

FAA Preemption After *Concepcion*

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INTRODUCTION

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the Federal Arbitration Act (“FAA”) preempted California’s use of unconscionability doctrine to invalidate an arbitration clause containing a class arbitration waiver.¹ Much has been written on *Concepcion*, with most

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1. 131 S. Ct. 1740, 1750-53 (2011).

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

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

Part II then examines the implications of *Concepcion* for FAA preemption doctrine.⁶ It takes the decision and analysis in *Concepcion* as given and applies that analysis to other possible uses of unconscionability doctrine. I suggest a narrow view of FAA preemption after *Concepcion*, under which states can continue to use unconscionability doctrine to police the fairness of arbitration agreements unless the state rule is inconsistent

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

3. 9 U.S.C. § 2 (2012).

4. See *infra* text accompanying note 64.

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

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

with “fundamental attributes of arbitration,” as illustrated by the particular examples given by the Court. In fact, *Concepcion* might herald a narrowing of FAA preemption, at least to the extent it suggests that state laws may impose some conditions on the enforceability of arbitration agreements.

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

I.

MISCONCEPTIONS ABOUT *CONCEPCION*

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

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

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

7. See *supra* text accompanying note 1.

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

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

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

To illustrate the point, consider the report issued by Public Citizen and the National Association of Consumer Advocates on the first anniversary of *Concepcion*.¹⁰ The report identified seventy-six cases from eighteen jurisdictions in which “judges cited *Concepcion* and held that class action

(2012) (“*Concepcion* . . . improperly guts the FAA savings clause and violates the reserved role under the FAA for states to hold arbitration clauses to the standards required for all contracts.”).

9. For a high-end estimate, see ALAN S. KAPLINSKY, THE USE OF PRE-DISPUTE ARBITRATION AGREEMENTS BY CONSUMER FINANCIAL SERVICES PROVIDERS 36 (2011), available at www.law.gwu.edu/News/2010-2011Events/Documents/Kaplinsky-%20Submission%20-%20Outline.pdf (“Courts applying the laws of 26 states [and the District of Columbia] have held that class action waivers are enforceable under state law, at least when the arbitration agreement neither imposes higher arbitration costs on the consumer nor limits the remedies that can be awarded in arbitration . . .”). The parties in *Concepcion* agreed that states had adopted varying approaches prior to *Concepcion*, although they disagreed about how to classify the decisions of some of the states. Compare Petition for Writ of Certiorari at 21-22, app. at 63a-69a, *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010) (No. 09-893) with Respondents’ Brief in Opposition at 10-11, *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010) (No. 09-893).

10. PUB. CITIZEN & NAT’L ASS’N OF CONSUMER ADVOCATES, JUSTICE DENIED — ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT’S *CONCEPCION* DECISION ARE PLAINLY EVIDENT (2012).

bans within arbitration clauses were enforceable.”¹¹ Of the eighteen jurisdictions, however, at least eight might have reached the same result as a matter of state law even without the decision in *Concepcion*.¹² Attributing the dismissals of the class actions in those states to *Concepcion* potentially overstates the effect of the decision.

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

11. *Id.* at 4.

12. *Id.* app. at 32-34. Of the jurisdictions listed, the following are identified by KAPLINSKY, *supra* note 9, at 36, as having cases that upheld class arbitration waivers prior to *Concepcion*: Colorado, Washington D.C., Georgia, Illinois, Louisiana, Missouri, New York, Ohio, Oklahoma, and Tennessee. The respondents in *Concepcion* objected to two of the states on the list (Georgia and Illinois). See cases cited *supra* note 9. Barely twenty percent (16 of 76) the decisions identified in the Public Citizen/NACA report were from these ten jurisdictions, which is not surprising: if the jurisdiction previously had upheld class arbitration waivers as a matter of state law, there would be little incentive to litigate the issue further in that jurisdiction. By comparison, close to half of the decisions (35 of 76) were from courts in California, where prior to *Concepcion* courts had refused to enforce class arbitration waivers.

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

14. Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013).

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

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

B. *Concepcion and the Use of Arbitration Clauses*

After *Concepcion* was decided, a number of commentators predicted that soon all businesses would include arbitration clauses with class arbitration waivers in their consumer, employment, and other standard form contracts.¹⁷ Every business would switch, according to these commentators, because there is no reason not to.¹⁸ Every business wants to avoid class actions, and it is cheap and easy for businesses to change their standard form contracts to include an arbitration clause with a class arbitration waiver.¹⁹

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

Bo Rutledge and I examined changes in the dispute resolution provisions in franchise agreements since *Concepcion*, and found that “the use of arbitration clauses in franchise agreements has increased since *Concepcion*, but not dramatically, and most franchisors have not switched to arbitration.”²² Prior to *Concepcion*, 40.3% of a sample of major franchisors used arbitration clauses. By the end of 2013, that percentage had increased to 46.3%—the same level as in 1999.²³ Moreover, of the four franchisors switching to arbitration since *Concepcion*, three had previously used arbitration clauses and switched away from arbitration; the fourth had previously used arbitration to resolve some but not all disputes with franchisees.²⁴

A preliminary report on the use of arbitration clauses in consumer financial services contracts released by the Consumer Financial Protection

laboratories for the evolution of non-commercial arbitration involving the types of disputes that can affect all segments of society.”).

17. See, e.g., Ian Millhiser, *Supreme Court Nukes Consumers' Rights In Most Pro-Corporate Decision Since Citizens United*, THINKPROGRESS: JUSTICE (Apr. 27, 2011, 3:40 PM), <http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers/> (“After *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action.”); Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, SFGATE (Nov. 7, 2010, 4:00 AM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/06/INA41G6131.DTL> (“Once given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to [arbitration agreements with class waivers].”).

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

19. Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 847 (2012).

20. Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. ____ (forthcoming 2014).

21. See Gilles & Friedman, *supra* note 2, at 629.

22. Rutledge & Drahozal, *supra* note 20, at ____.

23. *Id.* at ____ & n.136.

24. *Id.* at ____.

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

Professor Rutledge and I consider two possible explanations for the limited move to arbitration since *Concepcion*. One possibility is that standard form contracts are “sticky”—i.e., resistant to change—even when a rational party would make the change.²⁹ Another possibility is that there are, in fact, reasons for parties not to use arbitration clauses (such as limited appeal rights), so that parties that face little perceived risk of a class action may have decided that an arbitration clause is not worth the cost.³⁰ We find some evidence supporting both possible explanations,³¹ although more research remains necessary.

C. *Concepcion* and Other FAA Preemption Cases

Finally, some courts have cited *Concepcion* as requiring them to change their prior FAA preemption decisions when, in fact, the preemption doctrine on which the courts relied was established long before *Concepcion*. The best example is the Ninth Circuit’s decision in *Ferguson v. Corinthian Colleges, Inc.*³² In *Ferguson*, the Court of Appeals overruled circuit

25. See CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 54-57 (2013), available at http://www.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

26. *Id.* at 54. The CFPB reported “no additional issuers switching to arbitration between December 31, 2012, and June 30, 2013.” *Id.* at 54 n.125.

27. *Id.* at 56. Data on changes between the date of the decision in *Concepcion* and summer 2012 were unavailable.

28. *Id.* at 25-26.

29. See, e.g., G. MITU GULATI & ROBERT E. SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 32-44 (2012); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard Form Contracts*, 88 N.Y.U. L. REV. 240, 241 (2013).

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

31. Rutledge & Drahozal, *supra* note 20, at ___.

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

precedent applying the California Supreme Court's *Broughton-Cruz* doctrine to find state law public injunction claims not subject to arbitration,³³ holding instead that the doctrine was preempted by the FAA.³⁴ In so holding, the Ninth Circuit stated that it was overruling its prior precedent because "it is clearly irreconcilable with intervening Supreme Court authority"—i.e., *Concepcion*, among others.³⁵

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

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

None of this is to say that the Ninth Circuit decision in *Ferguson* is wrong on the merits. To the contrary, I have long taken the position that *Broughton* and *Cruz* are preempted by the FAA.³⁹ My point here is that nothing in *Concepcion* changed FAA preemption law so as to require the Ninth Circuit to overrule its prior precedent. Presumably the Ninth Circuit panel was seeking to avoid the need for en banc review by relying on

33. See *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 77-78 (Cal. 1999); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1164-65 (Cal. 2003).

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

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

36. *Ferguson*, 733 F.3d at 934 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)).

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

38. See, e.g., *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) (explaining that summary reversal "is a rare and exceptional disposition, usually reserved by th[e] Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error") (quoting EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 281 (6th ed. 1986)) (internal quotation marks omitted).

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

Concepcion as “intervening” Supreme Court precedent.⁴⁰ But while *Concepcion* was “intervening” in the sense that it was decided after the prior Ninth Circuit case and before *Ferguson*, again, nothing in *Concepcion* changed FAA preemption doctrine.⁴¹ The prior case was wrong when it was decided, and the Ninth Circuit in *Ferguson* was simply correcting its previous error.

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

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

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

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

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

44. 303 F.3d 994, 997, *reh’g en banc granted*, 319 F.3d 1091 (9th Cir. 2003).

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

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

47. *Id.* at 744-45.

II.

CONCEPCION AND FAA PREEMPTION

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

A. An Overview of Concepcion and General Contract Law Defenses

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

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

48. The Court has addressed the savings clause in dicta, in two cases: *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.") and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 689 n.3 (1996) (same).

49. 9 U.S.C. § 2 (2012).

50. Another limit, touched on but not discussed at length by the Court, is that the application of the general contract law defense must not discriminate against arbitration. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011); see Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 U.C.L.A. L. REV. 1189, 1195-98 (2011); Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1245-48 (2011); Hiro N. Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 Y.B. ON ARB. & MEDIATION 39, 54 (2012) (arguing that "[p]roperly understood, *Concepcion* . . . stands for the proposition that *Discover Bank* somehow purposefully discriminates against arbitration"); see also *infra* text accompanying notes 86-88.

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

arbitrators follow the court system's rules of evidence, even when parties have chosen more flexible procedures."⁵²

In its opinion, the Court largely adopted the respondents' approach, changing the formulation of the test to whether the condition imposed by the court "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."⁵³ It also cited respondents' examples of a "rule classifying as unconscionable arbitration agreements that failed to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed 'a panel of twelve lay arbitrators' to help avoid preemption)."⁵⁴ To those examples, the Court added a third, "obvious illustration": a "case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery."⁵⁵

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

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

Conditioning the enforceability of arbitration agreements on the availability of class arbitration would frustrate both of these goals: expeditious dispute resolution and enforcing the parties' agreement to arbitrate.⁶⁰ The Court gave three reasons: (1) "the switch from bilateral to

52. *Id.* at 33-34.

53. *Concepcion*, 131 S. Ct. at 1748.

54. *Id.* at 1747.

55. *Id.*

56. *See infra* text accompanying notes 64-65.

57. *Concepcion*, 131 S. Ct. at 1747-48.

58. *Id.* at 1748.

59. *Id.*

60. An alternative rationale that might have avoided some of the broader readings of *Concepcion* was that relied on by the dissenting Justices in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 458-

class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment”; (2) “class arbitration requires procedural formality”; and (3) “class arbitration greatly increases risk to defendants” of aberrational awards that cannot be reviewed in court.⁶¹ The mere fact that parties might agree to particular procedures, the Court continued, did not save state rules requiring such procedures from preemption.⁶² Finally, the Court rejected the dissent’s argument “that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system,” concluding that “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”⁶³

B. Implications of Concepcion for Preemption of State Unconscionability Doctrine

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

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

59 (2003) (Rehnquist, C.J., dissenting) (arguing that class arbitration was inconsistent with parties’ agreement as to how arbitrator would be selected).

61. *Concepcion*, 131 S. Ct. at 1751-52 (emphasis omitted).

62. *Id.* at 1752-53. The Court does suggest that if the parties agreed to class arbitration, it would be consistent with the FAA to enforce that agreement. *See id.* at 1750-51 (“The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.”).

63. *Id.* at 1753.

64. *See* Stipanowich, *supra* note 8, at 380 (“In the wake of [*Concepcion*], one wonders what if anything is left of the doctrine of unconscionability in the realm of arbitration agreements.”); Arpan A. Sura & Robert A. DeRise, *Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 408-09 (2013) (arguing that “the potentially boundless reach of *Concepcion*” “threatens to jeopardize a bevy of facially neutral contract laws as they are applied to arbitration agreements”).

65. *Concepcion*, 131 S. Ct. at 1748.

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

So viewed, the question then is what, if any, other applications of unconscionability doctrine “interfere[] with fundamental attributes of arbitration” so as to be preempted?⁶⁸ A full explication of the standard is beyond the scope of this article. Instead, I focus on some recent and important examples for illustrative purposes.

The California Supreme Court got it partly right on the facts of *Sonic-Calabasas A, Inc. v. Moreno*.⁶⁹ Certainly it was correct to repudiate its prior case law, which conditioned the enforceability of an arbitration agreement on the parties first participating in an administrative hearing before the Labor Commissioner (a “Berman hearing”).⁷⁰ Such a rule interferes with a fundamental attribute of arbitration by requiring the parties to appear before

66. Sura & DeRise, *supra* note 64, at 449.

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

68. *Concepcion*, 131 S. Ct. at 1748. As noted above, one example given by the court is a state rule conditioning the enforceability of arbitration agreements on the availability of “judicially-monitored discovery.” *Id.* at 1747. For a broad application of *Concepcion* to discovery limits, see Lucas v. Hertz Corp., 875 F. Supp. 2d 991, 1007-08 (N.D. Cal. 2012) (“*Concepcion*, however, suggests that limitations on arbitral discovery no longer support a finding of substantive unconscionability. . . . Although there is a difference between a failure to provide for ‘judicially monitored discovery’ and a failure to affirmatively allow for any discovery devices to be used, the court believes the above reasoning applies with equal force here.”).

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

70. *Id.* at 200.

another decision maker before proceeding to arbitration.⁷¹ But the court's attempted modification of its rule, so that a comparison between arbitration and a Berman hearing is only a factor in evaluating unconscionability, does not save it from preemption.⁷² To the extent the court is simply reimposing its prior condition on a case-by-case basis, the rule should still be preempted.

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

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

71. *Cf.* *Preston v. Ferrer*, 552 U.S. 346 (2008) (holding that the FAA supersedes state laws that give primary jurisdiction to administrative forum over contractually agreed arbitral forum).

72. 311 P.3d at 206-07.

73. 733 F.3d 916, 927 (9th Cir. 2013).

74. 173 F.3d 933 (4th Cir. 1999).

75. Moreover, as discussed *infra* Part III, cases like *Hooters* likely would come out the same way even if unconscionability were no longer available as a ground for challenging arbitration agreements. Thus, I strongly disagree with the suggestion by Sura and DeRise that "there is even a plausible case that *Hooters* may no longer be valid after *Concepcion*, despite its unusual facts." Sura & DeRise, *supra* note 64, at 484.

76. See Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 750-52 (2006) (citing cases addressing excessive costs); Sura & DeRise, *supra* note 64, at 471-74 (citing cases addressing inconvenient locations).

77. See *In re Checking Account Overdraft Litigation*, 685 F.3d 1269, 1277-79 (11th Cir. 2012) (holding that the FAA does not preempt South Carolina's application of unconscionability doctrine to invalidate fee-shifting provision).

78. For a contrary view, see Sura & DeRise, *supra* note 64, at 467-74.

A more difficult line of cases are those holding arbitration agreements with nondisclosure provisions—i.e., contract provisions precluding the parties from disclosing the existence of the arbitration and such like—to be unconscionable.⁷⁹ Confidentiality (or, more precisely, privacy) certainly is a fundamental attribute of arbitration, as the Supreme Court has noted.⁸⁰ Even so, under U.S. law, the privacy of arbitration typically does not extend to precluding a party's disclosure of the existence of the arbitration or even its outcome.⁸¹ Instead, it means that non-parties can be excluded from the hearing and that the arbitrator and arbitration provider cannot disclose information about the proceeding.⁸² Indeed, the whole reason contracts with arbitration clauses include separate nondisclosure provisions is that the default view of arbitration in the United States does not extend as far as the nondisclosure agreements would require. Accordingly, while a much closer case, there is a good argument that these cases are not preempted under *Concepcion* either.

A final application of note of unconscionability doctrine are cases that invalidate an arbitration clause that excludes (i.e., carves out) certain claims or remedies (potentially including punitive damages) or that requires one party but not the other to arbitrate.⁸³ The argument here is that conditioning the enforceability of an arbitration agreement on arbitrating claims or remedies that the parties did not agree to arbitrate (those carved out) is inconsistent with a fundamental attribute of arbitration: that arbitration be based on the parties' consent. If the parties have not agreed to arbitrate a claim, the FAA does not require them to arbitrate.⁸⁴ On this view, invalidating an arbitration agreement because the parties have agreed to arbitrate certain claims or remedies but not others is inconsistent with the

79. *E.g.*, *Schnuerle v. Insight Comm'ns Co.*, 376 S.W.3d 561, 578 (Ky. 2012) (concluding that "we are not persuaded that *Concepcion* compels that we uphold the confidentiality agreement in this case").

80. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010).

81. *See Amy J. Schmitz, Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211, 1214 (2006) ("Arbitration is private but not confidential. . . . Privacy thus does not ensure confidentiality of arbitration proceedings. Information about and learned through domestic arbitrations may become public unless the parties contractually require that this information remain confidential. Arbitration therefore is not entirely secret."); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1260 (2006) ("A crucial distinction . . . must be drawn between the 'privacy' of the arbitral proceeding and the 'confidentiality' of the proceeding."). The law of some other jurisdictions takes a broader default understanding of the confidentiality of the arbitration process. *See, e.g.*, *Esso Australia Resources Ltd. v. Plowman* (1995) 183 CLR 10 (Austl.).

82. *E.g.*, Reuben, *supra* note 81, at 1260.

83. *See Christopher R. Drahozal & Erin A. O'Hara O'Connor, Unbundling Procedure*, 66 FLA. L. REV. (forthcoming 2014); Christopher R. Drahozal, *Nonmutual Agreements to Arbitrate*, 27 J. CORP. L. 537 (2002).

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

consensual nature of arbitration.⁸⁵ On the other hand, nothing in the FAA precludes states from requiring parties to arbitrate claims that they have not agreed to arbitrate—to require true “mandatory” arbitration of particular claims. (There are potential constitutional limits on mandatory arbitration, but that is a different issue.) The counterargument, then, is that the FAA does not preempt such a condition.

Alternatively, these sorts of mutuality requirements could be (and, in many cases, should be) held preempted because they discriminate against arbitration. No state requires that all contracts be “mutual” in the sense that both sides undertake equal obligations (indeed, that would be contrary to the whole idea of exchange).⁸⁶ So a special mutuality requirement applied to arbitration clauses would single out arbitration and be preempted as discriminatory.⁸⁷ Further, such a rule probably should be preempted even if imposed under the guise of unconscionability doctrine. If so, a court would not need to resolve whether such a mutuality requirement is preempted under *Concepcion*’s “fundamental attributes of arbitration” test.⁸⁸

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

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

86. Drahozal, *supra* note 83, at 538-39.

87. Drahozal, *supra* note 39, at 411 n.138; see *Easter v. Compucredit Corp.*, 08-CV-1041, 2009 WL 499384, at *3 (W.D. Ark. Feb. 27, 2009) (“find[ing] that the Arkansas law requiring independent mutuality in an arbitration clause is preempted by the FAA”); see also *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1169 (10th Cir. 2014) (invalidating mutuality requirement as contrary to Supreme Court precedent holding that “[a] court may not invalidate an arbitration agreement on the ground that arbitration is an inferior means of dispute resolution”). *But see Noohi v. Toll Bros.*, 708 F.3d 599, 611-13 (4th Cir. 2013) (rejecting argument that FAA preempts Maryland’s requirement of separate consideration for arbitration agreement).

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

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

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

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

But, at least as I understood FAA preemption, such an implication already had been established long before *Concepcion*. Thus, I stated in 2004 that “if the state rule precludes the parties from arbitrating disputes they otherwise have agreed to arbitrate, in whole or in part, *conditionally* or *unconditionally*, the FAA preempts the state rule.”⁹² The authority for the “conditionally” part of the statement was the Supreme Court’s decision in *Doctor’s Associates, Inc. v. Casarotto*, in which the Court held that the FAA preempted a Montana statute that made an arbitration clause “unenforceable unless ‘[n]otice that [the] contract is subject to arbitration’ is ‘typed in underlined letters on the first page of the contract.’”⁹³ If a state statute conditioning the enforceability of an arbitration clause on conspicuous disclosure is preempted under *Doctor’s Associates*, it would seem to follow that a state statute conditioning enforceability on the availability of class arbitration would be preempted as well. If anything, the hypothetical statute based on *Concepcion* is more intrusive on the parties’ agreement to arbitrate than the one in *Doctor’s Associates*. Yet while

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

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

91. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

92. *Drahozal*, *supra* note 39, at 415 (emphasis added).

93. 517 U.S. 681, 683 (1996) (quoting Mont. Code Ann. § 27-5-114(4)).

Concepcion implicitly held such a state statute to be preempted, it seemed to have to work a lot harder at it than the Court did in *Doctor's Associates*.⁹⁴

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

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

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

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

It is not clear what this footnote means. (It is, of course, only dicta, because the issue was not before the Court in *Concepcion*.) In *Doctor's Associates*, the Court held that a state statute requiring arbitration clauses to be highlighted is preempted.⁹⁶ Given that it is the arbitration clause itself that operates as a "class action waiver"—it removes the case from the possibility of a class action in court—requiring conspicuous disclosure of a class action waiver arguably is simply inconsistent with the decision in *Doctor's Associates*.⁹⁷

Alternatively, perhaps by "class-action-waiver provisions" the court means provisions other than the arbitration clause that waive the availability

94. *Doctor's Associates* was an 8-1 opinion, written by Justice Ginsburg, with only Justice Thomas dissenting (on the ground that the FAA does not apply in state court). 517 U.S. 681 (1996).

95. *Concepcion*, 131 S. Ct. at 1750 n.6.

96. 517 U.S. at 688.

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

of class actions—in other words, class arbitration waivers.⁹⁸ Maybe the footnote means that states can require conspicuous disclosure of contract provisions other than the arbitration clause itself without being preempted by the FAA.

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

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

III.

AN OUTSIDE LIMIT ON FAA PREEMPTION: “[T]O [S]ETTLE BY [A]RBITRATION”¹⁰²

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

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

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

100. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 731 n.127 (1999) (“If the test is whether law ‘singles out’ arbitration, does that mean law becomes consistent with the FAA by ‘doubling out’ arbitration, i.e., precluding enforcement of arbitration agreements as just one other type of contract? If so, the FAA can be evaded just by finding some obscure, trivial type of contract and making it, along with arbitration agreements, unenforceable.”).

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

102. 9 U.S.C. § 2 (2012) (emphasis added).

arbitration clause.”¹⁰³ In either case, an important legal limitation on abusive arbitration clauses would no longer be available.

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

The FAA itself does not define “arbitration.” But an essential element of “arbitration” is that it must involve a decision by a neutral decision maker.¹⁰⁶ If a dispute resolution process does not specify a neutral decision maker, it is not arbitration and the FAA does not apply.¹⁰⁷ Accordingly, the

103. *Concepcion*, 131 S. Ct. at 1755. Justice Thomas based his argument on a textual interpretation of the savings clause of FAA section 2, which he construed as coextensive with language in FAA section 4 requiring a court to send a dispute to arbitration “upon being satisfied that the *making of the agreement for arbitration* . . . is not in issue.” 9 U.S.C. § 4 (2012) (emphasis added). But if FAA section 4 means what Justice Thomas says it means, there was no need for him to address the language of the FAA section 2 savings clause. *Concepcion* was a federal court case, and section 4 controls the district court’s authority to compel arbitration. If section 4 did not permit the district court to consider unconscionability as a defense, the court had to compel arbitration without regard to the language of the savings clause. For a debate over the meaning of FAA sections 2 and 4 in this regard, compare David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 399-408 (2012) with Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2062-64 (2011), and Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 NW. U.L. REV. COLLOQUY 53 (2011). For a different perspective on Justice Thomas’s concurrence, see Michael A. Helfand, *Purpose, Precedent, and Political: Why Concepcion Covers Less than You Think*, 4 Y.B. ON ARB. & MEDIATION 126, 138 (2012) (citing Justice Thomas’s concurrence as a reason why “courts may very well limit the application of *Concepcion*, refraining from applying the Court’s analysis to cases of unconscionability predicated on conduct that undermines the formation of the agreement”).

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

105. 9 U.S.C. § 2 (emphasis added).

106. See BLACK’S LAW DICTIONARY 119 (9th ed. 2009) (defining “arbitration” as “[a] method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding”). Compare Restatement (Third) U.S. Law of Int’l Comm. Arb. § 1-1(c) (Tent. Draft No. 2, Apr. 16, 2012) (“‘Arbitration’ is a dispute resolution method in which the disputing parties empower an arbitral tribunal to decide a dispute in a final and binding manner.”). The federal circuits are divided on whether courts should look to federal common law or state law for the definition of “arbitration” under the FAA. See *Bakoss v. Certain Underwriters at Lloyds of London*, 707 F.3d 140, 143-44 (2d Cir.), cert. denied, 134 S. Ct. 155 (2013) (looking to federal common law for definition of “arbitration” under FAA, but recognizing circuit split on whether federal law or state law applies).

107. Cf. *Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 873 (Ct. App. 1996) (holding dispute resolution process was not “arbitration” within the meaning of California law because “a third party decision maker and some degree of impartiality must exist for a dispute resolution mechanism to constitute arbitration”).

dispute resolution process in the well-known *Hooters* case, in which the business set up a one-sided procedure in which it got to define the pool of prospective arbitrators, should not be considered “arbitration” within the meaning of the FAA.¹⁰⁸ Likewise, the arbitrator selection process in the recent *Ralphs Grocery* case, in which the respondent always got to pick the arbitrator, would not be arbitration.¹⁰⁹ In neither case did the parties’ dispute resolution process result in a decision by a neutral decision maker.

In addition, a number of courts have refused to enforce “sham” arbitration awards, awards arising from processes that look like arbitration but that are not, in substance, processes for resolving disputes. For example, a series of federal and state court cases have refused to enforce purported arbitral awards when the “arbitration” was a sham, nothing more than an attempt to evade state law restrictions on structured settlements.¹¹⁰ Under the reasoning of such cases, a dispute resolution clause that includes an exceedingly short statute of limitations on filing claims or requires payment of highly excessive fees might be held to be a sham and thus not arbitration within the meaning of the FAA.¹¹¹

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

CONCLUSION

Concepcion is an important case for its holding that the FAA preempts application of state unconscionability doctrine to invalidate an arbitration clause with a class arbitration waiver. But in a number of respects, the effect of *Concepcion* has been overstated, including its effect on application of state unconscionability doctrine to arbitration clauses. *Concepcion* does not preempt all or even most state unconscionability doctrine as applied to arbitration agreements. Properly construed, *Concepcion* preempts state unconscionability doctrine only when that doctrine conditions enforcement of arbitration agreements on procedures inconsistent with “fundamental

108. *Hooters of Am., Inc., v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

109. *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013).

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

111. *Cf. Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2314 (2013) (Kagan, J., dissenting) (“The agreement might set outlandish filing fees or establish an absurd (e.g., one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum.”). The argument suggested here is not, however, coextensive with the vindication-of-rights theory addressed in *Amex* (hence the “sufficiently extreme case” modifier).

attributes of arbitration” of the sort illustrated in *Concepcion* itself—such as the use of juries, court-monitored discovery, evidentiary rules, and, of course, class arbitration.¹¹² If, however, the Supreme Court were to construe *Concepcion* more broadly (or eliminate application of unconscionability to invalidate arbitration clauses altogether), courts would retain some residual authority to police the fairness of arbitration clauses, but only by finding a dispute resolution process not to be arbitration at all.

112. AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1748 (2011).