however, the court found that these Minnesota laws were created to provide the citizens of Minnesota with a “cost-effective, simplified, and informal alternative to litigation.”¹⁵¹ This assertion was not just rhetoric; it detailed what substantive choices made by the parties were consistent with arbitration. For example, the court noted that this position clearly placed Minnesota in conflict with the Eighth Circuit’s view of arbitration’s purpose (at least in federal law). The Minnesota Supreme Court held that the purpose of the FAA was to ensure that “agreements are enforced in accordance with their terms. Accordingly, courts . . . seek to protect the right of the parties to receive their bargained-for dispute settlement mechanism, regardless of any inefficiencies that may result.”¹⁵² According to the Eighth Circuit, Minnesota’s position was that “the overriding goal of [arbitration] to promote the expeditious resolution of claims[,]” which is not necessarily the same as enforcing the parties’ own choices about how their claims should be arbitrated.¹⁵³

Ironically, the Minnesota Supreme Court’s view was the same as that adopted by Justice Scalia in *Concepcion*. In response to Justice Breyer, who took the same position taken by the Eighth Circuit in *Baessler v. Continental Grain Co.*,¹⁵⁴ Justice Scalia argued that the “point of . . . arbitration . . . is to allow for efficient, streamlined procedures tailored to the type of dispute.”¹⁵⁵ The type of dispute before the court in *Illinois Farmers Insurance* was whether a “‘formulaic’ method of reimbursement” had been properly applied.¹⁵⁶ The court concluded that consolidation was the best way to promote arbitration, which was confirmed by the trial judge on remand, and trial judges in other cases involving the same industry.¹⁵⁷

149. See generally AM. ARB. ASS’N, MINNESOTA NO-FAULT, COMPREHENSIVE, OR COLLISIONS DAMAGE AUTOMOBILE INSURANCE ARBITRATION RULES (2012), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_022607.

150. MINN. STAT. §§ 572B.01–.31.

151. *Ill. Farmers Ins.*, 683 N.W.2d at 806.

152. *Id.*

153. *Id.* at 806 n.3 (citing *Baessler v. Cont’l Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990)).

154. 900 F.2d 1193.

155. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

156. *Ill. Farmers Ins. Co., v. Glass Serv. Co.*, 683 N.W.2d 792, 806 (Minn. 2004).

157. See, e.g., *Alpine Glass, Inc. v. State Farm Fire & Cas. Co.*, 24 F. Supp. 3d 826, 829 (D. Minn. 2014); *Alpine Glass, Inc. v. Country Mut. Ins. Co.*, No. 09-3492 (PAM/JSM), 2010 WL 3521963, *3 (D. Minn. Aug. 9, 2010); *Boulay Auto Glass, Inc. v. Liberty Ins. Corp.*, No. 27-CV-

It is worth considering which features of the dispute made consolidation so appealing in a case with 5,700 individual claims. The trial court found that: (1) there existed “common issues of law and fact with respect to the disputed invoices”; (2) “[e]fficiencies with respect to resolving the disputes . . . greatly weigh[ed] in favor of a consolidated arbitration, particularly given the formulaic manner in which both the [parties] handle glass claims”; and (3) “[a]bsent consolidation, there [was] significant danger that separate arbitrations [would] result in inconsistent results” and that “[t]he only way to avoid inconsistent results was to consolidate the invoices for consideration in one proceeding.”¹⁵⁸ The defendant in a related case argued against consolidation because it planned to raise individual defenses of fact (concerning the assignment of the policies), which, in its view, meant that it was entitled to individual arbitrations. This argument was rejected in subsequent cases based on the state’s expressed policy for the “speedy resolution and diminished cost” of these arbitrated claims and the court’s determination that the individual defenses could be effectively heard in a consolidated proceeding with less risk of inconsistent results.¹⁵⁹

What might Justice Scalia have said in response to Minnesota’s position on consolidation? One possibility would have been for him to say that the plaintiff may have been correct. In a case in which there are 5,700 identical contracts and only one defendant and one plaintiff, consolidation is pro-arbitration and any decision against consolidation is anti-arbitration; however, that is not a matter of law for the courts but, rather, only for the parties when they write their agreement. In other, words, the law of arbitration gives the parties the power to decide whether consolidation in any particular case is required by the law of arbitration. A second possible response would have been to say that the law of arbitration gives the courts the power to decide

11-14139, 2012 Minn. Dist. LEXIS 249, *10 (Feb. 28, 2012); *BuyRite Auto Glass, Inc. v. Ill. Farmers Ins. Co.*, No. 06-4462 ADM/JSM, 2010 WL 145277, *1–2 (D. Minn. Jan. 8, 2010); *see Boulay Auto Glass, Inc. v. Ill. Farmers Ins. Co.*, No. 27-CV-12-14646, 2012 Minn. Dist. LEXIS 248, *9 (Dec. 12, 2012); *Alpine Glass, Inc. v. Auto Club Ins. Corp.*, No. 27-CV-12-14616, 2012 Minn. Dist. LEXIS 247, *7–8 (Dec. 14, 2012); *Alpine Glass, Inc. v. Progressive Cas. Ins. Co.*, No. 27-CV-09-21397, 2009 Minn. Dist. LEXIS 360, *4–5 (Dec. 7, 2009); *Star Windshield v. Progressive Cas. Ins. Co.*, No. 27-CV-09-16898, 2009 Minn. Dist. LEXIS 361, *4–5 (Nov. 12, 2009); *Glass Serv. Co. v. Ill. Farmers Ins. Co.*, No. A06-1074, 2007 WL 1815781, *2 (Minn. Ct. App. June 26, 2007).

158. *Glass Serv.*, 2007 WL 1815781, at *16.

159. *See e.g., Alpine Glass*, 2012 Minn. Dist. LEXIS 247, at *7–8 (“The parties’ claims and defenses may be pursued and determined in one arbitration proceeding, which would improve speed of review and decrease the danger of inconsistency. Distinct proceedings based on the defense of assignment would arguably cause prejudice through added delay and expense.”).

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whether consolidation in any particular set of proposed arbitrations is required, and that the Minnesota Supreme Court simply got it wrong: like class arbitration, because consolidation tends to interfere with arbitration, consolidation is never required by a court as a matter of law. In other words, consolidation “interferes with fundamental attributes of arbitration.”¹⁶⁰ The third possible response Justice Scalia may have given is that the law of arbitration provides courts the power to decide whether consolidation, in any particular set of proposed arbitrations is required under Minnesota arbitration law, and although the Minnesota Supreme Court may have gotten that correct, under the FAA arbitration law, consolidation interferes with fundamental attributes of arbitration and it is never required by a court as a matter of law.

It is difficult to see how Justice Scalia could have proposed the first possible response discussed *supra*, given what he had said in *Concepcion*. Justice Scalia could not have endorsed a view that the drafters of arbitration agreements can put *anything* they want in them, including requirements that would interfere with the fundamental attributes of arbitration, for the same reason that the states cannot put anything that would interfere with the fundamental attributes of arbitration into their own laws.¹⁶¹

The second response would have traded on a superficial conflation of class arbitration and consolidation. As Judge Easterbrook has observed, the two are not at all the same.¹⁶² The disadvantages of class arbitration listed by Justice Scalia in *Concepcion* are absent when a court orders consolidation. Consolidation certainly does not make the “process slower, more costly, and more likely to generate procedural morass” because consolidation does not require any proceedings over certification regardless of whether the named parties are sufficiently

160. See *Concepcion*, 563 U.S. at 344.

161. See *supra* notes 85–95. One cannot help but wonder if, as Justice Scalia asserted, class arbitration interferes with the fundamental attributes of arbitration, the parties should be permitted to choose it.

162.

Class actions always have been treated as special. One self-selected plaintiff represents others, who are entitled to protection from the representative’s misconduct or incompetence. Often this requires individual notice to class members, a procedure that may be more complex and costly than the adjudication itself. As a practical matter the representative’s small stake means that lawyers are in charge, which creates a further need for the adjudicator to protect the class. Finally, class actions can turn a small claim into a whopping one. . . . Consolidation of suits . . . poses none of these potential problems.

Blue Cross Blue Shield of Mass. v. BCS Ins. Co., 671 F.3d 635, 640 (7th Cir. 2011) (citation omitted); see also *In re A2P SMS Antitrust Litig.*, No. 12 CV 2656 (AJN), 2014 WL 2445756, at *9 (S.D.N.Y. May 29, 2014).

representative.¹⁶³ Consolidation does not increase the risk of procedural formality by importing a Rule 23-like process because there is no need for rules that can bind absent parties. Consolidation does not affect absent parties.¹⁶⁴ Finally, although consolidation “increases risks” to defendants of a single large liability judgment,¹⁶⁵ thus forcing them to invest time and money in the proceeding, it is not clear why this is a reason to disfavor consolidation, especially if, as the Minnesota courts have observed, consolidation benefits defendants and plaintiffs by removing the risk of inconsistent judgments and reducing the cost of dispute resolution for both sides.

As to the third response discussed *supra*, if it is true, as a matter of fact, that consolidation and class arbitration are different and that consolidation does not have features that interfere with arbitration in general, then what could have been Justice Scalia’s third response either raises an irrelevant point or begs the question.

Minnesota could have its own arbitration law parallel to the FAA. For example, state arbitration law relating to insurance is not preempted by the FAA.¹⁶⁶ The absence of preemption is irrelevant to the substantive claim made by the Minnesota Supreme Court: under some circumstances, either party’s refusal to consolidate interferes with arbitration. The fact that the court expressed this view about arbitration in a case in which its judgment was not subject to review by a federal court through FAA preemption explains, as a contingent fact, why courts in Minnesota have been able to develop a theory of arbitration that elevates consolidation to a position of primacy. Nevertheless, it does not lessen the validity of the theory for arbitration of similar, formulaic claims outside the context of insurance.¹⁶⁷ Therefore, the third potential response turns on there being a difference between Minnesota arbitration law and FAA arbitration law. In certain circumstances, this consolidation may be required to preserve the fundamental attributes of arbitration in the former but never in the latter.

163. See *Concepcion*, 563 U.S. at 348; see also *Underwood v. Palms Place1, LLC*, No. 2:09-cv-00700-RLH-PAL, 2011 WL 1790463, at *5 (D. Nev. May 9, 2011).

164. See *Concepcion*, 563 U.S. at 349; see also *Underwood*, 2011 WL 1790463, at *5

165. *Concepcion*, 563 U.S. at 350.

166. Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L.J. 253, 254 (2004); see, e.g., *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 382 (4th Cir. 2012).

167. The court based its analysis of the relationship between consolidation and arbitration on a noninsurance case, *Grover-Diamond Associates v. American Arbitration Ass’n*, 211 N.W.2d 787 (Minn. 1973), which, in turn, relied on the Minnesota Uniform Arbitration Act—all of these are sources, which, in theory, are subject to FAA preemption. See *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 805 (Minn. 2004).

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The claim that there is such a thing as Minnesota arbitration public policy simply means that Minnesota has a view about what arbitration means just as the members of the U.S. Supreme Court have views about what arbitration means. So, hypothetically speaking, if the Minnesota legislature amended its state arbitration law to prohibit consolidation waivers in consumer arbitration, or if the Minnesota Supreme Court announced that consolidation waivers in consumer arbitration would be unenforceable unless the party seeking to enforce the waiver made a showing that consolidated arbitration lacked the so-called “*Glass Service*” factors,¹⁶⁸ the Minnesota legislature or the Minnesota Supreme Court simply prescribed a rule implied by the legal concept of “arbitration” as that term is generally used. If, in the context of a FAA preemption case, members of the U.S. Supreme Court disagreed with this interpretation, it would be incumbent on them to explain why. The fact that the U.S. Supreme Court has the final word regarding the meaning of the FAA does not relieve it from the obligation to give a reasoned explanation for why a competing interpretation by a state legislature or a state court is not correct.¹⁶⁹

Finally, it is also possible that the FAA could make a minimum set of demands on the design of arbitration and that the states could impose additional demands—all in the name of improving or promoting arbitration—as long as those additional demands do not interfere with the essential or fundamental attributes of arbitration. An obvious example of this is the waiver of representation, which was discussed *supra*. Even if the U.S. Supreme Court were to decide that the FAA allows the waiver of representation by a consumer in an arbitration contract of adhesion, a state could prohibit these waivers (either through legislation concerning arbitration or judicial interpretation of existing state arbitration) because the requirement that consumer contracts of adhesion preserve the option of having a lawyer present at an arbitration hearing is the expression of the state’s views on the question of what is essential in arbitration. A state could take the same view about consolidation waivers as well, even if the U.S. Supreme Court were to take the view that the FAA allows the waiver of consolidation in an arbitration contract.

168. See generally *Boulay Auto Glass, Inc. v. Ill. Farmers Ins. Co.*, No. 27-cv-12-14646, 2012 Minn. Dist. LEXIS 248, at *8–9 (Dec. 12, 2012) (describing the *Glass Service* factors).

169. As Justice Robert Jackson noted regarding the Justices of the U.S. Supreme Court: “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring), *superseded by statute* 28 U.S.C. § 2254 (2012), *as recognized in* *Staley v. Jones*, 239 F.3d 769 (6th Cir. 2001).

B. Assignment

States may have a public policy concerning assignment in arbitration. A state might think, for reasons similar to those discussed *supra*, that in certain circumstances, waivers on the assignment of claims interfere with arbitration. Again, when Minnesota confronted the problem of how to promote the arbitration of auto glass insurance disputes, it ran into defendants (insurers) who resisted arbitration by one party—like the auto glass repair company in *Illinois Farmers Insurance* that had 5,700 identical claims—on the ground that the contracts, which provided for arbitration, prohibited the assignment of the contract and, by extension, any claim for a remedy for breach of that contract.¹⁷⁰ The glass companies who sought to arbitrate thousands of short-pay claims against the insurers had taken an assignment of the insured's right to their insurance proceeds.¹⁷¹ In one way, the question of whether to enforce the waiver of the right to assign is even more difficult than the question faced by the Minnesota Supreme Court in *Illinois Farmers Insurance* because in that case, the court was faced with the question of whether to enforce an explicit waiver of a common law right.¹⁷²

In *Star Windshield Repair, Inc. v. Western National Insurance Co.*,¹⁷³ the Minnesota Supreme Court held that the waiver was unenforceable.¹⁷⁴ The court based its decision on its interpretation on Minnesota insurance law (finding that contract waivers regarding the assignment of proceeds relating to auto glass repair were inconsistent with the state's statutory scheme for auto insurance), but the concept of arbitration it employed was the same as the concept it used when it held that courts could order consolidation in auto glass cases. It emphasized that Minnesota had chosen arbitration as the only way for disputes over auto glass insurance payments to be resolved, and this choice must entail free assignability for the arbitration scheme to operate.¹⁷⁵ The court noted that forcing the insurer to preserve the in-

170. See *Star Windshield Repair, Inc. v. W. Nat'l Ins. Co.*, 768 N.W.2d 346, 349 (Minn. 2009) (discussing *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267 (Minn. 2004)).

171. *Id.* at 347 (“In each case, an insured vehicle incurred windshield damage, and an auto glass vendor repaired the windshield. The insured policyholder assigned his or her claim for insurance proceeds to the auto glass vendor, which then billed the respective insurer directly.”).

172. In this respect, *Star Windshield Repair*, is more similar to *Concepcion* and *Amex* than *Illinois Farmers Insurance*.

173. 768 N.W.2d 346.

174. *Id.* at 350, 350 n.6. The court carefully stressed that its holding only extended to the post-loss assignment of proceeds and not to “pre-loss” assignments. *Id.* at 350 n.6; see *Edgewood Manor Apt. Homes LLC v. RSUI Indem. Co.*, 782 F. Supp. 2d 716, 737 (E.D. Wis. 2011) (citing *Star Windshield Repair*, 768 N.W.2d at 350 n.6).

175. *Star Windshield Repair*, 768 N.W.2d at 350.

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sured's right to assign the proceeds did not affect the insurer's rights in arbitration.¹⁷⁶

As with consolidation, the fact that Minnesota's public policy concerning arbitration and assignment was worked out in the context of insurance arbitration, an area immune from federal preemption, is irrelevant to the point that I have been trying to make in this Section. That is, in some circumstances, a state may come to the conclusion that waivers of assignment in contracts undermine the state's interest in promoting arbitration. This could be true regardless of whether that conclusion is ultimately subject to review for preemption under the FAA. This point also does not depend on the fact that the principle articulated in *Star Windshield Repair*, that assignment may be so important to an arbitration scheme that it cannot be waived by contract, arose in the specialized area of auto glass insurance claims; the same principle was extended to claims of "short-pay" by medical insurers to medical providers.¹⁷⁷

Although less frequent than waivers on consolidation, some consumer credit card agreements require waiver of the right to assign one's post loss claim.¹⁷⁸ The argument for claiming that assignment waivers are incompatible with a state's arbitration public policy could be modeled after the argument developed by the Minnesota Supreme Court in the auto glass insurance cases, although it could be based on more basic policy considerations. Many state courts have stated that there is a strong public policy favoring assignment except in limited cases involving personal torts.¹⁷⁹ Given that the ability to assign a consumer claim is likely to be the only way for a consumer to secure the value of the claim she has as a result of commercial wrongdoing, and because it imposes no extra burden on the company, it is easy to

176. *Id.* at 350 n.6 ("Allowing auto glass vendors to arbitrate shortpay [sic] claims does not increase the insurers' risk of loss, and . . . does not affect the bargain struck between the insurer and the insured.").

177. *Med. Scanning Consultants, PA v. Metro. Prop. & Cas. Ins. Co.*, No. A10-2186, 2011 WL 2750708, at *3 (Minn. Ct. App. July 18, 2011) ("While there is no similar statutory scheme for medical services to insured persons, the auto glass repair case law is still analogous.").

178. *See, e.g., AM. EXPRESS*, *supra* note 139.

179. *See, e.g., Henkel Corp. v. Hartford Accident & Indem. Co.*, 62 P.3d 69 (Cal. 2003), *overruled by* *Flour Corp. v. Superior Court*, 354 P.3d 302, 304 (Cal. 2015). "The courts, of course, have placed certain limits on nonassignment clauses-there is [a] strong policy in favor of the free transferability of all types of property . . . and the prohibition, does not apply where all that remains to do under the contract is the payment of money." *Thomas v. Thomas*, 13 Cal. Rptr. 872, 877 (Ct. App. 1961) (citations omitted).

see how a prohibition of assignment waivers would be required by a state's arbitration public policy.¹⁸⁰

VI. CONCLUSION

This Article began with an assumption that arbitration means more than outsourcing contract design to contracting parties—especially in the context of contracts of adhesion and consumer transactions that are of relatively small value. It suggested that the original architects of the FAA—who were motivated by principles not mysterious to us—would have wanted the U.S. Supreme Court to impose a substantive vision of arbitration that maximized the benefits of speedy and efficient claim resolution for as many citizens as possible. Once we recognize the need to develop a substantive theory of arbitration that does more than enforce private agreements, the next obvious question is whether the states can experiment with different interpretations of the FAA's theory of arbitration. This Article argued that they can, within limits, and it set out some areas in which state arbitration public policy has been articulated, and could be articulated further, depending on how aggressively a state wishes to promote consumer arbitration. The simple legal tools of consolidation and assignment could help bring many more consumer claims into arbitration. If the states choose to encourage their citizens to pick up these tools, the U.S. Supreme Court should not allow their efforts to be thwarted by the waivers designed to undermine arbitration itself.

180. Myriam Gilles and I proposed that, in the wake of *Concepcion*, “arbitration entrepreneurs” could purchase small claims and arbitrate them in a consolidated action. See Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 456–57 (2012). Arbitration entrepreneurs could only operate in a world without assignment and consolidation waivers.