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# Impact Preemption: A New Theory of Federal Arbitration Preemption

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## IMPACT PREEMPTION: A NEW THEORY OF FEDERAL ARBITRATION ACT PREEMPTION

*Kristen M. Blankley\**

### Abstract

The United States Supreme Court has expanded its arbitration preemption jurisprudence to unprecedented and unexplained bounds, ultimately creating a new type of preemption, herein coined “impact preemption.” As applied by the Court, the scope of impact preemption is broader than even field preemption. The future policy implications of impact preemption are significant. Impact preemption shifts the balance of regulatory power in the dual federal–state arbitration system toward the federal courts and away from state regulatory authorities, contrary to the language and legislative history of the Federal Arbitration Act (FAA). In addition, impact preemption has the potential to undermine the stability of the national arbitration system for consumers and contracting parties who utilize arbitration agreements in commerce.

This Article traces the history of three fundamental flaws in prior Supreme Court rulings that ultimately resulted in the creation of impact preemption. First, the Court failed to define arbitration for approximately ninety years, and when it finally did so, the Court defined arbitration with a pro-business bias. Second, the Court failed to conduct a preemption analysis or to specify the type and scope of preemption it applied to arbitration. Third, as a result of the first two failures, the Court allowed the preemptive effect of the FAA to expand dramatically over time, notwithstanding its statutory language and legislative history, a failure that culminated in the creation of impact preemption.

Impact preemption raises serious federalism issues because it does not require a conflict between federal and state law. Taken to its logical conclusion, the Court’s impact preemption analysis may prohibit states from regulating any aspect of arbitration that potentially “impacts” the arbitration process. This Article urges the Supreme Court to return to the classic roots of conflict preemption analysis under the FAA. A return to these conflict preemption principles would restore the balance of regulatory power between the states and the federal government, and

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would restore a measure of predictability for consumers and contracting parties who use the national arbitration system to conduct commerce.

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## INTRODUCTION

In the last five years, the United States Supreme Court has broadened the scope of federal preemption power under the Federal Arbitration Act<sup>1</sup> (FAA) to unprecedented and unexplained bounds. This expansion of federal authority has a real and immediate impact on the lower federal courts, Congress, state lawmakers, and the business community. The Supreme Court’s new preemption jurisprudence, which this Article labels “impact preemption,” goes well beyond the boundaries of any other known type of preemption and implicates the federalism principles upon which all preemption doctrine is based. This Article explores the history of FAA interpretations, and the future implications of the Court’s new impact preemption jurisprudence in the arbitration context. This Article ultimately recommends that the Supreme Court should reverse its course and apply classic conflict preemption principles to FAA preemption.

When Congress enacted the FAA in 1925, contemporary courts and commentators considered it a procedural law applicable in the federal courts.<sup>2</sup> While the FAA applied in federal courts, states regulated arbitration within their own borders. With its 1984 decision in *Southland Corp. v. Keating*,<sup>3</sup> the Court made a radical shift and ruled that the FAA was actually substantive law with preemptive power.<sup>4</sup> This landmark ruling is peculiar both in its holding and in its reasoning. Academics have long debated the wisdom of the Court’s holding in *Southland*,<sup>5</sup> and this Article does not revisit those old arguments. Instead, this Article exposes in *Southland*’s reasoning fundamental flaws that are directly responsible for the subsequent exponential growth in the FAA’s preemptive power.

1. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16 (2012)).

2. See David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1219 (2013).

3. 465 U.S. 1 (1984).

4. See *id.* at 10–11.

5. The “correctness” of *Southland* has long been a subject for academic debate, and many scholars agree that it was wrongly decided. See, e.g., David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 WASH. U. J.L. & POL’Y 129, 129–30 (2004); Kenneth F. Dunham, *Southland Corp. v. Keating Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 332 (2010).

The *Southland* Court overlooked two critical questions: (1) what type of preemption should apply, and (2) what should the scope of that preemption be? This lazy jurisprudence led to the expansion of preemption doctrine in the arbitration context from traditional conflict preemption to today's unprecedented "impact preemption," which first emerged in the 2011 landmark case of *AT&T Mobility LLC v. Concepcion*.<sup>6</sup> Although *Concepcion* claims to continue to apply conflict preemption principles,<sup>7</sup> upon closer analysis it becomes apparent that the Supreme Court has created a new form of preemption. The preemption applied in *Concepcion* strays from the plain language, the prior accepted meaning, and the purposes of the FAA. Ultimately, *Concepcion* not only expands preemption doctrine but it also promotes business interests at the expense of the consumer.

Impact preemption differs fundamentally from any of the traditional categories of preemption—express preemption, field preemption, and conflict preemption. Impact preemption occurs without an express mandate from Congress, unlike express preemption.<sup>8</sup> Impact preemption applies in an area with no pervasive regulatory scheme, unlike field preemption.<sup>9</sup> Finally, impact preemption does not require a conflict in text or purpose between federal and state regulation, unlike conflict preemption.<sup>10</sup>

For reasons developed below, impact preemption is a dangerous expansion of federal power and it is particularly ill suited to the FAA. The Court appears to leave no room for state regulation of arbitration, even in areas traditionally reserved for the states, such as ethics, qualifications, and arbitration procedures. None of the literature to date has exposed this new type of preemption, and few articles have systematically considered the question of FAA preemption.<sup>11</sup>

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6. See 131 S. Ct. 1740 (2011).

7. See *id.* at 1747.

8. See *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 98 (1992) (plurality opinion); Dayna B. Royal, *Take Your Gun to Work and Leave It in the Parking Lot: Why the Osh Act Does Not Preempt State Guns-at-Work Laws*, 61 FLA. L. REV. 475, 483 (2009).

9. See *Gade*, 505 U.S. at 98.

10. See *id.*

11. See generally Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271 [hereinafter Cole, *Federalization of Consumer Arbitration*] (discussing the breadth of the FAA preemption and the resulting issues for state regulation of consumer arbitration); Horton, *supra* note 2, at 1218–23 (determining the role of state public policy in the wake of increasing federal authority and the proper scope of the FAA under a purposivism analysis). In addition, a handful of student works discuss the preemption analysis of the *Concepcion* case. See generally Kristopher Kleiner, Comment, *AT&T Mobility L.L.C. v. Concepcion: The Disappearance of the Presumption Against Preemption in the Context of the FAA*, 89 DENV. U. L. REV. 747 (2012); Shane Blank, Note, *Concerning Preemption: Upholding Consent Under the Federal Arbitration Act*, 2012 J. DISP. RESOL. 281. These pieces, while good, are not sweeping statements of preemption in the area of arbitration because of the limited nature of student works.

This Article fills this scholarly void by examining the historical development and potential consequences of impact preemption. Part I presents a short primer on preemption law and the contours of the FAA. Part II uncovers the fundamental flaws in the Supreme Court's prior FAA preemption jurisprudence that culminated in the creation of impact preemption. Part III discusses the origins and attributes of the new form of preemption the Court has created. Part IV analyzes the implications and potential consequences of impact preemption, focusing on federalism and contractual concerns. Part V concludes that the Supreme Court should end its experiment with impact preemption and return to classic conflict preemption analysis when determining the preemptive effect of the FAA.

### I. FEDERAL PREEMPTION LAW AND THE FAA

Under all preemption theories, state regulation must yield to the U.S. Constitution, as well as federal laws and regulations governing the same subject.<sup>12</sup> The Constitution's Supremacy Clause dictates preemption.<sup>13</sup> Preemption is also grounded in the principles of federalism.<sup>14</sup> The

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Of course, scholars have certainly written on the area of preemption generally and in other specific areas of the law, and this Article will build on that scholarship. Arbitration is not the only field with questionable preemption rulings. *See, e.g.*, Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 322 (2012) (discussing the preemption of city and other local laws); Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 153, 155 (2012) (regarding preemption in the area of immigration laws following Arizona's attempts at self-policing immigration laws); Michael P. Moreland, *Preemption as Inverse Negligence Per Se*, 88 NOTRE DAME L. REV. 1249, 1249 (2013) (providing that, with respect to state tort claims, "a grand unified theory of preemption doctrine has been elusive, and preemption cases come to wildly unpredictable results"); Raymond Natter & Katie Wechsler, *Dodd-Frank Act and National Bank Preemption: Much Ado About Nothing*, 7 VA. L. & BUS. REV. 301, 303-06 (2012) (discussing the preemptive effect of the Dodd-Frank Act in the wake of the mortgage crisis and the Great Recession); Kevin Wiggins, *Medical Provider Claims: Standing, Assignments, and ERISA Preemption*, 45 J. MARSHALL L. REV. 861, 861 (2012) (discussing disparate preemption treatment for claims made by plan participants and medical providers).

12. *See Gade*, 505 U.S. at 108.

13. U.S. CONST. art. VI, cl. 2; *see also Gade*, 505 U.S. at 108 (providing that the preemption doctrine derives from the Supremacy Clause); Charles Franklin & Allison Reynolds, *TSCA Reform and Preemption: A Walk on the Third Rail*, 27 NAT. RESOURCES & ENV'T, Summer 2012, at 14 ("Tension between federal and state powers is hardly a novel dynamic in American governance. Indeed, the U.S. Constitution not only foresaw the potential for clashes between federal and state policies, but incorporated specific provisions to address such situations."); Moreland, *supra* note 11, at 1253 ("Preemption is the apparently straightforward constitutional doctrine based in the Supremacy Clause that a state law that conflicts with federal law is without effect." (internal quotation marks omitted)); Natter & Wechsler, *supra* note 11, at 308 ("The foundation for the doctrine that federal law supersedes conflicting state law is found in the 'Supremacy Clause' of the U.S. Constitution.").

14. *See, e.g.*, Moreland, *supra* note 11, at 1285. Of course, the Tenth Amendment to the Constitution provides that "powers not delegated to the United States by the Constitution, nor

supremacy of federal law and the respect for state sovereignty are best viewed as two sides of the same coin because the states retain their police power unless and until Congress acts to displace it.<sup>15</sup> Examining the FAA within the larger scheme of preemption raises the following question: What form of preemption should apply to the FAA? To answer this question, this Part examines the various forms of preemption along with the provisions of the FAA and the congressional intent behind those provisions.

### A. Federal Preemption Doctrines

Preemption jurisprudence recognizes both express and implied preemption.<sup>16</sup> Express preemption occurs when a statute explicitly states that the law has preemptive effect.<sup>17</sup> Statutes that do not contain an express provision still have implied preemptive power under the Supremacy Clause. The jurisprudential framework for implied preemption takes one of two forms: field preemption or conflict preemption. Field preemption occurs when Congress establishes a pervasive regulatory scheme, and the “volume and complexity of federal regulations demonstrate an implicit

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prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

15. Preemption scholars note the tension between the supremacy concerns and the federalism concerns wrapped up in the preemption debate: “Preemption doctrine is plagued by both indeterminacy and incoherence. These problems likely reflect the inevitable tension in a federal system between the appeal of having one clearly applicable federal policy and a commitment to preserving state and local sovereign authority.” Erin O’Hara O’Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 648 (2013) (footnote omitted). Professors Erin O’Hara O’Connor and Larry Ribstein also note that:

The Court’s preemption decisions sometimes stress the benefits of state sovereignty and diversity while, at other times, the Court asserts a need to protect federal policy from the vagaries of different state policies. The justices’ rhetoric seems to vacillate between these two pillars of federalism depending on the individual circumstances of the case.

*Id.* at 648–49 (footnote omitted).

16. See *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (“Our past cases have recognized that the Supremacy Clause may entail preemption of state law either by express provision, by implication, or by a conflict between federal and state law.” (citation omitted)).

17. See *Gade*, 505 U.S. at 98. The Employee Retirement Income Security Act (ERISA) and the Copyright Act are just two examples of statutes with express preemptive powers. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983) (“In this case, we address the scope of several provisions of ERISA that speak expressly to the question of pre-emption.”); *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 751 F.2d 501, 510 (2d Cir. 1984) (“[T]he Copyright Act, by express terms, preempts state actions with respect to rights ‘equivalent to any of the exclusive rights within the general scope of copyright.’”). The contours of the preemption are generally determined by statute. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1977 (2011); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 604–05 (1991) (“[Congress’s] intent to supplant state authority in a particular field may be express in the terms of the statute.”).

congressional intent to displace state law” in a given area.<sup>18</sup> When field preemption applies, states may not regulate within the field, even when state regulation would be consistent with or complementary to federal regulation.<sup>19</sup>

Conflict preemption deserves additional attention. Two distinct lines of jurisprudence have developed with respect to conflict preemption, both of which try to discern the purposes of Congress.<sup>20</sup> First is the “impossibility” doctrine, under which federal law preempts state law if it is “impossible for a private party to comply with both state and federal requirements.”<sup>21</sup> Second is the “obstacle preemption” doctrine, under which federal law may preempt state law when the state law “stands as an obstacle to the accomplishment and execution of the full *purposes and objectives* of Congress.”<sup>22</sup>

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18. Natter & Wechsler, *supra* note 11, at 309. In addition, the courts must determine whether the statutory scheme “manifest[s] the intention to occupy the entire field” of the subject of the legislation, *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1266 (2012) (quoting *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926)), or intends to occupy a field “exclusively.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). The exclusivity of field preemption would prohibit a state from even passing legislation that is consistent with the subject matter of the field. *See Gade*, 505 U.S. at 98 (providing that field preemption leaves “no room” for states to even supplement the pervasive scheme of federal regulation).

19. *See Gade*, 505 U.S. at 98 (providing that field preemption is a variant of implied preemption “where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress *left no room* for the States to *supplement it*” (emphasis added) (internal quotation marks omitted)); *id.* at 115 (Souter, J., dissenting); *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (“Absent explicit pre-emptive language, *Congress’ intent to supersede state law altogether may be inferred* because ‘[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ because ‘the Act of Congress may touch a field in which the federal interest is *so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject*,’ or because ‘the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.’” (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))); Brett Merritt, Note, *Collaborative Regulation: Cooperation Between State and Federal Governments Is Key to Successful Immigration Reform*, 66 OKLA. L. REV. 401, 411 (2014) (“Courts must determine that Congress intended to completely occupy the field, leaving no room for state supplementation; the federal interest is so dominant that it precludes any state laws on the same subject.” (footnote omitted)).

20. *See Gade*, 505 U.S. at 115 (Souter, J., dissenting). The Court required that a “high threshold” be met for preemption to occur. *Id.* at 110 (Kennedy, J., concurring in part and concurring in judgment); *see also* Courtney Gaughan, Note, *Some More Watters, Please: The Dodd–Frank Act’s New Preemption Standards Lighten Consumers’ Wallets*, 63 FLA. L. REV. 1459, 1464 (2011) (“As a check on federal preemption powers in the absence of clear congressional intent to override a state law, a high threshold must be met for these implied types of preemption to be applicable.”).

21. *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (quoting *English*, 496 U.S. at 79) (internal quotation marks omitted). The impossibility doctrine is known as a “demanding defense.” *Wyeth v. Levine*, 555 U.S. 555, 573 (2009).

22. *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981) (emphasis added) (internal quotation marks omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also* *Crosby v. Nat’l*



The Court also established presumptions to preserve the balance between the states and the federal government. If the states typically regulate an area, the Court presumes that Congress does not intend to displace state regulation,<sup>23</sup> and vice versa in areas traditionally regulated by the federal government.<sup>24</sup> Further, a “presumption against preemption” exists in areas that the states historically regulated.<sup>25</sup> The presumption can only be rebutted if Congress shows a “clear and manifest purpose” to preempt the state law.<sup>26</sup>

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Foreign Trade Council, 530 U.S. 363, 372–73 (2000) (same); N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (“Since pre-emption claims turn on Congress’s intent, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.” (citations omitted)).

23. O’Connor & Ribstein, *supra* note 15, at 650 (“For example, the Court often presumes that Congress has not displaced state laws when it legislates in an area traditionally regulated by the states.”); *see also* California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) (noting that parties seeking preemption must “overcome the presumption against finding pre-emption” in fields in which the states traditionally regulate); *Travelers*, 514 U.S. at 654 (explaining that the Court should begin with the “starting presumption that Congress does not intend to supplant state law”); Decker, *supra* note 11, at 333 (noting that the “presumption against preemption” applies to local laws in addition to state laws); Natter & Wechsler, *supra* note 11, at 310 (“In general, the courts will apply a ‘presumption against preemption,’ especially in a field which the states have traditionally occupied.”). When Congress evidences an intent to share the scope of regulation with the states, conflict preemption is applied more narrowly given the “dual regulatory system.” *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493, 514–15 (1989); *see also* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1984–85 (2011) (finding the test for preemption more burdensome when Congress intends to allocate “authority between the Federal Government and the States”).

24. O’Connor & Ribstein, *supra* note 15, at 650; *see ARC Am. Corp.*, 490 U.S. at 100 (“[W]hen Congress intends that federal law occupy a given field, state law in that field is pre-empted.”); Natter & Wechsler, *supra* note 11, at 310 (noting that the presumption against preemption does not apply where an extensive federal statutory and regulatory regime exists).

25. O’Connor & Ribstein, *supra* note 15, at 650, 656; *see* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 *Nw. U. L. REV.* 463, 466 (2009) (“[T]he ‘presumption against preemption’ . . . means that all doubtful statutes should be construed in ways that do not block the imposition of additional sanctions at the state level.”).

26. *Rice*, 331 U.S. at 230; *see also* *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *Wyeth*, 555 U.S. at 565; *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001); *Medtronic*, 518 U.S. at 485; *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.*, 519 U.S. 316, 325 (1997); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 (1991); *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

## B. *The FAA*

Given these federal preemption doctrines, what form of preemption should apply to the FAA? The answer to this question requires a close examination of the text of the FAA, its legislative history, and the history of the states' arbitration regulation. Through this examination it becomes apparent that Congress intended a dual system of arbitration regulation, and that FAA preemption should be limited to strict conflict preemption.

### 1. The Statutory Text

An analysis of congressional preemptive intent begins with the statutory text.<sup>27</sup> Congress passed the Federal Arbitration Act in 1925 to reverse the “judicial hostility” toward arbitration.<sup>28</sup> At that time, courts considered agreements to arbitrate unenforceable executory contracts.<sup>29</sup> A party could shirk the duty to arbitrate by filing a lawsuit at any time prior to the issuance of an arbitrator’s award.<sup>30</sup> Breaching an arbitration agreement resulted in nominal legal damages, and the courts deemed arbitration agreements as unenforceable.<sup>31</sup>

Congress passed the FAA to make arbitration agreements *specifically* enforceable<sup>32</sup>—the “front end” of arbitration law. The FAA also ensures that arbitration awards are enforceable as court judgments<sup>33</sup>—the “back

27. *Gade v. Nat'l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 98 (1992) (plurality opinion); *FMC Corp. v. Holliday*, 498 U.S. 52, 56–57 (1990); *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (“The purpose of Congress is the ultimate touchstone.” (internal quotation marks omitted) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978))).

28. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 625 n.14 (1985); *Id.* at 646 (Stevens, J., dissenting); *see also Sarah Rudolph Cole & Kristen M. Blankley, Arbitration*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 318, 320–21 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (noting judicial reluctance to strengthen the enforceability of arbitration agreements prior to passing the FAA).

29. *See Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 984–85 (2d Cir. 1942) (describing the executory nature of agreements to arbitrate prior to the passage of the FAA). The legislative history of the FAA notes the hostility towards arbitration agreements in the Senate Report from the Judiciary Committee. S. REP. NO. 68-536, at 2 (1924) (“Further, the [arbitration] agreement was subject to revocation by either of the parties at any time before the award.”); IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 49 (2013) (noting that an agreement to arbitrate was revocable until the point that an arbitrator issued an award).

30. *See, e.g.*, S. REP. NO. 68-536, at 2; Horton, *supra* note 2, at 1225–26 (describing Congress’s intent to reverse the “ouster” and “revocability” doctrines by passing the FAA).

31. *Kulukundis Shipping*, 126 F.2d at 984; *see also* STEPHEN K. HUBER & MAUREEN A. WESTON, *ARBITRATION: CASES AND MATERIALS* 5, 8 (3d ed. 2010).

32. *See Southland Corp. v. Keating*, 465 U.S. 1, 12–13 (1984).

33. Professor Ian R. Macneil, in his highly influential book *American Arbitration Law*, described “modern” arbitration statutes as those which make executory agreements to arbitrate enforceable and which contain limited grounds for judicial review. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 16 (1992).

end.” This relatively short statute accomplishes these twin goals<sup>34</sup> and intentionally does little else.<sup>35</sup>

#### i. “Front End” Provisions

The “front end” consists of the first four FAA provisions.<sup>36</sup> Of these provisions, section 2 makes arbitration agreements specifically enforceable:

*A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*<sup>37</sup>

Section 2 reverses the historical treatment of arbitration agreements as executory contracts and makes them specifically enforceable. The final clause, known as the “savings clause,” puts arbitration agreements on equal footing with all other contracts by recognizing that arbitration agreements

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34. See HUBER & WESTON, *supra* note 31, at 10. At least one commentator, Professor Macneil, described the FAA as “a comprehensive integrated modern arbitration law containing everything needed for a complete system of arbitration, other than the basic contract law necessarily underlying any such system.” MACNEIL, *supra* note 33, at 102 (footnote omitted). Professor Macneil claimed that the “comprehensive” and “integrated” nature of the statute supported his argument that the FAA only applied in the federal courts, and not the state courts. *Id.* He argued that because sections 3 and 4 contain specific jurisdictional limits, the rest of the statute must also be read with those jurisdictional limits. *Id.* at 106–07.

35. Professor Richard Reuben describes the FAA as being “remarkably simple on its face.” Richard C. Reuben, *FAA Law, Without the Activism: What if the Bellwether Cases Were Decided by a Truly Conservative Court?*, 60 U. KAN. L. REV. 883, 886 (2012). In 1970, Congress passed provisions relating to the enforceability of international arbitration awards, which developed out of the New York Convention. Because this Article concerns domestic arbitration provisions and the enforceability of state law, Chapter 2 of the FAA is outside the scope of this Article. Also, in 1988, Congress added two provisions to the FAA, neither of which are relevant here. See 9 U.S.C. §§ 15–16 (2012).

36. See Jack M. Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WM. & MARY BUS. L. REV. 227, 254–55 (2011) (discussing the “front-end” issues of the FAA). Section 1 contains some definitions, including a definition of “commerce,” which is important for some of the early determinations on whether the FAA has preemptive power at all. 9 U.S.C. § 1 (2012). Although not part of this Article’s analysis, it is worth noting that the Supreme Court in 2001 interpreted the last phrase regarding employment contracts to only include contracts of employment in interstate travel types of occupations, similar to the enumerated categories of seamen and railroad employees. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

37. 9 U.S.C. § 2 (2012) (emphasis added).

are subject to the same rights and defenses of general contract law defined by the states.<sup>38</sup>

Section 2 contains no language limiting its application exclusively to federal courts. Scholars have debated the meaning of this omission. The late Professor Ian Macneil, for example, in his influential book, *American Arbitration Law: Reformation, Nationalization, Internationalization*, argues that a jurisdictional limitation should be read into section 2.<sup>39</sup> To the contrary, Professor Christopher Drahozal argues that this silence indicates the opposite intent—that section 2 should have broader applicability than the sections without an express jurisdictional limit.<sup>40</sup> As explained in more detail below, the Supreme Court has applied section 2 broadly, giving it preemptive effect over state law.

This Article takes a limited view of section 2's reach. It proposes that section 2 speaks only to the parties' agreement to "settle by arbitration."<sup>41</sup> As detailed below, section 2 does not discuss the conditions or terms under which parties may arbitrate, such as the number of arbitrators, applicable law, arbitrator qualifications, and applicable discovery. This Article treats the parties' bare agreement to arbitrate separately from the terms and conditions that the parties apply to that arbitration. The idea of separating out agreements to arbitrate from other contract clauses, even within an arbitration agreement, has a great deal of support in other aspects of arbitration law, notably through the law of arbitrability.<sup>42</sup>

This limited reading of section 2, however, may arguably conflict with section 4's requirement to enforce agreements to arbitrate "in accordance

38. *Id.*; see also H.R. REP. NO. 68-96, at 1–2 (1924); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006); Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 12 (2013) (defining the "saving[s] clause" as "a clause that explicitly declares that the federal statute is not meant to preempt certain state laws or remedies").

39. See MACNEIL, *supra* note 33, at 105–06; see also Horton, *supra* note 2, at 1219 ("Most courts and commentators believe that Congress intended the statute to be a mere procedural rule for federal courts.").

40. See Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 124 (2002) [hereinafter Drahozal, *Legislative History*] ("As the above description of the FAA demonstrates, the language of the Act supports construing section 2 to apply more broadly than the rest of the Act. Section 2 alone by its terms applies to maritime transactions and transactions in interstate commerce, which could cover proceedings both in federal and state court.").

41. 9 U.S.C. § 2 (2012).

42. The law of arbitrability generally considers the question of whether parties actually agreed to arbitrate a dispute. See *Rent-A-Center W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010). One common defense for parties who do not want to arbitrate is contract invalidity. Since the 1960s, the Supreme Court instructed lower courts to consider the agreement to arbitrate separate from the rest of the "container contract." See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967). More recently, the Court instructed that an arbitrability clause in an arbitration agreement can be further separated from the remainder of the agreement to arbitrate. *Rent-A-Center*, 130 S. Ct. at 2785.

with the[ir] terms.”<sup>43</sup> Below, this Article addresses how that language can be read in conjunction with a narrow reading.

Sections 3 and 4 of the FAA contain the procedural mechanisms for enforcing agreements to arbitrate. Section 3 mandates that federal courts grant a stay of litigation in favor of arbitration.<sup>44</sup> Section 4 gives federal courts the power to issue an order compelling arbitration<sup>45</sup> upon a finding that an agreement to arbitrate exists.<sup>46</sup> Sections 3 and 4 facially apply to federal courts, and the Supreme Court has not applied either of these sections to the state courts.<sup>47</sup> In recent years, however, the Court has applied a small portion of section 4’s language to section 2.<sup>48</sup>

When the Court gave the FAA preemptive power, it did something unique in all statutory law—it found that the FAA was a substantive law that did not bestow federal jurisdiction.<sup>49</sup> Although scholars have used this anomaly to argue that the FAA should not be substantive law,<sup>50</sup> the FAA’s

43. 9 U.S.C. § 4 (2012).

44. *Id.* § 3.

45. *Id.* § 4 (requiring the parties to file a motion to request an order compelling arbitration). Under section 6 of the FAA, all applications to the court under the FAA must be presented as motions. *Id.* § 6. The federal court must have an independent ground for jurisdiction, such as diversity or federal question jurisdiction. *See id.* § 4 (specifying that the federal court would have jurisdiction “save for” the arbitration agreement).

46. *Id.* § 4 (2012) (“[U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”).

47. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989).

48. In *Buckeye Check Cashing, Inc. v. Cardegna*, the Court held that language in section 4 regarding the “making of the agreement” can be applied to the states because while the cases originally interpreting this language rely on section 4, the underlying principles “arise[] out of § 2, the FAA’s substantive command that arbitration agreements be treated like all other contracts.” 546 U.S. 440, 445, 447 (2006). In this way, the Supreme Court’s incorporation of sections 3 and 4 into section 2 of the FAA is similar to the way that the Supreme Court has incorporated most of the Bill of Rights into the Fourteenth Amendment of the Constitution.

49. *Southland Corp. v. Keating*, 465 U.S. 1, 9, 12, 15 n.9 (1984) (“While the [FAA] creates federal substantive law requiring the parties to honor arbitration agreements, *it does not* create any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976) or otherwise.” (emphasis added)); *see also* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581–82 (2008) (“As for jurisdiction over controversies touching arbitration, the Act does nothing, being ‘something of an anomaly in the field of federal-court jurisdiction’ in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983))).

50. Horton, *supra* note 2, at 1227; David L. Franklin & Steven Greenberger, “*An Edifice of Its Own Creation*”: *The Supreme Court’s Recent Arbitration Cases*, 10 DEPAUL BUS. & COM. L.J. 495, 499 (2012) (“At the very least, it would be odd—and the Supreme Court noted the oddity all the way back in 1984 in *Southland*—for Congress to oust state courts of jurisdiction over a wide range of cases without providing any substantive federal rule of decision and without creating federal question jurisdiction. But that’s what the Supreme Court has interpreted the FAA to do.”).

strict jurisdictional limits show that the states have an important role to play in enforcing arbitration agreements and awards.

## ii. “Back End” Provisions

The FAA also makes arbitration awards enforceable, and three primary sections deal with these so-called “back end” issues. Under section 9, a federal district court “must” confirm an arbitration award unless it is vacated, modified, or corrected.<sup>51</sup> A confirmed arbitration award has “the same force and effect” as a court judgment.<sup>52</sup>

Sections 10 and 11 concern vacating and modifying an arbitration award. Under section 10, a federal court can vacate an arbitration award if certain conditions are met, such as fraud in the proceedings, arbitrators’ bias, procedural irregularity, or if the arbitrators exceed their contractual powers.<sup>53</sup> These grounds are extraordinarily narrow, and courts do not vacate arbitration awards lightly.<sup>54</sup>

The stringent review provisions serve Congress’s primary goal of enforcing agreements to arbitrate. Limited review holds parties to their bargain by enforcing rendered arbitral awards. Provided that the arbitration was free from procedural irregularities, the arbitral award will likely withstand review.<sup>55</sup>

## iii. Other Provisions

The FAA contains few provisions regarding the arbitration hearing itself. Section 5 gives courts the ability to appoint an arbitrator, if necessary.<sup>56</sup> Section 7 gives arbitrators the ability to subpoena witnesses and compel the witnesses to bring evidence with them to the arbitral

51. 9 U.S.C. § 9 (2012).

52. *Id.* § 13. For instance, if a party could receive a judicial lien or a sheriff’s enforcement of a court order, then those remedies are available to a party with a confirmed arbitral award. Given the enforceability of a confirmed arbitral award, the statute requires that the non-moving party have notice of the confirmation proceedings. *Id.* § 12.

53. *Id.* § 10; see also Kristen M. Blankley, *Lying, Stealing, and Cheating: The Role of Arbitrators as Ethics Enforcers*, 52 U. LOUISVILLE L. REV. 443, 459 & n.91, 460 (2014) (discussing the grounds for judicial review).

54. See Kristen M. Blankley, *Advancements in Arbitral Immunity and Judicial Review of Arbitral Awards Create Ethical Loopholes in Arbitration*, in JUSTICE, CONFLICT AND WELLBEING 237, 270 (Brian H. Bornstein & Richard L. Wiener eds., 2014).

55. Two judicially created grounds for review, while still limited, do look at the merits of the award. Some courts will vacate an arbitral award when the arbitrator engages in a “manifest disregard of the law” or when the satisfaction of an award “contravenes public policy.” See *id.* at 271. Issues regarding the viability of review outside of the FAA are beyond the scope of this Article.

56. 9 U.S.C. § 5 (2012). Section 5 applies when the parties’ chosen method does not yield an arbitrator. *Id.*

hearing.<sup>57</sup> Finally, section 8 contains some special provisions for certain admiralty claims.<sup>58</sup>

The statutory text of the FAA becomes more intriguing when one considers what the Act does *not* cover. The FAA contains no guidance on how the proceeding should occur, the number of arbitrators, whether arbitrators must be impartial, the burden of proof, the availability of counsel, the ability to join actions together, whether the proceeding must be under oath, the availability of appellate arbitral review, due process requirements, or the like. Presumably, Congress's silence endorses party flexibility<sup>59</sup> and state regulation, especially considering the narrow scope of the text of section 2 and its limitation on the agreement to arbitrate.

In addition, parties should be allowed to design a process to meet their needs depending on the complexity of the underlying dispute (subject to state regulation).<sup>60</sup> This flexibility is consistent with the dual nature of regulation under the FAA because it gives states latitude to regulate arbitration and experiment within their borders.

The FAA also does not dictate the details of what makes an agreement enforceable, leaving that issue for the states. Under the savings clause, an agreement to arbitrate is enforceable unless grounds exist “at law or in equity for the revocation of any contract.”<sup>61</sup> Here, Congress explicitly incorporates state contract law into the federal scheme,<sup>62</sup> thus further evidencing a dual system of regulation.

Given Congress's design—providing for both federal and state regulation of arbitration—the Supreme Court should proceed cautiously when determining the preemptive effect of the FAA. As explained in Part II below, the Court has expanded the scope of federal preemption under the FAA in contradiction to established principles of federalism and contractual rights.

57. *Id.* § 7.

58. *Id.* § 8.

59. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

60. *See, e.g., id.* (noting congressional history that enumerates many of the benefits that arbitration affords parties); Neal Troum, *The Problem with Class Arbitration*, 38 VT. L. REV. 419, 419 (2013) (describing the FAA as allowing “freedom of parties to resolve their disputes outside of the court system” and generally in a “laissez-faire environment”).

61. 9 U.S.C. § 2 (2012).

62. *See* Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 772 (2012) (“A fundamental principle underlying the FAA is to respect freedom of contract. While the FAA may be regarded as federal pro-arbitration policy, Congress, through the FAA's savings clause, retained a role for states to hold arbitration contracts to the standards of generally applicable state contract law, including defenses applicable to any contract, such as fraud, duress, unconscionability, or contrariness to public policy.”).

## 2. The Legislative History

The legislative history is the next-best method of determining preemptive intent.<sup>63</sup> The legislative history of the FAA is scant, at best.<sup>64</sup> The primary drafter of the bill was Julius Henry Cohen, general counsel for the New York Chamber of Commerce and a member of the American Bar Association Committee on Commerce, Trade, and Commercial Law.<sup>65</sup> Cohen testified before Congress and wrote an influential brief reprinted in the hearing transcripts.<sup>66</sup> The brief largely concerned the need to enforce agreements to arbitrate and the potential for conflict between the FAA and state regulation.<sup>67</sup>

Most of the legislative history deals with the need for courts to enforce arbitration agreements. The report of the House Committee stated:

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

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they *refused to enforce specific agreements to arbitrate* upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle

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63. See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 606–07 (1991) (relying on an analysis of legislative history after determining that the language of the state was not clear as to preemption); *Wyeth v. Levine*, 555 U.S. 555, 566–67 (2009) (relying on an analysis of legislative history). *But see* *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (stating that relying on legislative history to determine preemptive effect is inappropriate where the state law “falls within the plain text” of the federal statute).

64. Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1314 (1985) (“Little emerges from the legislative history other than unhappiness with prior law.” (footnote omitted)).

65. Drahozal, *Legislative History*, *supra* note 40, at 130.

66. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Judiciary*, 68th Cong. 13–19, 33–41 (1924) (statement of and brief by Julius Henry Cohen).

67. See *id.* at 37 (“[W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is *determined by the law of the jurisdiction wherein the remedy is sought*.” (emphasis added)); Horton, *supra* note 2, at 1259–60 (noting that the Cohen brief “suggests that although states would lose their ability to apply the ouster doctrine, they would otherwise retain their traditional authority over the *validity* of arbitration clauses”); Drahozal, *Legislative History*, *supra* note 40, at 131–33.



became firmly embedded in the English common law and was adopted with it by the American courts.<sup>68</sup>

In a similar vein, Senator Thomas Walsh stated during a 1923 Senate hearing that the FAA “sought to ‘overcome the rule of equity, that equity will not specifically enforce an[y] arbitration agreement.’”<sup>69</sup> This report addresses the heart of the FAA—the enforceability of agreements to arbitrate and a judicial remedy of specific performance.<sup>70</sup>

The legislative history also suggests that the FAA should reach all agreements involving interstate commerce. Senator Thomas Sterling announced that “the purpose of the bill is that it shall not only extend to maritime transactions but also to transactions involving interstate commerce as well.”<sup>71</sup> The business community backed the FAA and wanted to ensure that courts would enforce arbitration agreements as written.<sup>72</sup> Business interests largely wanted to increase efficiency: “The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals.”<sup>73</sup> Supporters considered

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68. H.R. REP. NO. 68-96, at 1–2. (1924) (emphasis added); *see also* MACNEIL, *supra* note 33, at 96 (quoting Alexander Rose of the Arbitration Society of America testifying before Congress: “We have a weakness in our system of arbitration. We need, and we must have the cooperation of the Federal Courts.”).

69. *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (quoting *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary*, 67th Cong. 6 (1923) [hereinafter *1923 Hearings*] (alteration in original) (remarks of Sen. Walsh)).

70. *See* Drahozal, *Legislative History*, *supra* note 40, at 112. Professor Drahozal noted the reliance on this House Report in the Court’s *Southland* decision:

Although [Chief Justice] Burger explained the reference no further, the point of the quotation is its suggestion that the FAA applies to contracts either “involving interstate commerce” or “which may be the subject of litigation in the Federal courts.” If the FAA did not apply in state court, the House Report presumably would have used “and” instead of “or.” By describing the coverage of the act in the alternative, the House Report suggests the possibility of contracts involving interstate commerce but not the subject of litigation in federal court—thus, necessarily, in state court.

*Id.*

71. 66 CONG. REC. 2761 (1925) (Statement of Sen. Sterling).

72. *See* 66 CONG. REC. 3004 (1925) (Statement of Sen. Graham) (answering “Commercial” when questioned about whether the proponents of the bill were “legal societies” or “commercial”). The American Bar Association helped draft the legislation, which was sponsored by a “large number of trade bodies.” H.R. REP. NO. 68-96, at 1; *see also* SZALAI, *supra* note 29, at 137–40 (describing how Charles Bernheimer testified before Congress in 1923 regarding how the primary goal of the FAA would be to make agreements to arbitrate enforceable and to revamp the arbitration procedure and as to the types of typical business disputes being resolved by arbitration at the time).

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

arbitration to be a “great value,” allowing for the achievement of “practical justice” outside of the clogged judicial system.<sup>74</sup> In addition, Charles N. Bernheimer, chair of the arbitration committee of the New York Chamber of Commerce stated: “The fundamental conception underlying the law is to make arbitration agreements valid, irrevocable, and enforceable. The commercial bodies of the country have been urging the adoption of this principle of legislation throughout the country, and their point of view has now been accepted by the American Bar Association.”<sup>75</sup>

Scholars have debated how to interpret the legislative history. In particular, Professor MacNeil and Professor Drahozal have written books and lengthy articles on whether the legislative history supports a finding that the FAA is substantive federal law or merely a procedural law applicable only in federal courts.<sup>76</sup> This Article, however, assumes what modern commenters take as “given”—that the FAA is substantive law applying in federal and state court—and focuses instead on the Supreme Court’s development of impact preemption jurisprudence.

### 3. State Authority in a Regulatory Vacuum

Finally, traditional preemption doctrine considers the balance of state and federal regulation in the area at issue. Federal courts apply preemption more liberally in areas with broad federal regulation.<sup>77</sup> Congress never created a regulatory authority to enforce or interpret the FAA, which reads like a procedural statute giving instructions on dealing with arbitration agreements. The scant provisions of the FAA and the lack of federal agency involvement strongly indicate that the Supreme Court should limit the FAA’s preemptive power.

The “presumption against preemption” in areas traditionally regulated by the states<sup>78</sup> should apply to the FAA. This presumption helps preserve the balance between the federal and state regulation. Arbitration is an area that states have traditionally regulated; however, the majority of Supreme Court decisions in this area have largely disregarded the historic role of the states, these presumptions, and the federalism concerns at issue here.<sup>79</sup>

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74. *Id.* Then Secretary of Commerce Herbert Hoover wrote a letter to Senator Sterling championing the FAA. In his letter, Hoover expressed his concern that without the FAA, the courts would become clogged and unable to handle growing dockets. Letter from Herbert Hoover to Sen. Thomas Sterling (Jan. 31, 1923), in SZALAI, *supra* note 29, at 144–45.

75. 1923 *Hearings*, *supra* note 69, at 2 (statement of Charles Bernheimer); *see also* MACNEIL, *supra* note 33, at 88–89 (describing the testimony by Bernheimer).

76. *See* MACNEIL, *supra* note 33; Drahozal, *Legislative History*, *supra* note 40.

77. *See, e.g.*, Christopher J. Kochevar, Note, *Reforming Judicial Review of Bioequivalence Determinations*, 87 N.Y.U. L. REV. 2040, 2065–66 (2012).

78. *See supra* notes 23–26 and accompanying text.

79. In the *Southland* case, two of the dissenting opinions noted the traditional role of the states in the area of arbitration. Justice Paul Stevens, concurring in part and dissenting in part, cautioned the “exercise of State authority in a field traditionally occupied by State law will not be

States began passing laws enforcing arbitration agreements and awards even before Congress passed the FAA.<sup>80</sup> In fact, Congress patterned the FAA after New York state law.<sup>81</sup> The legislative history does not discuss displacing the many statutes already in effect at the time, but historical evidence suggests that a number of states had already passed legislation similar to the FAA.<sup>82</sup> As noted above, the FAA worked in harmony with state arbitration legislation from 1925 until 1984, when the Court decided *Southland*.<sup>83</sup>

At present day, all fifty states (plus the District of Columbia) have statutes enforcing agreements to arbitrate and arbitral awards.<sup>84</sup> Most of these statutes have deep roots. Although the 2000 Revised Uniform Arbitration Act (RUAA) treads lightly because of the drafters' preemption concerns,<sup>85</sup> the states still have a role to play in regulating arbitration. States have been experimenting with so-called "second generation" laws regulating the arbitration process, even when they do not regulate the question of whether agreements to arbitrate are enforceable.<sup>86</sup> These types

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deemed pre-empted by a federal statute unless that was the clear and manifest purpose of Congress." *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part). Similarly, Justice Sandra Day O'Connor, in dissent, noted that by 1925 "several major commercial states had passed state arbitration laws, but the federal courts refused to enforce those laws in diversity cases." *Id.* at 34 (O'Connor, J., dissenting).

80. HUBER & WESTON, *supra* note 31, at 8 ("Prior to the enactment of the FAA in 1925, arbitration was governed by state law and local practice . . .").

81. S. REP. NO. 68-536, at 3 (1924) ("The bill, while relating to maritime transactions and to contracts in interstate and foreign commerce, follows the lines of the New York arbitration law enacted in 1920, amended in 1921, and sustained by the decision of the Supreme Court of the United States in . . . *Red Cross Line v. Atlantic Fruit Co.*, rendered February 18, 1924."); *see also* *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 279 (1995) (noting that the FAA's supporters "urged Congress to model the Act after a New York statute that made enforceable a written arbitration provision in a written contract" (internal quotation marks omitted)); Drahozal, *Legislative History*, *supra* note 40, at 125 (acknowledging that the FAA was modeled after the New York arbitration statute); SZALAI, *supra* note 29, at 86 (noting that the New York Arbitration Act passed the New York legislature in 1920).

82. *See supra* note 81 and accompanying text; *see, e.g., Southland*, 465 U.S. at 34 (O'Connor, J., dissenting) ("The drafters' plan for maintaining reasonable harmony between state and federal practices was not to bludgeon states into compliance, but rather to adopt a uniform federal law, *patterned after New York's path-breaking state statute. . . .*" (emphasis added)).

83. *See Southland*, 465 U.S. at 16 (recognizing Congress's intent to foreclose attempts by state legislatures "to undercut the enforceability of arbitration agreements"); Dunham, *supra* note 5, at 332 (noting *Southland's* departure from fifty-nine years of doctrine).

84. Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 596 (1997).

85. The drafters of the Revised Uniform Arbitration Act (RUAA) questioned whether the RUAA it would be preempted by any provisions conflicting with the FAA and sought to carefully construct an act that would not run into a question on the area of preemption. UNIF. ARBITRATION ACT prefatory note (2000).

86. Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 393-95, 408 (2004) [hereinafter Drahozal, *FAA Preemption*] (noting that some questions remain unsettled as

of laws regulate a variety of issues, including arbitrator qualifications, arbitrator disclosures, ethics, and process requirements—hearing location, consolidation of arbitrations, notice, and the like. The states have historically regulated, and currently continue to regulate, arbitration to the extent they can. Given the concurrent jurisdiction of the federal and state governments regarding arbitration, states rightfully should continue regulating the area, despite recent challenges to state law on the basis of federal preemption.<sup>87</sup>

The states have another important role in the regulation of arbitration. The FAA contemplates that state contract law will determine the enforceability of arbitration agreements. Under the savings clause in section 2,<sup>88</sup> states retain an important role in determining the validity of arbitration agreements even under the FAA.

#### 4. Conclusion: Conflict Preemption Should Apply

The text of the FAA, its legislative history, the lack of federal regulatory authority, and the historical role of the states in the area of arbitration all indicate that the preemptive effect of the FAA should be analyzed under a theory of conflict preemption. In the late 1980s, the Supreme Court acknowledged that “[t]he FAA contains no express preemptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.”<sup>89</sup> Because Congress explicitly limited the substantive law of the FAA—section 2—to enforcing arbitration

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to whether the states can regulate); *see also* Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1200 (2011) (discussing the different “generations” of arbitration laws and state regulations); Cole, *Federalization of Consumer Arbitration*, *supra* note 11, at 285 (noting that laws regarding “discovery, consolidation of claims, and arbitrator immunity” fall within the class of “second generation” arbitration laws). One example of this next generation of arbitration laws is a statute that would prohibit a person from arbitrating outside of one’s home state. MONT. CODE ANN. § 27-5-323 (2014).

87. Drahozal, *FAA Preemption*, *supra* note 86, at 408–09 (noting litigation issues generated by second generation arbitration laws). By its definition, the FAA is limited to regulating interstate commerce and maritime transactions. *See* 9 U.S.C. § 2 (2012). In addition, state law continues to play a role in arbitration agreements to the extent that the parties choose to be bound by state law. *See Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 484 (1989) (Brennan, J., dissenting).

88. 9 U.S.C. § 2 (2012).

89. *Volt*, 489 U.S. at 477. Scholars, too, recognize that conflict preemption is the “correct” analysis for determining the balance of federal and state laws. *See, e.g., Horton*, *supra* note 2, at 1226 (“Yet the FAA neither contains an express preemption clause nor sweeps far enough to ‘field’ preempt state law. Thus, the FAA can only trump state rules through the mechanism of obstacle preemption.” (footnote omitted)); Aragaki, *supra* note 86, at 1195 (noting that the current paradigm for considering the enforceability of state arbitration law turns on conflict preemption analysis and whether state laws are arbitration “enforcement neutral or enforcement impeding”).

agreements, federal courts should limit conflict preemption to state regulations that would make arbitration agreements unenforceable.<sup>90</sup>

Limiting conflict preemption to such laws serves important policy goals regarding the appropriate authority of federal and state governments as well as the role that arbitration has in national commerce. The principles of federalism would be better served by applying a traditional, limited preemptive power to state arbitration laws. States, then, could continue experimenting with “second generation” arbitration laws, determining the best practices within a particular jurisdiction, especially in areas such as arbitrator qualifications and ethics.<sup>91</sup> For the business community, a narrower federal role continues to support the freedom of contract and allows parties to know courts will enforce their contracts as written. However, the Supreme Court has expanded the preemptive reach of the FAA, jeopardizing these important policies and goals.

## II. IMPACT PREEMPTION UNDER THE FAA

To understand how the Supreme Court expanded the FAA’s preemption to the point of “impact preemption,” one must understand the three fundamental flaws in the Court’s arbitration jurisprudence. First, the Court has never defined “arbitration,” thus giving it latitude to engage in results-oriented jurisprudence. Second, the Court has failed to engage in an analysis of the type and scope of FAA preemption, resulting in confusion regarding proper state authority. Third, as a result of these first two fundamental flaws, the Court, in *Concepcion*, expanded preemption doctrine to the point of “impact preemption,” which neither jurisprudential principles nor sound public policy support. Although the *Concepcion* Court claims to apply obstacle preemption, the Court actually creates a new type of preemption.

### A. Fundamental Flaw I: Not Defining “Arbitration”

“Arbitration” is an undefined term in the FAA. Congress chose to define “commerce” and “maritime transaction,”<sup>92</sup> but not “arbitration.”<sup>93</sup> Parties regularly litigate the definition of “arbitration,” raising a host of questions about the characteristics that constitute arbitration and the body

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90. See Stephen J. Ware, “Opt-In” for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT’L ARB. 263, 269 (1997) (“[I]f one can imagine an arbitration agreement that might be rendered unenforceable by the state law then that state law is almost sure to be preempted unless it falls into the ‘general contract law’ category . . .”).

91. Montana is just one example of a state whose legislature has taken great care in crafting arbitration laws befitting the state’s particular needs. See *infra* Section IV.A for more examples of state statutes that meet the needs of individual jurisdictions.

92. 9 U.S.C. § 1 (2012).

93. Portland Gen. Elec. Co. v. U.S. Bank Trust Nat’l Ass’n, 218 F.3d 1085, 1089 (9th Cir. 2000) (“Curiously, the FAA does not define ‘arbitration.’”).

of law the courts should consult to make that determination.<sup>94</sup> The definition of arbitration has a large impact on preemption jurisprudence because the FAA is confined to enforcing a “provision . . . to settle [a dispute] by arbitration.”<sup>95</sup> Defining arbitration is critical because state law, not the FAA, governs processes that fall outside of arbitration.<sup>96</sup>

Given the weighty consequences of defining arbitration, it is surprising that the Court has yet to define the term. Some lower courts define arbitration as any process that resembles “classic arbitration”—an adversarial system complete with a hearing, witnesses, documents, evidence, arguments, and a neutral decision maker.<sup>97</sup> Other lower courts consider whether the process is likely to involve a binding “settlement,” promoting the finality of arbitration.<sup>98</sup> In the 2011 *Concepcion* decision, the Supreme Court described what “arbitration” is, but the Court’s image of arbitration is not grounded in the text of the FAA.<sup>99</sup> The Court’s description in *Concepcion* is essentially the “classic” definition of arbitration, but with the explicit requirement that the arbitration be

94. Compare *id.* at 1086 (holding that state law, and not the FAA, controls where the FAA neither defines arbitration, nor spells out the instant issue), with *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143 (2d Cir. 2013) (“We have not directly addressed whether federal courts should look to state law or federal common law for the definition of ‘arbitration’ under the FAA. We do so now and hold that federal common law provides the definition of ‘arbitration’ under the FAA.”), *cert. denied*, 134 S. Ct. 155 (2013). Given the incorporation of state law into the FAA in the savings clause, an argument can be made that the definition of “arbitration” should be determined under state law.

95. 9 U.S.C. § 2 (2012).

96. See, e.g., *Portland Gen. Elec.*, 218 F.3d at 1086 (reversing the district court’s treatment of a final appraisal decision as an arbitration under the FAA and ruling that “because the FAA neither defines arbitration nor spells out whether the term arbitration includes appraisal, we look to state law” (emphasis added)). For instance, some commentators refer to “binding mediation” as a process in which a mediator gives either a recommended or a binding outcome if the parties reach impasse. Questions would arise whether this type of procedure would constitute “arbitration,” especially if the parties are bound by the “mediator’s” decision at the end of the process. See generally Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317 (2011) (discussing the hybrid ADR “arbitration–mediation” process and the potential drawbacks thereof vis-à-vis traditional arbitral cases).

97. See, e.g., *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 7 (1st Cir. 2004) (noting that whether a given process is an “arbitration” depends on “how closely the specified procedure resembles classic arbitration”).

98. See, e.g., *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 349 (3d Cir. 1997); *Salt Lake Tribune Publ’g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 690 (10th Cir. 2004).

99. The Supreme Court’s refusal to define arbitration is not due to bad advocacy. In fact, the Supreme Court has received multiple requests for the Court to define arbitration. Already once in the 2013–2014 term, the Supreme Court denied certiorari on a case that would put this question squarely before the Court. See *Bakoss v. Certain Underwriters at Lloyd’s of London Issuing Certificate No. 0510135*, 134 S. Ct. 155 (2013). The Court’s repeated refusal to define arbitration affects the scope of FAA preemption.

bilateral—between two parties.<sup>100</sup> Notably, the Supreme Court’s recent jurisprudence instructs that class arbitration is not “arbitration” as the FAA uses the term.<sup>101</sup> Congress, however, remains silent on issues regarding class arbitration, and the Court’s recent description of arbitration as an efficient, bilateral proceeding has already begun to impact the Court’s preemption jurisprudence.

### B. *Fundamental Flaw II: Not Defining the Type or Scope of FAA Preemption*

Prior to *Southland*, courts and scholars often had to consider the power under which Congress passed the FAA. If passed under the Constitution’s Article I Commerce Power, then the FAA would be “substantive” law applicable in both state and federal courts.<sup>102</sup> If passed under the Article III power to regulate the courts, then the FAA would be merely federal “procedural” law applicable only in federal courts.<sup>103</sup>

Congress passed the FAA prior to the Supreme Court’s landmark decision in *Erie Railroad Co. v. Tompkins*,<sup>104</sup> which held that federal courts should apply state substantive law in diversity cases.<sup>105</sup> After *Erie*, questions arose regarding the application of the FAA in diversity cases. In 1956, the Court ruled in *Bernhardt v. Polygraphic Co. of America*<sup>106</sup> that arbitration law is “substantive” under *Erie* and that state law should apply

100. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011); see also Cole, *Federalization of Consumer Arbitration*, *supra* note 11, at 282 (noting that “class action arbitration is not arbitration (though the FAA does not define arbitration),” according to the Court).

101. See, e.g., *Concepcion*, 131 S. Ct. at 1748; *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 504 (2012); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013). *But see* *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066 (2013) (holding that an arbitrator’s finding that the parties’ contract provided for class arbitration “survives the limited judicial review” permitted under the FAA). In her article on this topic, Professor Sarah Cole states that by “defining arbitration [as in *Stolt-Nielsen* and *Concepcion*], the Court may be sending a signal that FAA preemption, even in areas that the FAA does not address, is likely to occur.” Cole, *Federalization of Consumer Arbitration*, *supra* note 11, at 289.

102. See Craig Smith & Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 *TEX. TECH L. REV.* 281, 288–91 (2012). The FAA is considered an anomaly in that even those who support finding that Congress passed the FAA under its commerce power concede that the FAA does not give jurisdiction to the federal courts, its status as “substantive” law notwithstanding. See Charles E. Harris II, *Enforcing Arbitral Subpoenas: Reconsidering Federal Question Jurisdiction Under FAA Section 7*, *DISP. RES. J.*, Aug./Oct. 2011, at 24, 30 n.14 (2011) (noting the characterization of the FAA as an “anomaly”).

103. See *Dunham*, *supra* note 5, at 341–43 (noting *Southland*’s dramatic divergence from fifty-nine years of precedent: “[A]lmost every case decided between 1938 and 1984 reaffirmed the USAA, and subsequently the FAA, as an Article III procedural act”); Smith & Moyé, *supra* note 102, at 287–88.

104. 304 U.S. 64 (1938).

105. *Id.* at 78.

106. 350 U.S. 198 (1956).

in diversity cases unless the arbitration agreement evidences a transaction in “commerce.”<sup>107</sup>

The *Bernhardt* decision prompted further Court analysis on the “substantive vs. procedural” question in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>108</sup> The *Prima Paint* Court found that the underlying contract involved “commerce,” thus satisfying the *Bernhardt* test.<sup>109</sup> The Court went on to address concerns about *Erie*, noting that whether substantive or procedural, “Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate.”<sup>110</sup> The Court further stated: “[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over *interstate commerce* and over admiralty.”<sup>111</sup> The Court relied on legislative history to come to this conclusion,<sup>112</sup> invoking a strong dissent.<sup>113</sup> The case was silent, however, on the issue of preemption because that issue was not before the Court.

Twenty years later, in *Southland Corp. v. Keating*,<sup>114</sup> the Court held that the FAA is substantive federal law with preemptive power. The Court also held that the FAA applies in federal and state courts, thus answering any lingering questions from *Bernhardt* and *Prima Paint*.<sup>115</sup> The Court found that the California franchise law at issue<sup>116</sup> was in direct conflict with the FAA, because the California law would require litigation of claims that the parties would otherwise arbitrate.<sup>117</sup> Relying on *Prima Paint*, the Court

107. *See id.* at 202–03. For an in-depth analysis of the implications of *Erie* and *Bernhardt* on arbitration, see Hirshman, *supra* note 64, at 1309–24.

108. 388 U.S. 395, 422 (1967).

109. *Id.* at 405.

110. *Id.* The issue of preemption was not before the Court. The case progressed through the federal courts under diversity jurisdiction, and no questions of state law arose in the case. *Id.* at 404. In addition, the Court specifically found that the contract in question involved interstate commerce. *Id.* at 401.

111. *Id.* at 405 (emphasis added) (quoting H.R. REP. NO. 68-96, at 1 (1924)) (internal quotation marks omitted); *see also* Richard A. Bales & Mark B. Gerano, *Oddball Arbitration*, 30 HOFSTRA LAB. & EMP. L.J. 405, 408 (2013) (providing that *Prima Paint*, by holding that the FAA was created under the commerce power, “circumvent[ed] the problem that *Erie* created”).

112. *Prima Paint*, 388 U.S. at 405 & n.13.

113. The dissenting Justices found that the legislative history was “clear” that Congress passed the FAA under the power to regulate the courts. *Id.* at 418–20 (Black, J., dissenting).

114. 465 U.S. 1 (1984).

115. *Id.* at 14–16.

116. The franchise law, as interpreted by the California courts, required litigation of claims falling within its reach. Thus, the arbitration agreement at issue was unenforceable. *Id.* at 10 (“The California Supreme Court interpreted this statute to require judicial consideration of claims brought under the state statute and accordingly refused to enforce the parties’ contract to arbitrate such claims.”).

117. *Id.* In examining the FAA, the Court interpreted the Act to have only two limitations on the enforceability of arbitration agreements. First, the agreement must be in writing and be part of a



concluded: “The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause.”<sup>118</sup> Despite this momentous shift in the law, the Court said surprisingly little about the type or scope of preemption at issue. In a footnote, Chief Justice Warren E. Burger noted that the California statute at issue was not a defense in law or equity “for the revocation of *any* contract” but applied only to *franchise contracts*, setting up the “any contract” test for preemption.<sup>119</sup> Under the “any contract” test, a state law is subject to preemption under the FAA if it treats agreements to arbitrate differently than other types of contracts.<sup>120</sup> Interestingly, the Court never uses the word “obstacle” or invokes any of the routine presumptions that help promote the healthy balance of federal and state regulation contemplated in the FAA. While the “any contract” test is uncontroversial in and of itself, the manner in which the Court created the test is notable because the Court addressed the matter in a footnote without fleshing out the boundaries and principles underlying preemption under the FAA.

In the next term, the Supreme Court, in *Perry v. Thomas*,<sup>121</sup> confronted a similar issue in another California statute that required judicial resolution of claims by employees to collect wages.<sup>122</sup> The Court began by noting the “liberal federal policy favoring arbitration agreements,”<sup>123</sup> and cited *Southland* for the proposition that Congress intended to “foreclose state legislative attempts to undercut the *enforceability of arbitration agreements*.”<sup>124</sup> The *Perry* Court added in a footnote: “[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts

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maritime contract or one “evidencing a transaction involving commerce.” *Id.* at 10–11. Second, the agreement must not be revoked upon “grounds as exist at law or in equity for the revocation of any contract.” *Id.*

118. *Id.* at 11.

119. *Id.* at 16 n.11; see also Horton, *supra* note 2, at 1228–29; STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 34–36 (2d ed. 2007). Essentially, the “any contract” test applies when a state regulation would make arbitration agreements unenforceable when the same test would not make all contracts meeting the same criteria unenforceable. See *id.* at 36.

120. See Horton, *supra* note 2, at 1226–32.

121. 482 U.S. 483 (1987).

122. The California statute at issue provided that “actions for the collection of wages may be maintained ‘without regard to the existence of any private agreement to arbitrate.’” *Id.* at 484 (quoting CAL. LAB. CODE ANN. § 229 (West 1971)). This statute, unlike the statute at issue in *Southland*, actually included the words “agreement to arbitrate.”

123. *Perry*, 482 U.S. at 489 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Professors Richard Bales and Mark Gerano describe the expansion of arbitration law in *Moses H. Cone* as follows: “The important aspect of *Moses H. Cone* was the Court’s declaration that the FAA applied in both federal and state courts. Equally important in *Moses H. Cone* was the Court’s recognition of the strong policy favoring arbitration, and that when in doubt regarding arbitrability, the preference should be to arbitrate.” Bales & Gerano, *supra* note 111, at 410 (footnotes omitted).

124. *Perry*, 482 U.S. at 489 (emphasis added) (quoting *Southland*, 465 U.S. at 16).

generally,” while state laws specifically invalidating arbitration agreements do not comport with section 2.<sup>125</sup> The language suggests that preemption applies when a state law—like this California law—singles out arbitration agreements and makes them unenforceable.<sup>126</sup> The Court still failed to discuss the type of preemption—conflict or otherwise—and it left the scope of the preemption unsettled, at best.<sup>127</sup>

Finally, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*<sup>128</sup> is instructive on the issue of preemption, although it turned on the effect of a California choice-of-law provision in the contract.<sup>129</sup> Under California law, the parties would need to litigate certain issues before arbitrating the remainder of the claims.<sup>130</sup> In enforcing the choice-of-law clause, the Court found section 4 of the FAA controlling, requiring courts to enforce arbitration agreements “*in the manner provided for*” in the contract.<sup>131</sup> The Court stressed that one of the purposes of the FAA is simply to make the contracting party live up to his agreement and that an arbitration agreement be “placed upon the same footing as other contracts, where it belongs.”<sup>132</sup> The Court grappled with the policy pronouncements made in a prior case, broadly stating that “the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”<sup>133</sup> The Court, however, did not specify whether the “according to their terms” language stems from section 4 or whether this policy also emerges from section 2’s preemptive effect.

125. *Id.* at 492 n.9.

126. Professor David Horton parses out the language of the footnotes in *Southland* and *Perry* to provide two different tests for preemption: “Were . . . state policies preempted because, as *Southland* suggested, section 2 denies state legislators the ability to regulate arbitration clauses? Or, following *Perry*, should courts ask whether these laws expressed hostility to arbitration?” Horton, *supra* note 2, at 1231. This parsing may draw too fine a distinction between the cases and give more credit to the Court than it deserves.

127. The *Perry* case involved a 7–2 decision. Justice Stevens wrote a short dissent on the basis that the policy articulated by the state of California should take precedence over the general federal statute. *Perry*, 482 U.S. at 493–94 (Stevens, J., dissenting). Justice O’Connor also dissented, primarily on the grounds that *Southland* was wrongly decided. *Id.* at 494 (O’Connor, J., dissenting). Justice O’Connor also dissented on the grounds that the policy articulated by California should control. *Id.* at 495.

128. 489 U.S. 468 (1989).

129. *Id.* at 470, 472, 479.

130. *Id.* at 471 (citing CAL. CIV. PROC. CODE § 1281.2(c) (West 1982) (providing that a court may stay arbitration while litigation with a third party is ongoing and the possibility of conflicting rulings on issues of common law or fact exists)). In this multi-party contract dispute, some parties had an obligation to arbitrate while others did not. The California statute, which applies in multi-party situations, required the parties to litigate. After litigation was complete, the parties subject to arbitration agreements would be allowed to arbitrate.

131. *Id.* at 474–75 (emphasis added) (quoting 9 U.S.C. § 4 (1988)).

132. *Id.* at 476, 478 (internal quotation marks omitted).

133. *Id.* at 476 (discussing the rule from *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1 (1983)).

The Court then, for the first time, discussed the applicable type of preemption in a case in which preemption was not before the Court. The Court recognized that the FAA “contains *no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration,*”<sup>134</sup> and that the state law that “*stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress*” should be preempted.<sup>135</sup> Ultimately, the Court concluded that the California statute was not preempted because the statute had not eliminated the arbitration option, only delayed it.<sup>136</sup> For the first time, the Court explicitly referenced the applicability of conflict preemption and denounced the application of field preemption due to federalism concerns. The Court stated in dicta that the FAA would not have preempted the California statute because it delayed but did not invalidate the arbitration.<sup>137</sup> As a practical matter, the delay would effectively negate arbitration under traditional preclusion principles.<sup>138</sup> The Court’s willingness to find this statute enforceable is a strong statement of the limited nature of the FAA’s preemptive scope.

Thus, the decisions of the 1980s established FAA preemption without any real explanation of the scope or type of preemption. The Court gave some indication that preemption should be narrowly applied. However, its failure to place clear boundaries in these early cases left plenty of room for later expansion.

### C. *Fundamental Flaw II Expanded*

The 1990s brought gradual expansion of the FAA. As the Court applied the preemption doctrine during this time period, it expanded the preemptive scope without clearly defining the boundaries of the FAA’s reach. The Court’s failure therefore allows for expansion of the doctrine on a case-by-case basis.

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134. *Id.* at 477 (emphasis added).

135. *Id.* (emphasis added) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

136. *Id.* at 477–79. This distinction between delaying arbitration and denying arbitration is critical.

137. *See id.* at 479 (“Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.” (citation omitted)). In 1996, the Court further explained this holding: “[t]he state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996).

138. The dissent, which does not touch on the issue of preemption, noted the practical effect of the requirement to the situation: “Applying the California procedural rule, which stays arbitration while litigation of the same issue goes forward, means simply that the parties’ dispute will be litigated rather than arbitrated.” *Volt*, 489 U.S. at 487 (Brennan, J., dissenting).

For example, in *Allied-Bruce Terminix Cos. v. Dobson*,<sup>139</sup> the Court expanded the reach of the FAA to the full contours of the Commerce Clause. That case, which involved the sale of a termite-infested Alabama house,<sup>140</sup> pitted an Alabama statute invalidating all predispute arbitration agreements<sup>141</sup> against the FAA, which would enforce such agreements. To avoid preemption, the homeowner argued that the contract did not “involve interstate commerce” pursuant to section 2 of the FAA.<sup>142</sup> The Court determined, however, that these words should be read to the fullest extent of the Commerce Clause,<sup>143</sup> relying on the purpose of the FAA to “broadly” overcome “judicial hostility to arbitration agreements” at both the state and federal levels.<sup>144</sup> The mere use of the word “broadly,” however, can hardly be deemed a test regarding the preemptive scope of the FAA.

The Justices in the *Terminix* case were deeply divided on this issue. Justice Sandra Day O’Connor, in a concurring opinion, expressed doubt that the FAA should have preemptive effect at all, especially because states have historically regulated arbitration.<sup>145</sup> Justices Antonin Scalia and Clarence Thomas dissented on the basis that *Southland* should be overruled.<sup>146</sup> The majority, however, refused to overrule *Southland* and ultimately expanded its reach by construing “interstate commerce” to the full extent of the commerce power.

This gradual expansion continued in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,<sup>147</sup> technically another choice-of-law decision.<sup>148</sup> Like in *Volt*, the parties had a contract with both an arbitration agreement and a choice-of-law clause (selecting New York law).<sup>149</sup> Controlling New York law—the *Garrity* rule—prohibited arbitrators from awarding punitive

139. 513 U.S. 265 (1995).

140. *Id.* at 268.

141. *Id.* at 269 (citing ALA. CODE § 8-1-41(3) (1975) (“The following obligations cannot be specifically enforced: . . . An agreement to submit a controversy to arbitration.”)).

142. Brief of Respondents G. Michael Dobson and Wanda C. Dobson at 4, 9, *Allied-Bruce*, 513 U.S. 265 (No. 93-1001), 1994 WL 381849.

143. *Allied-Bruce*, 513 U.S. at 277. Twenty state attorneys general requested that the Court overrule *Southland*. *Id.* at 272.

144. *Id.* at 272.

145. *Id.* at 283 (O’Connor, J., concurring) (noting that under the Court’s own precedent, Congress must evidence a “clear and manifest” intent to preempt in areas traditionally regulated by the states (internal quotation marks omitted)).

146. *See id.* at 285–86 (Thomas, J., dissenting).

147. 514 U.S. 52 (1995). The Court decided *Mastrobuono* and *Terminix* in the same term, and these cases turn on ideologically similar lines regarding the breadth of the FAA.

148. *See id.* at 55 (granting certiorari to resolve a conflict in the courts of appeals as to whether a contractual choice-of-law provision may preclude an arbitrator from awarding punitive damages).

149. *Id.* at 54–55.

damages.<sup>150</sup> The ruling of *Volt* generally allowed parties to agree to arbitration procedures different than the FAA.<sup>151</sup> While the *Mastrobuono* Court determined as a matter of contract law that the parties' agreement allowed an award of punitive damages, the opinion included additional language on the lasting effect of the *Garrity* rule.<sup>152</sup> The Court stated that "punitive damages would be allowed because, in the absence of contractual intent to the contrary, the FAA would pre-empt the *Garrity* rule."<sup>153</sup>

This statement signals a significant expansion of the Court's preemption jurisprudence. Prior to *Mastrobuono*, the Court had only preempted state laws invalidating the parties' agreement to *participate in the arbitral forum*.<sup>154</sup> In this instance, the parties did not dispute the requirement to arbitrate. They disagreed on the terms and conditions under which the arbitration would take place—whether punitive damages may be awarded. The New York law at issue limited the parties' ability to contract for how the arbitration would take place, and the Court found that this limitation, only applicable to arbitration agreements, ran afoul of the FAA.<sup>155</sup> Certainly, this case departed from the Court's decision in *Volt*, that a state law effectively (but not legally) foreclosing the arbitral option was not preempted because the arbitration option remained a legal possibility.<sup>156</sup>

Justice Thomas stated, in his dissent in *Mastrobuono*,<sup>157</sup> that "[t]hankfully, the import of the majority's decision is limited and narrow"

150. *Id.* (citing *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976)). The *Garrity* rule is grounded in the policy that awarding punitive damages is something that only a public institution, such as the courts, can do. *Garrity*, 353 N.E.2d at 794. Under the *Garrity* rule, private arbitrators are prohibited from awarding punitive damages. *Id.*

151. *Mastrobuono*, 514 U.S. at 57 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989)).

152. *Id.* at 59–60.

153. *Id.* at 59; see also Christopher R. Drahozal, *Error Correction and the Supreme Court's Arbitration Docket*, 29 OHIO ST. J. ON DISP. RESOL. 1, 17 (2014) [hereinafter Drahozal, *Error Correction*] (describing the relationship between *Volt* and *Mastrobuono*).

154. See, e.g., *Volt*, 489 U.S. at 478.

155. See *Mastrobuono*, 514 U.S. at 58; see also 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, 548 (1994) ("Garrity refuses to enforce arbitration agreements giving arbitrators the power to award punitive damages. Because *Garrity* singles out arbitration agreements and limits their enforceability, it is preempted by the FAA." (footnote omitted)).

156. See *supra* note 137 and accompanying text.

157. Justice Thomas dissented in this opinion, not necessarily on the preemption issue, but on the contract interpretation issue and the correct reading of the *Volt* decision. See *Mastrobuono*, 514 U.S. at 66–67 (Thomas, J., dissenting). Until recently, Justice Thomas was the most consistent vote in the preemption cases, ruling that the FAA should not apply to the states. Justice Thomas's dissent did not address the statement made by the majority on the preemptive effect of the FAA over the *Garrity* rule. See *id.* (dissenting on the grounds that the holding enforced a choice-of-law provision that could not be distinguished from *Volt*).

and has “applicability only to this specific contract and to no other.”<sup>158</sup> Perhaps this decision foreshadowed the Court’s decision in *Concepcion*, nearly twenty years later, when the Court expressly preempted another state law that did not invalidate agreements to arbitrate.

The following year, the Court decided *Doctor’s Associates, Inc. v. Casarotto*,<sup>159</sup> which involved a “classic” preemption situation. The *Casarotto* case concerned a Subway sandwich shop franchise dispute in Montana.<sup>160</sup> Montana law required that an arbitration agreement “shall be typed in underlined capital letters on the first page of the contract.”<sup>161</sup> The franchise agreement’s arbitration clause did not meet this requirement.<sup>162</sup> The Supreme Court easily preempted this law, stating that: “Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”<sup>163</sup> The FAA preempted the Montana law because the “first page of the contract” rule applied *only* to arbitration agreements.<sup>164</sup> The Court found this statute hostile to arbitration, thus running afoul of section 2 of the FAA.<sup>165</sup>

In addition, the Court identified as a “purpose” of the FAA the idea that Congress intended the Act to ensure “that private agreements to arbitrate are enforced according to their terms.”<sup>166</sup> When the *Volt* Court used this language, it was discussing parties’ ability to enforce a choice-of-law provision.<sup>167</sup> Notably, the Court did not use this language in the preemption analysis.<sup>168</sup> As noted above,<sup>169</sup> the “according to their terms” language is part of section 4—a procedural portion of the FAA—and not section 2—the only substantive section the Court has applied to the states.<sup>170</sup> One might argue that the Supreme Court attempted to incorporate

158. *Id.* at 71–72 (Thomas, J., dissenting).

159. 517 U.S. 681 (1996).

160. *Id.* at 682–84.

161. *Id.* at 684 (quoting MONT. CODE ANN. § 27-5-114(4) (1995) (repealed 1997)) (internal quotation marks omitted).

162. *Id.*

163. *Id.* at 687.

164. *See id.* (reasoning that the Court has consistently provided that the FAA precludes states from “singling out arbitration provisions”).

165. *Id.* The *Casarotto* case was an 8–1 decision of the Court. *Id.* at 682. Justice Thomas was the lone dissenting vote, and he dissented on the grounds that the FAA should not apply to the states. *Id.* at 689 (Thomas, J., dissenting). Justice Thomas’s vote was consistent with his previous rulings in the area of FAA preemption. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) (Thomas, J., dissenting).

166. *Casarotto*, 517 U.S. at 688 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

167. *See Volt*, 489 U.S. at 479 (“[I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself.”).

168. *See id.* at 477–79 (setting forth the Court’s preemption analysis).

169. *See supra* notes 40–43 and accompanying text.

170. *See Volt*, 489 U.S. at 477 n.6 (“While we have held that the FAA’s ‘substantive’

the “according to their terms” language into section 2, but a change so substantial should ordinarily not be assumed *sub silencio*.

The resulting test coming out of *Casarotto* provides additional clarification that although states may regulate contracts generally, they may not invalidate agreements to arbitrate simply because they are agreements to arbitrate. Although the test is easily definable, the Court still refrains from identifying the type of preemption at issue (again, presumably conflict preemption) or applying traditional preemption presumptions—the narrow application of preemption, for instance—especially in the area of conflict preemption.

These cases from the 1990s and early 2000s<sup>171</sup> arguably broadened the scope of the preemptive power without ever defining what arbitration is and without clearly identifying the type of preemption to apply or the scope of preemptive power. These failures set up the Court’s expansive ruling in *Concepcion*.

#### D. Fundamental Flaw III: Impact Preemption

The Court’s new preemption test, herein coined “impact preemption,” begins with the 2011 decision in *AT&T Mobility LLC v. Concepcion*.<sup>172</sup> In *Concepcion*, the Court considered whether a California common law test regarding class action waivers ran afoul of FAA section 2.<sup>173</sup> The *Concepcions* and similar customers bought “free” phones but were later charged sales tax in the amount of \$30.22, based on the phone’s value.<sup>174</sup> The *Concepcions* brought a class action against AT&T even though the contract required arbitration on an individual basis.<sup>175</sup> Under the California common law test provided in *Discover Bank v. Superior Court*,<sup>176</sup> the

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provisions—§§ 1 and 2—are applicable in state as well as federal court, we have never held that §§ 3 and 4, which by their terms appear to apply *only* to proceedings in federal court . . .” (citation omitted).

171. Although not otherwise discussed in this Article, the Court’s decision in *Preston v. Ferrer* expanded the preemptive scope of the FAA in cases involving administrative agencies. 552 U.S. 346, 349–50 (2008).

172. 131 S. Ct. 1740 (2011).

173. *Id.* at 1746.

174. *Id.* at 1744. The *Concepcion* case likely would not have proceeded without class action relief. Each individual plaintiff incurred damages in the amount of \$30.22, and no rational plaintiff would pay a court filing fee or hire a lawyer to recover this small sum of money. In an attempt to make the dispute resolution clause less challengeable on the grounds of unconscionability, AT&T added a “premium payment” of \$7500. *Id.* at 1744–45. Under the contract, if a plaintiff refused a settlement offer and thereafter won more at arbitration, that party was awarded a “premium payment” of \$7500 plus twice the amount of attorneys’ fees. *Id.* at 1744. Even with this premium payment, the chances of hiring a lawyer for this small amount of money are slim.

175. *Id.* The arbitration agreement provided that claims be brought in a party’s “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding” in either arbitration or court. *Id.* (internal quotation marks omitted).

176. 113 P.3d 1100 (Cal. 2005).

Court found the class action waiver unconscionable.<sup>177</sup> If the *Discover Bank* test was met, the California court would strike the class action waiver, but the agreement to arbitrate may remain enforceable.<sup>178</sup>

The Court recognized the “liberal policy in favor of arbitration” along with the “fundamental principle that arbitration is a matter of contract.”<sup>179</sup> The Court further recognized that arbitration agreements must be regulated “on an equal footing with other contracts,” citing *Volt* for the proposition that arbitration agreements must be enforced “according to their terms.”<sup>180</sup> Again, the Court used the phrase “according to their terms” to describe the policies underlying section 2, when that language comes from section 4’s procedural mandate. The Court did not address whether that language should be incorporated into section 2.

In the opinion, the Court also appeared to recognize the role of state regulatory authority. The Court stated that the FAA savings clause normally allows states to develop their own “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses

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177. *Concepcion*, 131 S. Ct. at 1745. The *Discover Bank* rule would invalidate any such class action waiver if the following elements are met: (1) the contract is one of adhesion; (2) the disputes involve a predictably small amount of damages; and (3) the party with superior bargaining power has “carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.” *Id.* at 1746 (quoting *Discover Bank*, 113 P.3d at 1110). The *Discover Bank* test was intended to deal with the classic problem of what happens when a large company cheats 1,000,000 customers out of \$1 each. While each individual only suffers \$1 in damages, the company gains \$1,000,000. *Cf. Discover Bank*, 113 P.3d at 1108–09 (“Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because [a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation.” (alteration in original) (citations omitted) (internal quotation marks omitted)).

178. *Concepcion*, 131 S. Ct. at 1746 (noting that the waivers themselves are unconscionable where *Discover Bank* is satisfied and citing California cases in which the courts did not enforce the agreement). Under traditional severability (not to be confused with separability, mentioned above) analysis in contract law, if a court were to find that one offending provision permeates or taints the entire agreement, the entire agreement may be invalidated. *See generally* 17A AM. JUR. 2D *Contracts* § 318 (2004) (“While recognizing that illegal contracts are generally unenforceable or void, a court may, where possible, sever the illegal portion of the agreement and enforce the remainder.” (footnotes omitted)); Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1952 (2014) (“Accordingly, when a court invalidates certain provisions in an arbitration clause as unconscionable, it should preserve the remainder of the arbitration clause for claims as to which the arbitral procedural bundle is not unconscionable.”).

179. *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted).

180. *Id.* at 1745–46 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) and *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).



that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>181</sup>

The question became whether the *Discover Bank* test was “generally applicable.” Unlike the Montana law in *Casarotto*, the *Discover Bank* test was facially neutral and applied to class action waivers in arbitration and litigation alike.<sup>182</sup> While acknowledging this point, the Court created a new test for arbitration preemption: whether the state law can be “*applied in a fashion that disfavors arbitration*” and has a “*disproportionate impact*” on arbitration.<sup>183</sup> The Court further stated that the operation of the rule in “practice,” not the text of the statute, should determine the impact on arbitration.<sup>184</sup>

In settling on this new test, the Court relied on “[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, . . . to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”<sup>185</sup> The Court built its reasoning on the premise that an important purpose of the FAA was to enforce agreements in which parties choose the more streamlined process of arbitration over the more elaborate process of litigation. Again, the Court appears to be conflating the purposes of sections 2, 3, and 4, even though section 2 is the only section that applies to the states.

The Court suggested that the FAA would additionally preempt (hypothetical) state laws deeming unconscionable arbitration agreements lacking “judicially monitored discovery,” adherence to the *Federal Rules of Evidence*, or arbitration by jury, because requiring arbitration to include these aspects of litigation would effectively convert the more streamlined process into an elaborate process that no longer resembled “arbitration” as that process was envisioned by Congress when it enacted the FAA.<sup>186</sup> Drawing on these principles, the Court held that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>187</sup>

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181. *Id.* at 1746 (emphasis added) (quoting *Doctor’s Assocs., Inc., v. Casarotto*, 517 U.S. 681, 687 (1996)).

182. The *Discover Bank* rule, in practice, had been applied to cases involving class action bans in litigation as well as arbitration. *See, e.g., Lopez v. Am. Express Bank*, No. CV 09-07335 SJO (MANx), 2010 WL 2628659, at \*4–5 (C.D. Cal. June 2, 2010) (addressing an arbitration class waiver); *Omstead v. Dell, Inc.*, 533 F. Supp. 2d 1012, 1017 (N.D. Cal. 2008) (noting the application of the *Discover Bank* test to litigation and arbitration class waivers); *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 711–13 (Cal. Ct. App. 2001) (addressing an arbitration class waiver). In practice, the test had been used more often in the arbitration context.

183. *See Concepcion*, 131 S. Ct. at 1747 (emphasis added).

184. *See id.*

185. *Id.* at 1748.

186. *See id.*

187. *Id.*

The Court ultimately found that certain generally applicable contract defenses—here unconscionability—that “stand as an obstacle” to the FAA’s objectives can be preempted.<sup>188</sup> Although drawing from *Casarotto*, *Perry*, and previous arbitration cases, this language marks a notable expansion of preemptive power. The focus on the “impact” of regulation on arbitration is unsupported by section 2 and arguably goes beyond the purposes of sections 2, 3, and 4—if the Court was proper in reading the purposes of sections 3 and 4 into section 2. Under this new test for arbitration preemption, the Court can now: (1) invalidate facially neutral regulations; (2) invalidate generally applicable contract defenses (such as unconscionability) based on the “impact” on arbitration; and (3) disregard the savings clause. Now, a statute that somehow “disfavors arbitration” or has a “disproportionate impact” on arbitration without actually invalidating the agreement to arbitrate can be preempted.<sup>189</sup> The Court’s analysis also failed to rely on traditional preemption principles.<sup>190</sup>

The *Concepcion* decision is also notable because the Court attempts to define “arbitration” for the first time. The Court appears to favor bilateral—between two parties—arbitration because class arbitration is “slower, more costly, and more likely to generate procedural morass” than “classic” arbitration.<sup>191</sup> The Court also reasoned that arbitrators might have difficulty handling the increased formality of class arbitration (unless, of course, the parties explicitly contract for such a procedure).<sup>192</sup> Further,

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188. *Id.*

189. *See id.* at 1747. This case is the first time since *Mastrobuono* in which the Court found a state law that did not invalidate an arbitration agreement preempted by the FAA. Note, however, that the *Mastrobuono* Court’s discussion of the enforceability of the *Garrity* punitive damages rule was merely dicta because the case turned on the choice-of-law determination. *See supra* notes 147–55 and accompanying text.

190. At the end of the majority opinion, the Court cites to a single general preemption case: “Because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ California’s *Discover Bank* rule is preempted by the FAA.” *Concepcion*, 131 S. Ct. at 1753 (citation omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Court “politics” appear to be at play in this decision. Up to this point, Justice Thomas had dissented on principle to every case involving FAA preemption on the grounds that the FAA does not apply to the states. *See supra* notes 157, 165 and accompanying text. In *Concepcion*, however, Justice Thomas joined the majority for the first time to give the majority its necessary fifth vote, and also filed a concurring opinion. *See Concepcion*, 131 S. Ct. at 1743.

191. *Concepcion*, 131 S. Ct. at 1751. The Court notes that “while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.” *Id.* at 1750. At least one scholar asserts that after *Concepcion*, the scope of FAA preemption allows the Court to paint “a picture of arbitration and preempt state laws that are incompatible with that picture.” Troum, *supra* note 60, at 427.

192. *Concepcion*, 131 S. Ct. at 1751–52; *see also* Troum, *supra* note 60, at 421 (describing the Court’s view of class arbitration as the “incompatibility” of class procedures with the FAA).

“classic” arbitration did not involve the same “risks to defendants”<sup>193</sup> and “high[] stakes.”<sup>194</sup> Despite these criticisms of complex, multiparty arbitration, the Court must still acknowledge that freedom of contract allows parties to agree to these types of procedures.<sup>195</sup> As expected, the case drew strong dissent, largely on federalism grounds.<sup>196</sup>

This decision marked a critical turning point in Supreme Court preemption jurisprudence. For the first time, the Court invalidated a state law<sup>197</sup> *not* because it invalidated an arbitration agreement, but because it “impacted” a newly articulated type of arbitration—bilateral arbitration.<sup>198</sup> By characterizing the “purpose” of the FAA as preserving bilateral arbitration, the Court widely redefined arbitration preemption.<sup>199</sup> While the *Concepcion* decision has been roundly criticized on a wide variety of grounds,<sup>200</sup> this Article largely focuses on the Court’s treatment of preemption, as opposed to its treatment of class actions.

193. *Concepcion*, 131 S. Ct. at 1752. Note that the Court was not concerned about the risks to claimants in having to bring low stakes claims without a lawyer or whether claimants in arbitration would be similarly disadvantaged by high-stakes procedures.

194. *Id.* at 1750. The Court is in a precarious situation in that the right to contract would allow parties to have a class-wide procedure if all of the parties agreed to such a procedure. The Court essentially speaks out of both sides of its mouth in denouncing the class-wide procedure as a whole and then needing to admit that parties could opt for such a procedure if they so choose.

195. *Id.* at 1752.

196. *See id.* at 1762 (Breyer, J., dissenting) (“Congress retained for the States an important role incident to agreements to arbitrate.”).

197. As noted in *Mastrobuono*, the Court’s statements regarding the enforceability of the New York *Garrity* rule dealing with punitive damages were dicta. *See supra* note 189; Drahozal, *FAA Preemption*, *supra* note 86, at 415. The Court, however, did indicate a willingness to overturn that rule, which had nothing to do with the enforceability of arbitration agreements. *See supra* notes 147–55 and accompanying text (noting that the *Garrity* rule limited the parties’ ability to contract).

198. The Court’s loose language on the preemptive power of the FAA has confused scholars on what can be preempted. Because the preemption power has to be limited to section 2 of the FAA, state laws that do not invalidate arbitration agreements cannot be in conflict with section 2. Now, however, the Court has created a misconception that any law that treats arbitration differently than other contracts could be preempted. *See Troum, supra* note 60, at 424 (“State contract law controls the interpretation of arbitration agreements, just as it does all contracts, but that law must treat arbitration agreements like all other agreements. Otherwise, the FAA’s section 2 preemption power kicks in and the state law is preempted. *Concepcion* is an example of just such a flexing of the FAA’s preemption muscle.” (footnote omitted)).

199. Interestingly, Justice Scalia takes the lead in authoring this decision. As noted above, Justice Scalia had previously concurred in the *Terminix* case expressing a viewpoint that *Southland* and the entirety of FAA preemption should be overruled. *See supra* note 146 and accompanying text. Yet Justice Scalia has been the author of the recent decisions that have created this new ad hoc business preemption and changed the legal landscape in this area.

200. *See, e.g.*, Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203, 1204–05 (2013) (noting the perspicuous consequences of *Concepcion* and noting that “[r]ecent scholarship has established that *Concepcion* fundamentally misreads the original purpose and design of the FAA”); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 269 (2013) (noting that an extension

At least two arguments can be made to support the contention that the Court is actually applying traditional obstacle preemption and not a new test. First, one may argue that one of the purposes of the FAA is to enforce contracts “according to their terms,” and that the *Discover Bank* test frustrates this purpose by invalidating class action waivers. As noted above, this argument is based on a purpose drawn from section 4 of the FAA, which courts have not given preemptive power. Under usual preemption analysis, the purposes of the whole statute can be considered in determining its purposes and objectives. The FAA, on the other hand, is unique in that only one small portion—section 2—has preemptive power,<sup>201</sup> while the rest of the statute is arguably procedural in nature. To date, the Court has not appreciated the complexity involved in applying preemption principles to a statute that only has partial preemptive power. This Article suggests that because section 2 contains an express limitation regarding state law *invalidating* arbitration agreements, regulations that fall short of invalidation do not fall within the preemptive scope of the FAA. Application of the broader policies based on the text of sections 3 and 4 should not be used to expand and contradict the plain language of section 2.

The second argument could be made on the basis of the language of section 2 itself. This argument is that the Court is reading “bilateral” into the definition of “arbitration,” as that term is used in section 2, and the *Discover Bank* test then stands as an obstacle to the purposes of the FAA because class arbitration is not arbitration as the FAA defines that term. This avoids the problems of the first argument by stating that the difficulty is not with the invalidation of the arbitration agreement, but with the definition of arbitration.

This argument, too, suffers from textual and logical flaws. The FAA does not define “arbitration.” Until *Concepcion*, the Court had not attempted to define the term. The discussion of what arbitration means in *Concepcion* is not concrete. In other words, the Court only talked about arbitration in terms of certain characteristics such as streamlined procedures and simplicity. It did not state whether class arbitration could meet those parameters, especially when compared to class action litigation. In addition, the Court acknowledged that parties could agree to class action procedures as a matter of contractual choice. Arguably parties could contract for a procedure that could not be regulated by the states. Another counterargument is that class arbitration *has to be arbitration* otherwise the FAA would not apply at all. If class arbitration is truly outside of the realm

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of the *Concepcion* analysis from the realm of consumer claims to employment claims would “raise serious social equality concerns”); Bales & Gerano, *supra* note 111, at 424 (describing *Concepcion* as an “Oddball Case,” meaning in it created a wide-sweeping change in the law based on a case with atypical facts).

201. See Drahozal, *FAA Preemption*, *supra* note 86, at 398, 400.

of the FAA, then states should have the ability to regulate in the absence of any federal regulation on the subject.

The next Section considers how the Court has begun to apply impact preemption.

### E. *Fundamental Flaw III in Practice*

Impact preemption has already influenced the law of arbitration. In the last few terms, the Supreme Court has continued to act early and often in the area of arbitration preemption, applying preemption principles broadly.

In the term following *Concepcion*, the Court decided *Marmet Health Care Center v. Brown*,<sup>202</sup> and preempted a West Virginia common law ruling invalidating arbitration agreements in nursing home contracts.<sup>203</sup> Although unremarkable in its holding, the *Marmet* case is interesting because of its timing. The Court sent a strong message to the states by taking the first case to matriculate through the West Virginia court system on this issue. The *Marmet* decision is a clean application of the *Casarotto* decision because the West Virginia law singled out certain arbitration agreements—in nursing home contracts—and invalidated them.<sup>204</sup>

In 2012, the Court sent another message to the states regarding their role in arbitration in *Nitro-Lift Technologies, L.L.C. v. Howard*.<sup>205</sup> In this case, the Oklahoma Supreme Court invalidated certain unemployment agreements that required arbitrators to decide arbitrability issues.<sup>206</sup> The Court warned that: “It is a matter of great importance . . . that state supreme courts adhere to a correct interpretation” of the FAA,<sup>207</sup> which includes the teachings from *Prima Paint*, *Southland*, and *Concepcion*. The Court strongly reprimanded the Oklahoma Supreme Court, stating that it “must abide by the FAA, which is ‘the supreme Law of the Land,’ and by the opinions of this Court interpreting that law. . . . Our cases hold that the FAA forecloses precisely this type of ‘judicial hostility towards

202. 132 S. Ct. 1201 (2012) (per curiam).

203. *Id.* at 1204. As Professor Horton notes, cases such as *Marmet* demonstrate what he calls the Court’s “total-preemption theory,” meaning that despite the “any contract” language in the savings clause of section 2, invalidating a contract on general “public policy” grounds would necessarily create arbitration-specific enforceability rules. Horton, *supra* note 2, at 1220. Under this theory, a state cannot create a valid public policy defense under the “any contract” clause because such defenses are necessarily arbitration specific. *Id.* In *Marmet*, West Virginia created a rule that all arbitration agreements in nursing home contracts were unenforceable. 132 S. Ct. at 1202. This state policy is specific both to nursing home contracts and arbitration clauses, thus not generally applicable to all contracts. *Id.* at 1202–03. Horton further notes that the FAA must deal with enforceability generally, otherwise states would have the ability to prohibit arbitration within the state’s borders on public policy grounds. Such laws would clearly contravene the primary goal of the FAA—enforcing private agreements to arbitrate. Horton, *supra* note 2, at 1220.

204. *Marmet*, 132 S. Ct. at 1203–04.

205. 133 S. Ct. 500 (2012) (per curiam).

206. *Id.* at 501.

207. *Id.*

arbitration.”<sup>208</sup> While this decision is unspectacular in its outcome, it is worth noting because of the increased hostility the Court expressed toward the states.

The 2013 decision *American Express Co. v. Italian Colors Restaurant*<sup>209</sup> similarly demonstrates the Court’s willingness to cite *Concepcion* as authority. The question before the Court was whether an arbitration agreement could be enforced under the FAA when the “plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”<sup>210</sup> Like *Concepcion*, the plaintiff merchants had arbitration agreements prohibiting class dispute resolution.<sup>211</sup> The merchants argued that they would each need to spend up to \$1 million in legal fees to recover damages of less than \$40,000.<sup>212</sup> While the Court ultimately concluded that the merchants could vindicate their statutory rights because they were not financially precluded from accessing the arbitral forum,<sup>213</sup> the Court relied on the new definition of “arbitration” (i.e., bilateral arbitration) to uphold the class waiver.<sup>214</sup> Although *Italian Colors* did not involve a question of preemption, the Court’s definition of arbitration in *Concepcion* paved the way for this decision.<sup>215</sup> These recent cases demonstrate that the principles of *Concepcion* go beyond even the preemption area of the law.

### III. A NEW THEORY OF FAA PREEMPTION: IMPACT PREEMPTION

Express, field, and conflict preemption have a long jurisprudential history supported by well-defined tests on how preemption should be

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208. *Id.* at 503 (citations omitted) (quoting U.S. CONST. art. VI and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)).

209. 133 S. Ct. 2304 (2013).

210. *Id.* at 2307.

211. *Id.* at 2308. Prior to this case, precedent suggested that arbitration agreements could be invalidated if the structure of the agreement made it financially difficult to access the forum. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (holding that the party seeking invalidation of an arbitration agreement on the basis that arbitration is prohibitively expensive bears the “burden of showing the likelihood of incurring such costs”).

212. *Italian Colors*, 133 S. Ct. at 2308. The primary expenses for the merchants would include legal fees and expert witness fees.

213. *Id.* at 2310–11 (distinguishing between the costs of accessing the arbitral forum and the costs of proving the merits of a claim).

214. *Id.* at 2312.

215. A month prior to the *Italian Colors* decision, the Supreme Court decided another case involving class actions. In *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064 (2013), the Court upheld an arbitrator’s decision to allow class action arbitration when the contract was silent on the issue. The Court distinguished the case from *Stolt-Nielsen, S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. 662 (2010), on the basis that the arbitrator permissibly read and interpreted the contract to allow class arbitration. *Oxford Health*, 133 S. Ct. at 2070. The seemingly inconsistent holdings between these two cases will certainly lead to interesting discussion on whether *Italian Colors* overruled *Sutter* or merely reduced it to its facts.

applied to preserve the delicate balance between federal and state authority. In the area of arbitration, however, none of these rules seem to apply. The root of the problem lies in the fact that the Court historically failed to define the type of preemption to apply in cases involving the FAA, as well as the scope of that preemption.

The Court's analysis of arbitration has been the subject of multiple criticisms. Arbitration scholar Thomas Carbonneau recently noted that while the Justices:

have created a body of doctrine, their interest in arbitration is neither principled nor analytical. The Court has rarely, if ever, expressed a serious interest in the intellectual content of arbitration law; instead, the Court plays the role of craftsman, fixated on elaborating workable rules that promote recourse to arbitration.<sup>216</sup>

The Court has utterly failed to produce “workable rules” for arbitration preemption. Impact preemption goes far awry of traditional conflict preemption because it eliminates the requirement of a conflict. Without requiring a conflict, any state law may be subject to preemption simply because of its disproportionate “impact” on arbitration.<sup>217</sup> In addition, this new test is broader than field preemption.

The Court's creation of impact preemption contains a number of theoretical, legal, and political flaws. These flaws drastically impact arbitration practice and policy, which has an adverse effect on states, businesses, consumers, employees, and other stakeholders. These next Sections detail why impact preemption is untenable under Supreme Court precedent, arbitration theory, and public policy.

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216. Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates*, 14 *CARDOZO J. CONFLICT RESOL.* 593, 595 (2013) (footnote omitted). Other commentators have noted the lack of consistent rules within federal preemption law itself. *See, e.g.*, Meltzer, *supra* note 38, at 3 (“With a plethora of cases known for their lack of consistency, a complex set of crosscurrents, a broad set of subject matters, and a recent significant shift in the stance of the executive branch . . . generalizations about the direction of preemption law are hazardous . . .”).

217. For instance, each state has a statute that mirrors section 2 of the FAA. These provisions are obviously consistent with section 2. The drafters of the RUAA were keenly aware of preemption issues and have strived to suggest only model statutes that were consistent with the FAA or covered areas that the FAA did not address. *See* UNIF. ARBITRATION ACT prefatory note, at 2 (2000) (“In light of a number of decisions by the United States Supreme Court concerning the Federal Arbitration Act (FAA), any revision of the UAA must take into account the doctrine of preemption.”).

### A. *Impact Preemption Is Not Supported by the Statutory Text*

As mentioned above, the FAA contains only sixteen short provisions and creates no regulatory agency to administer them.<sup>218</sup> Of those sixteen provisions, only section 2 can have preemptive effect because the other sections contain express jurisdictional limitations, limiting the Act's applicability to the federal courts.<sup>219</sup> Section 2 accomplishes one purpose: enforcing arbitration agreements in the same way as other contracts. Prior to *Concepcion*, the Court's preemption decisions involved state regulation that actually conflicted with section 2. For instance, *Southland*, *Perry*, *Terminix*, and *Casarotto* all involved state laws that invalidated arbitration agreements or placed conditions on their enforceability.<sup>220</sup>

The text of section 2 does not support the Court's new "impact" preemption test for at least three reasons. First, the Court built its new theory on a newly articulated image of arbitration. In the wake of statutory silence on what arbitration is, the Court in *Concepcion*, *Nitro-Lift*, and *Italian Colors* has painted a picture of what arbitration should—and should not—be. While not explicitly defining the term, the Court has described that arbitration should be "bilateral" and non-complex.<sup>221</sup> What exactly is "bilateral"? Must it only involve two parties? Clearly, the Court views class procedures as inimical to its vision of bilateral arbitration;<sup>222</sup> however, consolidated actions (similar to class actions but without "absent" class members),<sup>223</sup> multi-party disputes, or even cases involving three parties also might not constitute "bilateral" arbitration. Is an arbitration that begins with two commercial parties but later includes impleaded or third-party claims still bilateral? The answers to these questions are unclear. Further, the Court now envisions time- and cost-saving efficiencies as a necessary part of arbitration. If that is true, can

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218. 9 U.S.C. §§ 1–16 (2012). Chapter 2 of Title 9 deals with international arbitration and is thus not applicable to this discussion. See *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 45 (1st Cir. 2008).

219. See, e.g., 9 U.S.C. §§ 3–4 (permitting parties to make motions to stay federal court litigation or compel arbitration in federal court); *id.* § 7 (allowing subpoena power in federal court); *id.* §§ 9–11 (providing a federal forum to confirm or vacate an arbitration award); *id.* § 16 (allowing appeals from the federal district courts to the federal appellate courts).

220. *Southland Corp. v. Keating*, 465 U.S. 1, 3 (1984); *Perry v. Thomas*, 482 U.S. 483, 491 (1987); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268–69, 281 (1995); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996).

221. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011).

222. See *Concepcion*, 131 S. Ct. at 1750–51 (providing that class arbitration, "to the extent that it is manufactured by [common law precedent] rather than consensual, is *inconsistent* with the FAA" and noting the benefits of bilateral arbitration over class arbitration (emphasis added)).

223. In a typical consolidated case, multiple parties bring similar claims against a common respondent.



complex and expensive antitrust,<sup>224</sup> employment, or trade secret cases (long supported by the Court) be arbitrated?

At first blush, the definition of arbitration may not appear relevant to the preemption inquiry. To the contrary, the Court's new preemption test appears to ask whether the state regulation would have a "disproportionate impact" on "arbitration"—whatever that may be.<sup>225</sup> In *Concepcion*, the preempted state law impacted only class action arbitration, not arbitration in a broader sense.<sup>226</sup> The FAA does not cover class issues, and all section 2 requires is that arbitration agreements are valid contracts.<sup>227</sup> The FAA contains almost no provisions regarding *how* arbitrations are run.<sup>228</sup> Presumably, this silence allows arbitrators great flexibility in determining how to run their own procedures. Silence also allows states to fill in those gaps and regulate the area of arbitration.<sup>229</sup> Impact preemption, however, invalidates otherwise valid "gap filling" laws to the extent that those laws disproportionately impact bilateral arbitration.<sup>230</sup>

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224. For many decades now, the Court has specifically ruled that arbitrators are competent to handle complex cases, such as antitrust matters. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 632, 634 (1985) ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.").

225. *See Concepcion*, 131 S. Ct. at 1747.

226. *See id.* Even the *Concepcion* Court, however, cannot deny the ability of parties to engage in a class procedure if all parties choose to be in a class procedure. *See id.* at 1752. The *Oxford Health* case demonstrates that parties who contract for class arbitration can still proceed with class arbitration.

227. The RUAAs, which has been adopted in seventeen states and the District of Columbia, specifically addresses the ability of parties to consolidate actions into a single action, but it does not cover class action procedures. *See* UNIF. ARBITRATION ACT § 10 (2000); *Acts: Arbitration Act (2000)*, UNIF. L. COMMISSION, available at <http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20> (detailing the jurisdictions that have adopted the RUAAs).

228. *See* Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 177 (2002) ("[T]he Court seems to recognize that the FAA speaks either ambiguously or not at all, such as post-award judicial review, arbitrators' standards of conduct and arbitral procedures-leaving potential gaps in the Act's pro-arbitration policy.").

229. *See id.* at 207 ("[S]tate law has the potential to fill in and give meaning to the parties' arbitration agreement and to assuage the continuing hostility toward arbitration.").

230. At a very basic level, the Supreme Court could not say that class arbitration is not arbitration. If the Court were to actually make this statement, the practical effect would be that the FAA governs bilateral arbitration and no federal law governs class arbitration. If no federal law governs class arbitration, then the states would be free to regulate it because there would be no conflict with the FAA. Thus, the Court can only imply that class arbitration is not "arbitration" as that term was used when Congress drafted the Act in 1925. *See Concepcion*, 131 S. Ct. at 1751 ("Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925 . . ."). To say so outright would actually significantly increase the power of the states by allowing them to regulate class arbitration (as well as any other type of arbitration that was not strictly bilateral).

Second, the Court is using impact preemption to strike down state laws that do not conflict with FAA section 2. Notably, the *Discover Bank* test did not *invalidate* an agreement to arbitrate—it merely invalidated a class action waiver.<sup>231</sup> The parties would still be required to arbitrate.<sup>232</sup> This marked the first instance in which the Court preempted a law that did not invalidate an arbitration agreement.<sup>233</sup> Nothing in section 2 conflicts with state laws that *regulate* arbitration without *invalidating* an agreement to arbitrate. The Court then, while *saying* it is applying conflict preemption, no longer requires a conflict.

Third, the impact preemption test created in *Concepcion* invalidated a generally applicable contract defense—unconscionability. The savings clause of section 2 specifically incorporates state contract law into the FAA, but under impact preemption, generally applicable state contract defenses that have a “disproportionate impact” on arbitration could still be subject to preemption.<sup>234</sup> The Court’s extraordinarily narrow reading of the savings clause in *Concepcion* runs contrary to the Court’s general rule and also to the ruling of another preemption case decided the same term.<sup>235</sup>

The *Concepcion* Court, in its decision, noted other situations that would be subject to the same treatment as unconscionability based on class action bans, including unconscionability based on failure “to abide by the Federal Rules of Evidence” or disallowing “ultimate disposition by a jury.”<sup>236</sup> The Court, however, left unclear whether those situations constitute arbitration or are permissible under section 2. If they are not “arbitration,” then they would not be covered by the FAA. If they are not permissible under section 2, the textual difficulties noted above would come into play.

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231. *Id.* at 1746, 1753.

232. Although some lower courts would invalidate the entire arbitration agreement on unconscionability grounds if it failed the *Discover Bank* test, *see, e.g.*, *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1087 (9th Cir. 2010), the Court could easily have taken the *Discover Bank* test on its face and upheld the test, provided that the lower courts still required the parties to arbitrate. *See Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

233. Of course, the Court in *Mastrobuono* would have found that the New York *Garrity* rule regarding punitive damages would have been preempted had that issue been squarely before the Court. Thus, the Court’s discussion of that issue is purely dicta.

234. *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, 374 (2012) (“*Concepcion* increases the federal restraints on state contract law by holding that even the application of a generally available contract defense like unconscionability, as interpreted by a state’s highest court, can be preempted under the FAA.”); Sandra Zellmer, *Preemption By Stealth*, 45 HOUS. L. REV. 1659, 1668 (2009) (providing that “[s]avings clauses reflect the congressional desire to preserve the presumption against preemption and, more generally, maintain state authority and state remedies” and “[d]espite the cooperative federalism trend seen in congressional action during the past three decades, the Supreme Court’s preemption decisions have gone in the opposite direction” (emphasis added) (footnote omitted)).

235. *See* Meltzer, *supra* note 38, at 12–13 (comparing *Concepcion* with *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011)).

236. *Concepcion*, 131 S. Ct. at 1747.

Taken to its extreme, this narrow reading renders the application of state contract law impossible. How can the state regulation specifically referenced in the FAA also be preempted? In the 2000 *Geier v. American Honda Motor Co.* decision,<sup>237</sup> the Court considered a similar question regarding the scope of a savings clause in the area of motor vehicle safety.<sup>238</sup> The *Geier* majority opted for a narrow preemptive scope, partly because a broad preemptive brush would negate the savings clause.<sup>239</sup> The *Concepcion* Court appears to take the opposite approach compared to *Geier*. The majority opinion in *Concepcion* fails to consider that the savings clause would indicate a statutory intent for a narrow preemptive reach. Instead, the Court struck a general unconscionability law applying to all class waivers—it did not “single out” agreements to arbitrate.<sup>240</sup> Taken to its logical conclusion, the impact preemption test may reduce the savings clause to nothing.

### B. Impact Preemption Is Contrary to the Purposes and Objectives of the FAA

Impact preemption not only offends the text of the FAA but also the purposes and objectives of the statute. While some commentators and courts suggest that preemption analysis should begin and end with the text of the statute,<sup>241</sup> under conflict preemption, the Supreme Court’s own test seeks to determine if the state regulation stands as an obstacle to the “purposes and objectives” of the federal statute.<sup>242</sup> Determining the purposes and objectives, then, necessarily requires that courts look beyond the text of the statute to figure out *why* Congress passed the statute in the first place and what Congress intended to accomplish.<sup>243</sup>

In his recent article, Professor David Horton notes that a shift is currently taking place in the Court’s jurisprudence, away from a strict reading of the FAA to a broader determination of the statute’s purposes. Professor Horton describes this movement as a shift from a purely textualist approach to a broader purposivist analysis.<sup>244</sup> Under purposivism, courts should consider the “general purpose” of a statute by trying to

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237. 529 U.S. 861 (2000).

238. *Id.* at 865–66, 869 (2000).

239. *Id.* at 867–68. The *Geier* Court also discussed how the presence of a savings clause is a textual indication that Congress intended the statute to have a limited preemptive effect. Ultimately, however, the *Geier* Court found that the state regulation at issue was preempted under general conflict preemption principles. *Id.* at 874.

240. Hiro N. Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 Y.B. ON ARB. & MEDIATION 39, 54 (2012).

241. *See* Meltzer, *supra* note 38, at 10 (discussing Justice Thomas’s reliance on a pure textualist approach to reading statutes for preemptive effect).

242. Horton, *supra* note 2, at 1245, 1248.

243. *Id.* at 1263.

244. *Id.* at 1223.

determine “how an objectively reasonable congressperson would have understood a statute’s ambitions” at the time of the statute’s passing.<sup>245</sup> In reaching this determination, courts should certainly consider the text, legislative history, and legal principles to determine the “spirit” of the law.<sup>246</sup>

While Professor Horton suggests that the Court engaged in a purposivist analysis to justify striking down the *Discover Bank* rule in *Concepcion*,<sup>247</sup> this Article contends that the Court’s decision in that case is not even supported by purposivist principles. As noted above,<sup>248</sup> the historical documents and legislative history surrounding the FAA center on two primary purposes. First, the drafters’ primary concern was that arbitration agreements should be specifically enforced and not treated as unenforceable executory contracts.<sup>249</sup> The second purpose and objective of the FAA is to make arbitration awards enforceable after the parties have gone through the process.<sup>250</sup>

The problem with the *Concepcion* ruling is that impact preemption does not serve either of these purposes or objectives. Preempting laws that have a “disproportionate impact” is overly broad, as explained in more detail above. The purpose of the FAA that most closely supports the *Concepcion* ruling is the idea that agreements to arbitrate should be enforced according to their terms. This language, however, comes from section 4 and the *Volt* case, which turned on section 4, not section 2.<sup>251</sup> The incredible breadth of impact preemption moves preemption analysis well beyond both the text, and the purposes and objectives of section 2 of the FAA, the only section that applies to the states. Returning to a classic application of conflict preemption would put the Court more in line with the purposes and objectives of the statute.

### C. Impact Preemption Is a Results-Oriented Creation

The Court’s new impact preemption appears to be motivated by business—not legal—interests.<sup>252</sup> The pro-business rhetoric began in the

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245. *Id.* at 1245 (internal quotation marks omitted).

246. *Id.*

247. *Id.* at 1254.

248. For a discussion on the legislative history of the FAA, see *supra* Subsection I.B.2.

249. See *supra* notes 31–35 and accompanying text.

250. See *supra* Subsection I.B.1.b.

251. See *supra* notes 128–38.

252. See Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 659, 684 (2013) (“In the last few years, arbitration agreements in the consumer context have become under fire for being ‘pro business,’ especially those contracts that limit the consumers’ ability to proceed as a class.”); David Korn & David Rosenberg, *Concepcion’s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151,

Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>253</sup> which was, interestingly, a dispute involving an arms-length transaction among business owners, as opposed to a business and a consumer.<sup>254</sup> In a case turning on arbitrability—the question of who should decide whether a dispute should be arbitrated at all—the Court found that an arbitration panel erred in proceeding with a class action when the parties stipulated that the contract was “silent” on the issue.<sup>255</sup> The Court found the arbitrators “exceeded their powers” because of the vast differences between class and bilateral proceedings.<sup>256</sup> It stated that “class-action arbitration changes the nature of arbitration” by sacrificing cost and efficiency,<sup>257</sup> resulting in a procedure involving *high stakes* for the defendant party.<sup>258</sup> The Court echoed these themes two years later in *Concepcion*.

The Court essentially decided *Concepcion* on business grounds.<sup>259</sup> The decision specifically weighed business interests more heavily than consumer interests:

[C]lass arbitration greatly increases risks to *defendants*. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. *Defendants* are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a

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1153, 1158 (2013) (providing an in-depth analysis of the Court's pro-defendant and pro-business bias in *Concepcion*).

253. 130 S. Ct. 1758 (2010).

254. *See id.* at 1764. The *Stolt-Nielsen* case involves agreements to ship liquids over international waters. *Id.* This case starkly contrasts with a case such as *Concepcion*, which involves a large class of individuals who purchased “free” phones from AT&T. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

255. *Stolt-Nielsen*, 130 S. Ct. at 1764, 1775 (holding that an arbitrator cannot find an implicit agreement to arbitrate as a class).

256. *See id.* at 1767.

257. *Id.* at 1775; *see also Concepcion*, 131 S. Ct. at 1751 (“First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 n.5 (2013) (noting that *Concepcion* all but decides the case on the issue of class action waivers).

258. *See Stolt-Nielsen*, 130 S. Ct. at 1776. Although the *Stolt-Nielsen* case involves a business–business dispute, the holding has wide application in consumer and employment cases. *See Bales & Gerano*, *supra* note 111, at 417; Drahozal, *Error Correction*, *supra* note 153, at 30, 33.

259. *See Korn & Rosenberg*, *supra* note 252, at 1152–53 (“Whether intended or not, *Concepcion*'s default rule against class arbitration creates a potent structural and systemic bias in favor of defendants.”).

devastating loss, *defendants* will be pressured into settling questionable claims.<sup>260</sup>

The Court then went on to note that defendants would not be willing to engage in “bet the company” claims in arbitration due to the limited nature of review.<sup>261</sup>

Interestingly, the Court has only become concerned about these types of high-stakes and bet-the-company claims in recent years and in the class action context. Previously, the Court approved of high-stakes, statutory-rights cases going to arbitration, including those involving antitrust, RICO, securities, and discrimination claims.<sup>262</sup> Many of these claims are, or can become, bet-the-company cases, and all are arbitrable. In fact, the business community was the largest proponent of the arbitrability of these types of cases.<sup>263</sup> After the business interests convinced the Court that statutory claims are arbitrable, “repeat players” began including arbitration agreements in all form contracts, including credit card and cellular telephone contracts, and employment agreements.<sup>264</sup> Some businesses became repeat players in arbitration and acquired skill in choosing arbitrators, navigating the system, and keeping awards confidential.<sup>265</sup> By

260. *Concepcion*, 131 S. Ct. at 1752 (emphasis added). The Court does not cite any authority for these propositions other than a single circuit opinion given as an example. *Id.* (citing *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677–78 (7th Cir. 2009)). In the class action litigation setting, the drafters of the *Federal Rules of Civil Procedure* noted that when a court grants class certification, defendants may feel pressure “to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.” FED. R. CIV. P. 23(f) advisory committee’s notes; see also *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1199–1200 (2013).

261. *Concepcion*, 131 S. Ct. at 1752.

262. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616, 640 (1985) (holding an arbitration act valid under the Sherman Act); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (holding that section 14 of the Securities Exchange Act did not prohibit arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (holding a claim under the Age Discrimination in Employment Act can be subject to compulsory arbitration in a securities registration application).

263. For instance, in the area of securities, the SEC historically opposed arbitrating consumer claims. In the landmark case *Wilko v. Swan*, the SEC filed an amicus brief siding with consumers who ultimately won their argument that consumer statutory claims should not be arbitrated. See 346 U.S. 427, 428 n.\*, 434–35 (1953). Thirty years later, the SEC switched its position and overturned *Wilko*. See *Rodriguez de Quijas*, 490 U.S. at 484.

264. See Bagenstos, *supra* note 200, at 67 (“[Arbitration critics] contend that arbitration favors employers, who, as repeat players, have an outsized influence on the selection of arbitrators. They contend that virtually all of the process that arbitration removes is process that benefits workers.” (footnote omitted)); L. Ali Khan, *Arbitral Autonomy*, 74 LA. L. REV. 1, 50 (2013); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 478 (2011) [hereinafter Cole, *Babies and Bathwater*].

265. Khan, *supra* note 264, at 50. For an overview of empirical evidence in the area of consumer arbitrations, see Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051 (2009).

contrast, the consumers, employees, and other “one-shot players” have less institutional knowledge of arbitration—a potential disadvantage in the process, although empirical data suggests that one-shot players are not actually disadvantaged in the arbitral forum.<sup>266</sup>

Now that many in the business community have become successful in requiring the arbitration of an assortment of disputes with one-shot players, business interests have pushed the envelope even further in requiring that the arbitration occur individually.<sup>267</sup> Many standard contracts now contain class action waivers facially applicable in both litigation and arbitration.<sup>268</sup> Since the *Concepcion* decision, lower courts have largely enforced these agreements and required individual arbitration.<sup>269</sup> With one exception,<sup>270</sup> the Supreme Court has ruled that class action waivers can be enforced according to their terms, and in the four cases involving this issue, business interests promoted these arguments.<sup>271</sup>

These arbitration opinions appear in line with a recent trend in making access to class action procedures more difficult, thus making the application of impact theory to preemption particularly troubling.<sup>272</sup> For

266. See Cole & Blankley, *supra* note 265, at 1054 n.17, 1056–57.

267. See William J. Woodward, Jr., *Legal Uncertainty and Aberrant Contracts: The Choice of Law Clause*, 89 CHI.-KENT L. REV. 197, 201 n.13 (2014) (“The new world of individual arbitration as the near-exclusive method of addressing consumer-business disputes that arise from a contract has made the problems much worse.”).

268. See, e.g., *AT&T Wireless Customer Agreement*, AT&T, <http://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement#arbAgreement> (last visited Feb. 28, 2015); *Chase Liquid Agreement*, CHASE 10, [https://www.chase.com/content/dam/chasecom/en/debit-reloadable-cards/documents/chase\\_liquid\\_terms\\_conditions.pdf](https://www.chase.com/content/dam/chasecom/en/debit-reloadable-cards/documents/chase_liquid_terms_conditions.pdf) (last visited Feb. 28, 2015) (containing explicit class action waivers).

269. See, e.g., *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 176 (4th Cir. 2013) (reversing the lower court’s holding of a class action waiver as unconscionable); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1236 (11th Cir. 2012) (holding that a class action waiver and arbitration clause were enforceable under *Concepcion*); *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 232–33, 237 (3d Cir. 2012) (upholding the validity of an arbitration agreement that did not contain an express class action waiver).

270. See *Oxford Health Plans LLC v. Sutton*, 133 S. Ct. 2064, 2071 (2013) (allowing an arbitrator’s decision to stand when the arbitrator read the contract broadly, allowing a class action procedure).

271. See *Am. Express Co. v. Italian Colors Rest*, 133 S. Ct. 2304 (2013); *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Bazze v. Green Tree*, 539 U.S. 444 (2003).

272. See, e.g., *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (finding no justiciable claim for class relief under the Fair Labor Standards Act when the named plaintiff’s claim becomes moot); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432–33 (2013) (finding that the district court erred in certifying a class action of two million customers against a large cable company in an antitrust claim on the grounds that the plaintiffs had not sufficiently proven their damages theory at the certification stage); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547, 2556–57 (2011) (finding that the district court erred in certifying a class of 1.5 million women in discrimination lawsuit because there was no commonality). *But see Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013) (upholding class certification in a securities fraud class

instance, the Court issued its decisions in *Concepcion* and *Wal-Mart Stores, Inc. v. Dukes*<sup>273</sup> in the same term, causing some to question the future of class procedures in any forum.<sup>274</sup> The combination of impact preemption with bilateral arbitration essentially insulates businesses from liability, especially liability stemming from low dollar claims that are inefficient to bring individually.<sup>275</sup> The Court's new jurisprudence appears to be results-oriented decision-making that seeks to protect business interests, rather than constitutional integrity.<sup>276</sup>

#### D. Conclusion: Impact Preemption Is Broader than Field Preemption

Impact preemption has the potential to be even broader than field preemption. While both types of preemption have some similarities, impact preemption, which is *supposed* to be an application of conflict preemption, has some applications considerably broader than even field preemption. This Section explores the intersection between impact, field, and conflict preemption.

First, the scope of preemption differs among all three types of preemption. Conflict preemption is supposed to involve the narrowest

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action on the grounds that the plaintiff class need not prove the merits of “materiality” in a fraud-on-the-market claim); *Knox v. Serv. Emps. Int’l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (finding that class action was not moot despite the fact that the defendant offered full refunds as a maneuver to avoid class treatment); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2183 (2011) (holding that security fraud plaintiffs need not prove loss causation to obtain class certification). For more information on the current treatment of class action litigation, see Angela D. Morrison, *Duke-ing Out Pattern or Practice After Wal-Mart: The EEOC as Fist*, 63 AM. U. L. REV. 87 (2013); Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J. L. REFORM 1097 (2013).

273. 131 S. Ct. 2541 (2011).

274. See, e.g., Jean R. Sternlight, *Tsunami*: *AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 & n.3, 708 (2012) (noting that the future of consumer and employment discrimination class actions looked “grim”); Jenna C. Smith, Comment, “*Carving at the Joints*”: *Using Issue Classes to Reframe Consume Class Actions*, 88 WASH. L. REV. 1187, 1188 (2013) (calling into question the future of class action practice following *Dukes*).

275. One interesting trend in the area of repeat player and one-shot player arbitration has been the inclusion of premium payments for those who reject the company’s last offer and then get a higher award from the arbitrator. See 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). The inclusion of these premium payments (usually around \$7500) should incentivize the companies to make a full offer of damages to make the plaintiff whole. See, e.g., *id.* (noting that AT&T’s arbitration agreement provides that the company will pay claimants at least \$7500 and two times the claimant’s attorney’s fees if the claimant obtains an arbitration award that exceeds the company’s last settlement offer). However, the premium payments are still well below what a lawyer would charge to represent an individual, either on an hourly fee or a contingency basis.

276. See, e.g., Zellmer, *supra* note 234, at 1671 (noting that the preemption decisions in the Rehnquist and Roberts Courts have been unprincipled and results-oriented).



scope. For example, conflict preemption applies only when it is *impossible* for a person to comply with both the federal and the state regulation at the same time.<sup>277</sup> Conflict preemption can also apply to a state regulation if the “purpose of the act” cannot be accomplished.<sup>278</sup> These tests are limited to actual conflicts, and the scope is only as large as the actual conflict.<sup>279</sup> Field preemption involves a broader scope of federal power, applying when “the matter on which the state asserts the right to act is in any way regulated by the federal government.”<sup>280</sup> For field preemption to apply, the federal government must actually occupy the field through regulation. Consistent with federalism concerns, the Supreme Court applies field preemption sparingly, usually in highly specialized areas such as alien registration,<sup>281</sup> locomotive safety,<sup>282</sup> and tanker operations and design.<sup>283</sup>

Impact preemption is not akin to either of these traditional types of preemption. Impact preemption appears to apply whenever state regulation disproportionately “impacts” or affects arbitration in “practice.”<sup>284</sup> While not defined in *Black’s Law Dictionary*, one ordinary definition of impact is very broad, including: “the force of impression of one thing on another.”<sup>285</sup> In other words, all that is required for an impact is some type of force of impression on federal arbitration law. Notably, the definition does not

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277. See, e.g., *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2470 (2013) (finding it impossible for pharmaceutical companies manufacturing generic drugs to obey both a federal law requiring the use of one label and a state law requiring the use of a different label at the same time); *Gade v. Nat’l Solid Wastes Mgmt. Assoc.*, 505 U.S. 88, 98 (1992) (plurality opinion) (noting that conflict preemption exists where the concomitant compliance with federal and state regulations is impossible).

278. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

279. The Supreme Court has repeatedly warns that conflict preemption should be narrowly applied, and it has created presumptions (like the presumption against preemption) to ensure the narrowness of the scope. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1984–85 (2011) (finding the test for preemption more burdensome when Congress intends to allocate “authority between the Federal Government and the States”); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (“When considering pre-emption, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946)) (internal quotation marks omitted)); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (noting that parties seeking preemption must “overcome the presumption against finding pre-emption” in fields in which the states traditionally regulate).

280. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 213 (1983) (quoting *Rice*, 331 U.S. at 236) (internal quotation marks omitted).

281. See *Arizona v. United States*, 132 S. Ct. 2492, 2497, 2503 (2012).

282. See *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1264 (2012) (regarding the Locomotive Inspection Act).

283. See *United States v. Locke*, 529 U.S. 89, 101, 112–14 (2000) (noting the field preemption of provisions of the Ports and Waterways Safety Act of 1972).

284. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

285. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1131 (Philip Babcock Gove, 3d ed. 1993).

require a conflict—just a force of impression. As noted below, this definition would encompass any state regulation of arbitration.<sup>286</sup> Impact preemption, then, is broader than field preemption because Congress does not currently occupy the “field” of arbitration and because the nexus of having an impact or an impression on the FAA is broader than any preemption principle seen to date.

Second, the ability of states to fill in the regulatory gaps differs among the preemption styles. Under traditional conflict preemption, states are free to legislate in any way that does not conflict with federal regulation.<sup>287</sup> Consistent state regulations and gap-filling provisions are, by definition, not *conflicting*; they are, therefore, permissible areas of state regulation. In contrast, when field preemption applies, states are unable to regulate anything within the boundary of the field, even when the state regulation would be consistent or gap-filling.<sup>288</sup> Impact preemption also appears to limit states’ ability to regulate consistently with the FAA or to fill in the many gaps in the FAA’s coverage of arbitration regulation. Under *Concepcion*, any state law that has a “disproportionate impact” on arbitration is subject to preemption without regard to a conflict in the statutes.<sup>289</sup>

The Court’s new test simply cannot be called an application of conflict preemption. Nor can it be called an extension of conflict preemption. None of the hallmarks of conflict preemption can be found in the new impact-preemption test. Taking the Court’s test to its logical conclusions also demonstrates that impact preemption is broader than field preemption. In the arbitration context, field preemption would be completely unwarranted, and the Court’s new test can only be a product of results-based decision-making.

#### IV. IMPACT PREEMPTION’S POLICY REPERCUSSIONS

Impact preemption has broad policy flaws. Chief among these flaws are implications for federalism, freedom to contract, separation of powers, and the Court’s power to create law, as opposed to simple interpretation of the law. This Part considers how impact preemption implicates these important policies.

##### A. *Federalism Concerns*

Impact preemption offends basic notions of federalism. As noted above, preemption principles are founded on a careful balance of powers between the federal and state governments. Over the course of the last four decades,

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286. See *infra* Section IV.A.

287. See *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1398 (2013) (holding that state law is only preempted when a direct conflict exists between the state and federal law).

288. See *supra* notes 17–19 and accompanying text.

289. See *supra* note 183 and accompanying text.

the Court has increasingly taken power away from the states in an unprincipled line of decisions, ultimately creating impact preemption and severely limiting state regulation under the Supremacy Clause.<sup>290</sup>

The rightful place of state arbitration regulation prior to *Concepcion* was unclear due to the Supreme Court's failure to engage in a preemption analysis. In a post-*Concepcion* world, the states' role is even less clear. A few examples help illustrate this point. For instance, a number of states, including Kentucky, have a relatively straightforward law stating: "A party has the right to be represented by an attorney at any [arbitration] . . . . A waiver thereof prior to the proceeding or hearing is ineffective."<sup>291</sup> A statute like this, allowing for lawyer representation, helps ensure that parties can be adequately represented in arbitration, and Kentucky normally would be able to legislate in this manner to protect citizens under the general police power. The FAA is silent on the issue of the right to representation, so under traditional conflict analysis, this statute would not *directly conflict* with the FAA. On the other hand, legal representation certainly has an "impact" on arbitration. Adding lawyers to the arbitration process might make arbitration costlier, less efficient, and more complex. One might assume that this type of law would not be preempted, but the Court's impact preemption analysis suggests that states cannot regulate in this way.

Other state statutes contain measures to provide even greater protection for citizens, especially consumers. Consider a Montana statute stating that "[a]n agreement concerning venue involving a resident of [Montana] is not valid unless the agreement requires that arbitration occur within the state of Montana."<sup>292</sup> This statute seeks to protect the citizens of Montana by allowing them to arbitrate on their "home turf." The statute does not invalidate any agreements to arbitrate and would only strike a contrary forum-selection clause.<sup>293</sup> Again, there is no direct conflict with the FAA because the FAA does not contain any provisions regarding forum. This statute, however, has an "impact" on arbitrations with Montana residents

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290. See Cole, *Federalization of Consumer Arbitration*, *supra* note 11, at 276–77 ("The Supreme Court's anti-federalism approach to arbitration precludes states from engaging in the kind of democratic experimentation with different regulatory approaches that federalism typically encourages and that, generally, results in well-considered solutions to existing problems." (footnote omitted)).

291. KY. REV. STAT. ANN. § 417.100 (West 2014).

292. MONT. CODE ANN. § 27-5-323 (West 2014) (allowing parties to waive this provision and arbitrate outside of the state if they so agree after receiving advice of counsel).

293. *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1245 (Mont. 1998). The Montana Supreme Court held that this provision did not conflict with the FAA and was, therefore, good law. *Id.*

by dictating where they must take place and it may very well be preempted the next time its validity is litigated.<sup>294</sup>

Some states' regulations now allow for multi-party arbitrations that fall short of a class action. For instance, Florida passed a statute allowing a court to consolidate "separate arbitration proceedings" into one proceeding.<sup>295</sup> As noted above, the FAA says absolutely nothing about consolidated actions; however, this type of law has an "impact" on arbitration. In fact, the impact that consolidation has on arbitration threatens the very definition of bilateral arbitration now espoused by the Court. Following *Concepcion*, strong arguments now exist that all consolidation statutes are preempted.

As these examples show, areas of arbitration law traditionally regulated by the states are now potentially subject to preemption due to the Court's overreaching. Preemption doctrines historically sought to preserve the balance between state and federal regulatory authority with a healthy regard for state authority in areas, like arbitration, traditionally regulated by the states.<sup>296</sup> Under a system of true conflict preemption analysis, the states should be allowed to regulate areas such as judicial review, availability of representation, class actions, discovery provisions, arbitrator selection,

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294. As an aside, the U.S. Supreme Court and the Montana Supreme Court have not always ruled consistently on these arbitration preemption issues. The *Casarotto* case discussed *supra* also involved a protectionist Montana statute, but arguably an important difference exists between the "first page" rule and the venue rule embodied in these statutes. Under the "first page" rule, arbitration agreements are *unenforceable* if the arbitration clause does not appear on the first page of the contract. *Doctor's Assocs., Inc. v. Casarotto*, 571 U.S. 681, 684 (1996). Under the venue rule, a contrary venue provision is struck from the agreement and the dispute is subject to arbitration in the state of Montana. *See* MONT. CODE ANN. § 27-6-323.

295. FL. STAT. ANN. § 682.033 (2014). The Florida statute would require that the court make the following findings:

- (a) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;
- (b) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;
- (c) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
- (d) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

*Id.* Because all parties are present, a consolidation is different than a class action.

296. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 133 (2004); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

ethics, and other issues that are neither addressed in the FAA nor specifically regulated by federal courts.

In addition to curtailing the ability of states to regulate arbitration specifically, impact preemption potentially limits incorporation of state law into the FAA through the savings clause.<sup>297</sup> Because the savings clause requires courts to apply state contract law to determine the validity of agreements to arbitrate, the balance between federal and state regulation should weigh in favor of state authority.<sup>298</sup> To the contrary, impact preemption might render the savings clause meaningless because general contract law has an “impact” on arbitration. Notably, unconscionability law has a large “impact” on arbitration, and the vast majority of successful unconscionability challenges to contracts occur in the arbitration setting.<sup>299</sup> If unconscionability is more successful in invalidating arbitration agreements than contracts as a whole, then it would seemingly fail the impact preemption test. A logical extension of the impact preemption doctrine would jeopardize other facially-neutral contract defenses, including fraud and duress.<sup>300</sup>

In the *Concepcion* dissent, Justice Stephen Breyer expressed deep concerns about federalism in arbitration regulation. He stated:

[Under the savings clause,] Congress retained for the States an important role incident to agreements to arbitrate . . . . Congress reiterated a basic federal idea that has long

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297. See *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1154 (9th Cir. 2013) (“After analyzing both *Concepcion* and subsequent cases, we conclude that *Concepcion* further limited the FAA’s savings clause . . . .”); 9 U.S.C. § 2 (2012) (making agreements to arbitrate enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract”).

298. See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011) (relying on the savings clause to find part of Arizona’s licensing law not preempted stating: “Congress chose to leave [certain parts of the regulation] to the States and therefore [Arizona’s law] is not expressly preempted”); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 612–13 (1991) (noting that preemption is less likely to be found in situations in which the statute specifically gives a portion of the regulation to the states).

299. See Kenneth A. DeVille, *The Jury is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims: Law, Ethics, and Prudence*, 28 J. LEG. MED. 333, 357–58 (2007) (noting that “[a]lthough claims of unconscionability are ordinarily difficult to sustain, courts will void arbitration agreements in select circumstances.”); Sternlight, *supra* note 274, at 707 (“While *Concepcion* will have less impact in those jurisdictions that had already permitted companies to use arbitration to insulate themselves against class actions, the analysis that follows shows that *Concepcion* is having a significant impact in those jurisdictions that previously allowed unconscionability attacks against arbitral class action waivers.” (footnote omitted)); *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 219 (2013), *cert. denied*, 134 S. Ct. 2724 (2014).

300. Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 153, 164 n.64 (2014). The *Concepcion* decision involved an application of unconscionability law; the California *Discover Bank* test was a specific application of unconscionability in the area of class action waivers. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746–47 (2011). Open questions may exist regarding whether unconscionability generally may be used as a defense to the validity of an arbitration agreement.

informed the nature of this Nation's laws . . . . But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach.<sup>301</sup>

Justice Breyer recognized—though not explicitly—the lack of clarity in the area of FAA preemption. Without additional, clear expression of the scope of preemption under the FAA, impact preemption will likely continue to eviscerate the states' role in arbitration.<sup>302</sup>

Without any guidance in the area of FAA preemption, the Court now has license to preempt any state law dealing with arbitration. The Court needs to step back and consider more seriously the type of preemption it intends to apply and then create careful rules to balance the textual limitations within the FAA, the purposes and objectives of the Act, and the proper role for the states. When the Court undertakes this task, it should conclude that limited conflict preemption should apply to the FAA, with the conflicts limited to the enforcement of arbitration agreements and, potentially, arbitral awards.

### B. *Freedom to Contract Concerns*

The Supreme Court's recent impact preemption decisions have not only affected the ability of states to regulate arbitration but also parties' abilities to contract for a procedure that best suits their needs—even in arms-length transactions. While it now sounds cliché, the Court previously understood that “[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,”<sup>303</sup> and to

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301. *Concepcion*, 131 S. Ct. at 1762 (Breyer, J., dissenting) (citations omitted).

302. In addition, the Supreme Court has been very quick to act in this area, which is contrary to federalism practice. Usually, the Court likes to give the states time to digest their decisions, experiment in their own jurisdictions, and otherwise struggle to determine how to best regulate an area within their own borders. In the area of arbitration, however, the Court has been extraordinarily quick to interfere. For instance, the Court granted certiorari in *Concepcion* less than two years following the issuance of the *Discover Bank* rule. *See id.* at 1745. The Court was even quicker to act in the *Marmet Health* case. In that case, the Court granted certiorari on the very first case that the West Virginia Supreme Court decided on the issue of the public policy surrounding arbitration clauses in the field of nursing home contracts. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam). The Court clearly wanted to jump in as soon as possible, rather than allow the states room to experiment and give them the opportunity to find out how to best regulate within their own borders.

303. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (alteration in original) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)) (internal quotation marks omitted).

overcome the “judicial hostility” towards arbitration agreements present at the turn of the twentieth century.<sup>304</sup>

If the FAA preserves the parties’ right to contract for arbitration, then parties should have the ability to be creative and utilize the arbitration procedure in the way that best meets their needs.<sup>305</sup> Unlike the standard judicial procedures available, parties in arbitration should have the ability to determine, for example: who will be the decision maker, how many decision makers will be involved, whether to tailor discovery rules, whether a live hearing will occur, the location of the hearing, the language of the hearing, applicable time limitations on presentations, applicable rules of evidence, applicable substantive law,<sup>306</sup> applicable time limitations on arbitrators to issue awards, and the availability of temporary or injunctive relief and class remedies, among countless other options. Parties choose arbitration, in part, to take advantage of these types of procedural informalities and to custom design a process to best meet the needs of all of the participants.<sup>307</sup>

Unfortunately, the Supreme Court’s recent decisions have eroded this freedom of contract. Impact preemption jeopardizes the parties’ established right to arbitrate “according to [the terms] of private agreements” as well as the previously established norm that “no federal policy favor[s] arbitration under a *certain set of procedural rules*.”<sup>308</sup> The erosion of the policies set forth in *Volt* goes far beyond the confusion the Court created

304. *Id.* These policies are firmly rooted in the text of the FAA. *See* 9 U.S.C. § 2 (2012) (making agreements to arbitrate “enforceable”); 9 U.S.C. § 4 (2012) (requiring federal courts to compel arbitration “in the manner provided for in [the parties’] agreement”); *see also* James Savage, *The Majority Approach to Arbitration Waiver: A Workable Test or a License for Litigants to Play Games with the Courts?*, 11 U. N.H. L. REV. 217, 217 (2013) (“The freedom of parties to agree to arbitrate their disputes is enshrined by contract law and federal law.”).

305. Of course, the options are not limitless and must be reined in with contract principles such as unconscionability. Provided that the procedures are lawful and conscionable, then the parties should be able to agree to resolve their disputes in a way that best makes sense for them.

306. As a general matter, parties have the ability to determine the substantive law that will govern their dispute and to choose the law that governs the arbitration proceedings. Kaleena Scamman, *ADR in the Music Industry: Tailoring Dispute Resolution to the Different Stages of the Artist–Label Relationship*, 10 CARDOZO J. CONFLICT RESOL. 269, 289 (2008). Under *Volt*, the Court discussed how a choice-of-law clause is an extension of the parties’ general right to contract. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–79 (1988). While *Volt* continues to be cited as good law, the Court seems to be slowly taking away the power of parties to contract for their own dispute resolution procedure.

307. *See* Stanley Sklar, *Arbitration Advocacy: Its Role in Business and Legal Education, and New Options for Dispute Resolution*, 11 DEPAUL BUS. & COM. L.J. 441, 452 (2013) (“There is no greater flexibility than in arbitration. It is far more flexible than the court process.”); Neal M. Eiseman et al., *A Tale of Two Lawyers: How Arbitrators and Advocates Can Avoid the Dangerous Convergence of Arbitration and Litigation*, 14 CARDOZO J. CONFLICT RESOL. 683, 701 (2013) (“The perceived benefits of arbitration, including flexibility, speed, and relative affordability, should be safeguarded at the pre-hearing conference.”).

308. *Volt*, 489 U.S. at 476 (emphasis added).

when it ruled in *Mastrobouno* that certain choice-of-law clauses are not enforceable.<sup>309</sup> Now, impact preemption may interfere with the parties' ability to contract around the FAA. Although the *Concepcion* majority recognizes the parties' freedom of contract and their ability to choose their own rules, this negative language leaves questions about what the Court would do in a situation involving parties who are truly willing to have a class arbitration.

The first real blow to the ability of parties to contract for their own arbitration procedures—outside of the *Mastrobuono* case—came in 2008 with the Court's decision in *Hall Street Associates v. Mattel, Inc.*<sup>310</sup> In *Hall Street*, the Court expressly held that parties could not contract for greater judicial review than that provided in the FAA.<sup>311</sup> The Court suggested that a party could gain this type of greater judicial review through state courts,<sup>312</sup> but there are still open questions about whether state law providing for review more extensive than the FAA would be preempted.<sup>313</sup> If the state law would be preempted, the Court would likely hesitate to allow parties to contract for more searching review through a choice-of-law provision.<sup>314</sup> The Court's current impact preemption decisions, then, affect how parties can draft their agreements to arbitrate. If parties cannot incorporate the state law of their choosing because the law was otherwise preempted, then the Court's decisions on preemption regulate not only the states but also private parties and their ability to draft their own arbitration agreements.

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309. The *Mastrobouno* case appears at odds with *Volt* in addressing the limits of parties' abilities to contract for their own arbitration procedures. Compare *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995) (holding that a choice-of-law provision incorporated only the specified state's substantive law, not its procedures for arbitration), with *Volt*, 489 U.S. at 476 (holding that “[i]nterpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration” does not contradict the FAA).

310. 552 U.S. 576 (2008).

311. *See id.* at 578.

312. *See id.* at 590.

313. Coincidentally, an open question still exists as to whether parties can contract for *less* review than is available under the FAA. *See, e.g., In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262, 1266 (9th Cir. 2013) (noting that an arbitration agreement that “eliminates judicial review” under the FAA is “unenforceable”); *Baylor Health Care Sys. v. Equitable Plan Servs., Inc.*, 955 F. Supp. 2d 678, 695 (N.D. Tex. 2013) (distinguishing the Texas Arbitration Act, which would allow for expanded or limited review, from the FAA, which does not allow for such contractual modifications); *Smith v. AHS Okla. Heart, LLC*, No. 11-CV-691-TCK-FHM, 2012 WL 3156877, at \*3–4 (N.D. Okla., Aug. 3, 2012) (finding a fee shifting provision in an arbitration agreement unenforceable, in part, because of a limitation on judicial review).

314. Previously, under *Volt*, parties could contract to be bound by laws that would otherwise be preempted by the FAA, thus giving life to preempted state statutes. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472–73 (1988). Since *Mastrobuono*, the law regarding choice-of-law remains muddied on the extent to which parties can contract around the FAA using state law.



The FAA should be read as default rules giving parties contractual freedom.<sup>315</sup> However, the impact preemption cases—*Concepcion* and beyond—have gone to great lengths to describe a “classic” type of arbitration that forms the statutory standard of arbitration regulation. In other words, the Court has explicitly stated that arbitration must be informal, cost-efficient, and quick in order to meet the purposes of the FAA.<sup>316</sup> The Court held that class arbitration does not meet these standards because it is “slower, more costly, and more likely to generate procedural morass,” and because it creates open questions regarding the protections of unnamed class members, confidentiality, and the high stakes involved in class arbitration.<sup>317</sup> At this point, it is unclear how the Court would treat an agreement *permitting* class actions under these or different terms.

The Court’s harsh language raises the question—can parties choose to have a dispute resolution procedure that does not meet the “classic” definition of bilateral arbitration? In 2013, the Court appeared to answer that question in the affirmative in *Oxford Health Plans LLC v. Sutter*,<sup>318</sup> when an arbitrator found that the language of the contract allowed for class procedures.<sup>319</sup> But the *Italian Colors* opinion, issued mere months later with its strong language against class procedures,<sup>320</sup> has raised questions as to *Oxford Health*’s broader application.

The Court’s recent decisions (*Oxford Health* aside) cast serious doubts as to whether parties can, for instance, specifically allow class procedures, contract for state law allowing greater judicial review, or design other types of arbitration processes. Nothing in the text of the FAA would prohibit any of these variations on dispute resolution. Thus, the Court’s recent rulings ultimately impede the parties’ freedom to contract—freedom central to Congress’s and the states’ rationale for adopting arbitration acts in the first place. If the Court engaged in a principled preemption analysis and narrowly construed FAA preemption, contract drafters would be freer to contract for any type of arbitration, including complex class procedures.

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315. See Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1138 (2011) (“But the FAA has few clearly identifiable default rules, largely a consequence of its 1925 vintage. And state arbitration laws raise difficult and unsettled issues of FAA preemption, which may limit their usefulness as gap-fillers, and are themselves incomplete.” (footnote omitted)).

316. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011); see also Cole, *Federalization of Consumer Arbitration*, *supra* note 11, at 288–89 (defining the “essential nature” of arbitration to include “confidentiality of the proceedings, all parties present, knowledgeable arbitrators, lower costs, speed, efficiency, limited judicial review, and limited ‘procedural vigor’”) (quoting *Concepcion*, 131 S. Ct. at 1751).

317. *Concepcion*, 131 S. Ct. at 1750–51; see also *Stolt-Nielsen v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

318. 133 S. Ct. 2064 (2013).

319. *Id.* at 2066.

320. See *Italian Colors*, 133 S. Ct. at 2312.

While the Court has routinely enforced the ability of parties to arbitrate, it must now be willing to allow the parties to contract for any type of arbitration that they would like, including class claims.

### C. *Other Contractual Concerns*

The Supreme Court has long described the FAA as an antidiscrimination statute intended to put arbitration clauses on “equal footing” with every other type of contract.<sup>321</sup> The Court’s impact preemption decisions, however, have placed arbitration on a pedestal and have treated agreements to arbitrate differently than all other contracts.

Although the Court continues to state that agreements to arbitrate should be treated the same as any other contract,<sup>322</sup> the Court’s impact preemption decisions now treat arbitration—especially bilateral arbitration—with a certain reverence not supported by any law, much less the FAA. As Justice Breyer noted in his dissenting opinion in *Concepcion*, prior arbitration precedent was never concerned with the merits of class actions, only with the “equal treatment of arbitration contracts and other contracts. Since [that question] is at issue here, I am not surprised that the majority can find no meaningful precedent supporting its decision.”<sup>323</sup> The Court has increasingly shown a preference for arbitration agreements over other types of contracts, enforcing agreements to arbitrate in a bilateral manner whether or not the parties appear to have contracted for such arbitration.

If the Court wants to treat agreements to arbitrate in the same manner as any other contract, the Court should temper its preemption doctrine decisions and uphold state laws that try to regulate contract issues. But the Court appears to favor arbitration agreements, restricting the states’ ability to regulate general contract law within their borders if arbitration agreements happen to be affected by that law. The Court, then, is not putting arbitration “on equal footing” with other contracts, but is instead giving it a higher status that Congress never intended.

## V. PROPOSAL: A RETURN TO CONFLICT PREEMPTION PRINCIPLES

Given the ad hoc manner in which the Court has been proceeding in the area of arbitration preemption for the last forty (or more) years, it must go back to basics and conduct a traditional preemption analysis. When the Court engages in this type of analysis, it will have to conclude that

321. *See, e.g.,* *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)); *see also* *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777–78 (2010); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008).

322. *Vaden v. Discover Bank*, 556 U.S. 49, 64 (2009); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006).

323. *Concepcion*, 131 S. Ct. at 1762 (Breyer, J., dissenting).

traditional conflict preemption applies to the FAA and that the impact preemption test it created in *Concepcion* is significantly broader than any other conflict preemption test. After abandoning the impact preemption test, the Court should return to the principles and objectives of the FAA, and should consider the traditional limitations on preemption in areas, such as arbitration, that have historically been regulated by the states. Finally, given the congressional deadlock on the issue of arbitration over the past decade or two, the Supreme Court stands in the best position to engage in this type of change, even if such a change means that the Court will have to overrule its decision in *Concepcion*.

#### A. *The Supreme Court Must Engage in a Preemption Analysis*

First and foremost, the Court needs to engage in a formal and principled preemption analysis for the FAA. The Court simply cannot continue its arbitration jurisprudence without undertaking this fundamental task. The Court is in an untenable situation precisely because it has not previously engaged in this exercise.<sup>324</sup> The remedy is to engage in this analysis and establish the rules and parameters of arbitration preemption.

When the Court engages in this analysis, it will have to again conclude that conflict preemption applies to the FAA. As detailed above more fully,<sup>325</sup> conflict preemption is the only type of preemption that could apply to the FAA. Based on the text of the FAA, express preemption cannot apply.<sup>326</sup> In addition, the limited nature of the FAA and the lack of regulatory oversight makes traditional field preemption analysis inappropriate.<sup>327</sup> Although some scholars describe the FAA as “comprehensive,”<sup>328</sup> they use this term simply to mean that the courts have the power to specifically enforce arbitration agreements as well as the ability to enforce arbitration awards<sup>329</sup>—not as an indication of the appropriate type of preemption. The term “comprehensive” could also mean that this task is all that the states traditionally needed to do, and that the alleged gaps would be filled by contract terms.

Arbitration scholars would not classify the FAA as “comprehensive” for preemption purposes because states have always played a critical role in arbitration regulation and because the FAA leaves significant gaps that state regulation could fill.<sup>330</sup> Thus, conflict preemption is the only type of preemption available to the Court.

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324. *See supra* Section IV.A.

325. *See supra* Subsection I.B.4.

326. *See supra* Subsection I.B.4.

327. *See supra* Section III.D.

328. *See supra* note 34.

329. *See supra* note 33 and accompanying text.

330. Of course, the terms can also be filled in by the parties in their agreement to arbitrate.

In addition to being the jurisprudentially correct thing to do, clearly defining the role of preemption will significantly benefit the other stakeholders in play. Lower courts, for instance, are currently at a loss regarding how to treat arbitration preemption issues. Since *Concepcion*, the lower federal courts have issued a myriad of conflicting decisions concerning the ability of states to regulate issues such as class actions, unconscionability, and other important issues.<sup>331</sup> Having clear boundaries on preemption would greatly aid the lower courts in applying a consistent, nation-wide rule.

Moreover, clear preemption boundaries would greatly aid states in understanding the limitations on their regulatory authority. Currently, states are essentially passing legislation without a clear view of the regulations' validity. Impact preemption has the real potential to displace all state regulation (statutory and common law) that has any type of influence on arbitration, whether such influence is consistent with the FAA or even covered by the FAA. States would be greatly aided if they understood the contours of FAA preemption and could better regulate within the scope of their authority.

Finally, clear preemption boundaries would give contracting parties a better idea of how arbitration agreements will be enforced as well as the scope of appropriate contract terms. Simultaneous with the creation of impact preemption, the Court has also made some statements suggesting that "arbitration" is defined as bilateral arbitration to the exclusion of class proceedings and other types of complex proceedings. Clarifying the limits of federal power over arbitration would greatly influence how parties craft their arbitration agreements.

In sum, having a principled discussion of the limits of conflict preemption as it applies to the FAA will have many positive benefits. This type of ruling will bring arbitration preemption in line with preemption jurisprudence generally. It will also greatly aid lower courts, state governments, and contracting parties—the primary stakeholders—in governing their behavior in the area of arbitration.

### B. *A Return to Conflict Preemption*

Having articulated that conflict preemption should apply to the FAA, the next question concerns the boundaries of this preemption. Preemption in this context should be limited to account for the dual role of federal and state regulation. It should also be limited to the purposes and objectives of the FAA under the established test for conflict preemption.

As noted above, based on the text, legislative history, and legal history, the FAA has two purposes and objectives.<sup>332</sup> The first is to enforce

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331. *See supra* note 269.

332. *See supra* Section I.B.

agreements to arbitrate. The second is to make arbitral awards enforceable as court judgments. Of these two purposes and objectives, only the prior can have preemptive effect because of textual limitations in the FAA. Thus, FAA section 2 should be the only portion of the FAA with preemptive effect.<sup>333</sup> All of the other provisions of the FAA have explicit jurisdictional language making them only applicable in the federal courts.<sup>334</sup>

In addition, federalism dictates that the states should be able to regulate issues not covered in the FAA. The list of things *not* covered is tremendous—and nothing in the FAA suggests that the states cannot legislate in these areas. Items not covered by the FAA include: regulations on discovery in arbitration, arbitrator qualifications, arbitrator regulation and malpractice, evidentiary burdens in arbitration, statutes of limitations for arbitration, evidentiary standards, notice requirements, consolidation procedures, class action procedures, and appellate arbitration proceedings, just to name a few. Because the federal act does not address any of these matters—or many others—the states should feel free to regulate them if they choose. The Kentucky, Montana, and Florida statutes all mentioned above<sup>335</sup> fall into these broad categories of arbitration regulation *not* covered by the FAA. These and other statutes should all be valid exercises of state authority.

If section 2 of the FAA is the only section that would apply to the states, then the preemptive effect should be limited to state regulation that seeks to invalidate agreements to arbitrate on grounds *other* than general contract grounds. In other words, this Article suggests that the Court was correct in its *Casarotto* ruling, but it should return to this type of preemption only after engaging in a principled preemption analysis.

Following a traditional conflict preemption rule, only state regulations that invalidate arbitration agreements in particular should be preempted. The types of statutes, regulations, and case law that would be subject to preemption would include any regulation invalidating an arbitration agreement for improper use of font, clause placement, “magic words,” underlining, etc., similar to the rule struck down in *Casarotto*.<sup>336</sup>

The FAA would also preempt—either by statute or by common law—efforts to invalidate arbitration agreements in certain contexts. Such circumstances might include employment contracts, consumer contracts, industry-specific contexts (like health care or debt collection), failure to

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333. As noted above, see *supra* notes 35, 38–39, the FAA is a unique piece of legislation in that it has the substantive power to preempt state regulation but it does not establish independent subject matter jurisdiction for the courts.

334. See 9 U.S.C. §§ 3–4, 6, 9–11 (2012).

335. See *supra* Section IV.A.

336. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (invalidating a Montana law requiring that an arbitration agreement be found on the first page of a contract).

include a class action option (if such failure is specific only to arbitration), and other contexts where agreements to arbitrate would be treated differently than that of any other type of contract. This rule is displayed in the *Marmet Health Care* case, in which the Court preempted a West Virginia Supreme Court policy that invalidated all arbitration agreements simply because the contract covered patient/provider disputes in the nursing home industry.<sup>337</sup>

This preemption rule should be narrowly limited to efforts by states to *invalidate* agreements to arbitrate on grounds applying solely to arbitration. State laws regulating arbitration that stop short of invalidating agreements to arbitrate would still be valid. For instance, the California *Discover Bank* test would not be preempted under a traditional conflict preemption analysis. Under the *Discover Bank* test, if the test is satisfied and the class action waiver is found to be unconscionable, then the result would be that the parties would still have to arbitrate, but the arbitration procedure could potentially involve a class action. Similarly, states could take it upon themselves to regulate nearly every aspect of arbitration provided that they do not invalidate agreements to arbitrate on grounds special to arbitration.

This reading of preemption is consistent with the text of the FAA as a whole, as well as the purposes and objectives Congress sought to enforce with this Act. This reading also promotes federalism and the dual system of regulation of arbitration envisioned by Congress in 1925 when it passed the FAA.

### C. *The Supreme Court Must Be the Agent of Change*

The Supreme Court must be the agent of change, bringing the law of arbitration preemption back to where it meets its original intent and preserving the balance of power between the federal and state governments. While many scholars over the years (myself included) have called for congressional action in the area of federal arbitration regulation,<sup>338</sup> Congress's inability to pass any type of arbitration legislation in more than ninety years demonstrates the sheer improbability that Congress could undertake such a task.<sup>339</sup> Although numerous changes to

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337. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (reversing an invalidation of contracts as against public policy because they covered disputes in the nursing home industry).

338. See, e.g., Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1337, 1348–54; Kristen M. Blankley, *Class Actions Behind Closed Door? How Consumer Claims Can (And Should) Be Resolved by Class-Action Arbitration*, 20 OHIO ST. J. ON DISP. RESOL. 451, 464, 483–85 (2005).

339. The most recent amendment to the FAA came in 1988 when Congress added certain procedural measures, such as taking appeals from lower court decisions. 9 U.S.C. § 16 (2012). In addition, at least one scholar argues that “Congress lacks the time and capacity to consider, and reconsider, the scope of preemption as regulatory schemes evolve over time.” Meltzer, *supra* note 38, at 18.

the FAA have been introduced in Congress, none of these bills have ever moved on beyond the committee stage.<sup>340</sup> Perhaps Congress's failure is the result of requests for sweeping changes to the FAA (such as invalidating all employment, consumer, franchise, and "civil rights" actions),<sup>341</sup> as opposed to requests for a more nuanced approach to arbitration regulation that many scholars have previously suggested.<sup>342</sup> Congressional action on the preemption issue is simply unfeasible and not the best route for action.

Critics might contend that this recommendation is counterintuitive because the Supreme Court created the impact preemption test. How could the Court possibly remedy this situation? The *Concepcion* and *AmEx* decisions deeply divided the court, resulting in 5–4 and 5–3 (plus one abstention) decisions. If the composition of the Court were to change or if the right case were to come along, the Court might be able to change its course. Recent history suggests this possibility. For instance, the *Casarotto* decision involved an 8–1 decision, with Justice Thomas dissenting on the ground that the FAA should have no preemptive power.<sup>343</sup> This Article suggests returning to the outcome of *Casarotto* while engaging in a thoughtful and analytical analysis of the bounds of conflict preemption for FAA section 2.

In addition, the conclusions called for in this Article are consistent with the FAA as it is written. It is only the enforcement of FAA preemption that has become an issue. With no legislative modifications needed, the Court is the appropriate agent of change. Although the impact preemption decisions have gone astray of the FAA, they have not gone so far astray that the Supreme Court could not fix its own problem. Simply returning back to the roots of the FAA—the text, the legislative history, purposes and objectives, and the policy underlying the legislation—as well as the roots of preemption, including preserving the balance of power between the federal and state governments and limiting intrusion on the power of the states, would right the ship and restore the rightful place of arbitration regulation.

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340. See, e.g., Cole, *Babies and Bathwater*, *supra* note 264, at 458 & n.1 (discussing repeated attempts to introduce the Arbitration Fairness Act). Congress has been able to adopt some reforms to arbitration, but only in industry-specific contexts. For example, the Dodd–Frank Act prohibits the use of pre-dispute arbitration agreements in connection with residential mortgages and home equity loans. 15 U.S.C. § 1226(a)(2) (2012). Following *Concepcion*, Al Franken introduced a bill that would invalidate all pre-dispute arbitration agreements in the context of consumer wireless phone contracts, but that bill did not advance. Roxanne Palmer, *Sens. Float Phone Contract Bill to Counter Concepcion*, LAW360 (Oct. 4, 2011, 9:21 PM), <http://www.law360.com/articles/276040/sens-float-phone-contract-bill-to-counter-concepcion>.

341. See Cole, *Babies and Bathwater*, *supra* note 264, at 458 n.1, 459 n.4, 460 n.5.

342. See Burch, *supra* note 338, at 1310–11.

343. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting). Ironically, Justice Thomas was the fifth vote in *Concepcion*, which created the vast impact preemption doctrine.

## CONCLUSION

Although the problem defined in this Article may have far-reaching consequences, the ability to fix this problem is well within the reach of the Supreme Court. The Court's current jurisprudence expanding the scope of arbitration and turning conflict preemption into field preemption goes well beyond the bounds of preemption law, causing long-term problems for lower federal courts, state governments, and contracting parties. Recommending that the Court take a serious look at arbitration preemption is a small and relatively easy solution to this problem. In taking that jurisprudential look at the FAA, the Court should consider its established preemption analysis and apply that analysis in a reasoned manner to the FAA. In doing so, the Court would reset the balance between state and federal regulation in a principled manner, honor congressional intentions to create a dual federal-state system of regulation, and support the principles of freedom of contract for private parties.



