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***Concepcion* and Mis-*Concepcion*: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence**

*Richard Frankel**

ABSTRACT

States have long relied on the doctrines of unconscionability and public policy to protect individuals against unfair terms in mandatory arbitration provisions. The Supreme Court recently struck a blow to such efforts in *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*. In those two cases, the Court established that a challenge to the enforceability of unfairly one-sided arbitration clauses is preempted if it would interfere with “fundamental attributes of arbitration.” Several commentators have argued that these decisions will dramatically alter the arbitration landscape, by wiping away virtually any contract defense to the validity of an arbitration agreement and giving corporations carte blanche to impose whatever terms they want into an arbitration clause. Many practitioners are aggressively pushing courts to take a similarly broad reading of *Concepcion* and *Italian Colors*.

This article takes a contrary view. First, this article argues that the cases will have very little impact outside of the context of class action waivers, the subject matter of both *Concepcion* and *Italian Colors*. Applying state law to strike down arbitration provisions that are so one-sided as to be unconscionable ordinarily will not interfere with “fundamental attributes of arbitration” and should not be preempted.

Second, the Court's newfound focus on “fundamental attributes of arbitration” reveals why *Concepcion* should actually narrow the scope of Federal Arbitration Act (FAA) preemption rather than expand it. A careful examination of arbitration clauses shows that, if anything, the “fundamental” aspect of arbitration is choice, that is, the ability of parties to freely negotiate the terms of their arbitration agreements in an arms-length fashion. If choice is fundamental to arbitration, then what is inconsistent with arbitration is a lack of choice, namely adhesion. As a result, states have much greater power than previously thought to ensure fairness in standard-form, non-negotiable adhesion contracts, in which most arbitration agreements are contained, without violating the FAA.

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INTRODUCTION

The use of mandatory arbitration clauses in consumer and employment contracts is an enormously controversial issue. The growth of mandatory arbitration clauses has spawned widespread academic commentary, as well as repeated congressional, federal agency, and state legislative hearings, regarding whether arbitration clauses are fair or whether they unjustly deprive individuals of the ability to seek redress for legal wrongs committed against them.¹

At the heart of this debate is whether the doctrines of unconscionability and public policy may be used to protect against unfair or overreaching arbitration clauses. For plaintiffs challenging a defendant's attempt to move a dispute from court to arbitration, raising an unconscionability or public policy defense is often the primary vehicle to invalidate the arbitration clause.² The question of whether these defenses can be applied, and if so to what degree, to arbitration clauses is an important one because the answer often determines whether or not the plaintiff's dispute is heard in any forum. In many cases, the result of declaring an arbitration clause enforceable is not that the dispute simply shifts from a judicial to an arbitral forum, but that because of the constraints written into the arbitration clause, the dispute is never heard at all.³

The U.S. Supreme Court appeared to strike a blow against the use of unconscionability and public policy defenses in two major cases involving the enforceability of class action waivers in arbitration clauses: *AT&T Mobility LLC v. Concepcion*⁴ (*Concepcion*) and *American Express Co. v. Italian Colors Restaurant*⁵ (*Italian Colors*). In *Concepcion*, the Supreme Court found that the Federal Arbitration Act (FAA) preempted California's application of its unconscionability doctrine to invalidate an arbitration clause's class action waiver because, in its view, requiring class wide arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."⁶ In *Italian Colors*, the Court applied *Concepcion* to require enforcement of an arbitration clause's class action waiver in a federal antitrust action, even if the waiver made it impossible for the plaintiffs to vindicate their rights under the Sherman Act.⁷

1. See, e.g., Thomas v. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1311 (noting that 139 bills designed to limit or regulate arbitration have been introduced in Congress since 1995); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1249-51 (2009) (describing the "fifteen-year academic debate" regarding the fairness of arbitration and documenting the rise in Congressional hearings and legislative proposals to amend the Federal Arbitration Act).

2. See, e.g., Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1439-41 (2008) (documenting the increased prevalence of unconscionability challenges to arbitration clauses as the Supreme Court has cut off other avenues for challenging the enforceability of arbitration clauses); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194-96 (2004) (describing how unconscionability challenges to arbitration clauses have increased and have become a central way for defeating arbitration agreements).

3. See, e.g., Myriam Gilles, *Testimony to the Senate Judiciary Committee On the Arbitration Fairness Act of 2013 (AFA) [S. 878/H.R. 1844]* 7 (Dec. 17, 2013), <http://www.judiciary.senate.gov/imo/media/doc/12-17-13GillesTestimony.pdf> (explaining that the purpose of mandatory arbitration provisions is not to provide an alternate forum but to "provide a way to suppress and bury claims").

4. 131 S. Ct. 1740 (2011).

5. 133 S. Ct. 2304 (2013).

6. 131 S. Ct. at 1748.

7. 133 S. Ct. at 2310-12.

Although both *Concepcion* and *Italian Colors* involved class action waivers, commentators have predicted that the cases will have broad ripple effects into other areas and will have “a revolutionary effect on the continuing viability of state and federal arbitration regulations.”⁸ A number of scholars have suggested that *Concepcion*’s holding that the FAA can preempt state unconscionability doctrine and its focus on “fundamental attributes” of arbitration means that the FAA preempts most, or even all, unconscionability challenges to arbitration provisions.⁹ Defense-oriented organizations are advising defense lawyers “to be very bullish” in pushing *Concepcion* well beyond the class action context in order “to enforce arbitration clauses in general,”¹⁰ and courts already have cited the two cases more than one thousand times.¹¹

This article takes a contrary view, and argues that the reports of the death of unconscionability as applied to arbitration clauses are vastly overstated. Rather, a close reading of *Concepcion* and *Italian Colors* show (1) that both cases should have almost no effect on arbitration clauses outside of the context of class actions, and (2) that the Court’s focus on “fundamental attributes of arbitration” may, counter-intuitively, provide grounds for narrowing FAA preemption rather than expanding it.

As to the first point, most of the provisions in arbitration clauses that are likely to be considered unconscionable, such as provisions shortening statutes of limitations, limiting damages liability, and establishing biased arbitrator selection mechanisms, do not interfere with fundamental attributes of arbitration and are not preempted. There is nothing about the nature of arbitration that requires dramatically shortening a statute of limitations from a matter of years to a matter of days, insulating a party from liability for punitive damages, or giving one side unilateral control over arbitrator selection.

As to the second point, when taken at its word, *Concepcion* should limit FAA preemption by greatly increasing the authority of courts and state legislatures to regulate arbitration clauses through both common-law and statutory law. While *Concepcion* established that the touchstone for FAA preemption is whether a state

8. Arpan A. Sura & Robert A. DeRise, *Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 408 (2013); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1243-44 (2013) (describing how some judges have interpreted *Concepcion* as “spilling over” into areas of unconscionability other than class action waivers).

9. See, e.g., Sura & DeRise, *supra* note 8, at 407-08; Jacob Johnson, *Barras v. BB&T: Charting a Clear Path to Apply Concepcion Through A Quagmire of Divergent Approaches*, 64 MERCER L. REV. 591, 596 (2013) (“The Court’s decision in *Concepcion* ‘dramatically diminished’ the use of unconscionability as a meaningful method of avoiding arbitration.”) (citation omitted); Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 NW. U. L. REV. COLLOQUY 53, 53-54 (2011) (“While *Concepcion* sanctions the continued theoretical applicability of unconscionability to arbitration provisions, it leaves very little room for actual application of the doctrine.”); Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 380 (2011) (“In the wake of *Concepcion*, one wonders what if anything is left of the doctrine of unconscionability in the realm of arbitration agreements.”). *But see* Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 BERK. J. OF EMP. & LABOR L. 153, 154 (2014) (arguing that some courts have interpreted *Concepcion* more narrowly than scholars first predicted).

10. Jamie Boyer and Liz Kramer, *Beyond Class Actions: Courts Hold State Anti-Arbitration Decisions are Preempted*, 56 No. 5 DRI FOR DEF. 26 (2014).

11. As of January 13th, 2015, Westlaw shows that *Concepcion* has been cited in 1,111 cases and *Italian Colors* has been cited in 146 cases, though there is undoubtedly some overlap between the two.

rule interferes with “fundamental attributes of arbitration,” the Court never defined that term. When actually examined, it appears that very few, if any, procedures are “fundamental.” Arbitration is not a monolithic concept.¹² Parties design their arbitration systems in myriad different ways; there is no one specific procedure or format that is universal to arbitration. That parties adopt different approaches for different disputes shows that the characteristic that is truly fundamental to arbitration is the concept of fairly negotiated private choice. The essence of arbitration, if there is one, is that parties can freely and fairly negotiate to adopt their own terms of dispute resolution rather than being subject to the fixed and immutable rules of public litigation.

As a result, what truly interferes with the fundamental attributes of arbitration is the lack of free and fair negotiation—i.e. adhesion. And most arbitration clauses, at least in the consumer and employment arenas, are embedded in adhesive contracts. This is not to say that arbitration clauses in contracts of adhesion should be categorically unenforceable. Even *Concepcion* recognizes that “the times in which consumer contracts were anything other than adhesive are long past.”¹³ But, what it does mean is that if *Concepcion* is really to be taken at its word, state regulation of adhesion contracts, or of arbitration clauses within adhesion contracts, is not preempted because adhesion contracts necessarily fall outside of the fundamental essence of arbitration.¹⁴ Thus, the most honest reading of *Concepcion* is that, outside of the class action context, the FAA does not preempt application of state law to arbitration clauses in adhesion contracts.¹⁵

Part I reviews and describes the FAA preemption doctrine from the *Concepcion* and *Italian Colors* decisions. Part II conducts a close reading of those decisions’ new articulation of a “fundamental attributes of arbitration” standard for FAA preemption. The article distills four principles from *Concepcion* that indicate why it should have a narrow impact on unconscionability and public policy defenses rather than a broad one. Part III then applies those four principles on various types of terms in arbitration provisions that trigger unconscionability challenges and suggests that *Concepcion*’s reasoning counsels against a finding that the FAA preempts such unconscionability challenges in most cases. Part IV considers what should constitute the “fundamental” aspect of arbitration and concludes that, if anything, it is the concept of non-adhesive, freely negotiated choice.

12. See *infra* note 142 and accompanying text.

13. AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1750 (2011).

14. Other scholars have presented persuasive cases that *Concepcion* should not be interpreted as broadly preempting unconscionability or public policy defenses, for different reasons than those presented here. See, e.g., Horton, *supra* note 8, at 1255, 1265-72 (arguing that *Concepcion*’s shift away from a textual analysis of FAA preemption in favor of a purposivist analysis means that the FAA should only preempt rules that “unjustifiably disfavor arbitration,” i.e., that regulate arbitration for no reason other than inherent suspicion of arbitration); Hiro N. Aragaki, AT&T Mobility v. *Concepcion* and the Antidiscrimination Theory of FAA Preemption, 4 Y.B. ON ARB. & MEDIATION 39 (2012) (asserting that *Concepcion* highlights how FAA preemption should be viewed through the lens of antidiscrimination theory and thus should only preempt rules that illegitimately discriminate against arbitration).

15. To be sure, *Concepcion* involved an adhesion contract, and the Court still found that the FAA preempted California’s application of unconscionability to the contract. However, it did so because it found that class action procedures would interfere with fundamental attributes of arbitration, regardless of whether the class action waiver was inserted into an adhesion contract or a negotiated contract. But that does not mean that the FAA would preempt other adhesion contracts that do not contain class action waivers. See *infra* notes 153-159 and accompanying text.

As a result, adhesion contracts, in which one party lacks meaningful choice over arbitration terms, are anathema to fundamental principles of arbitration and thus may be freely regulated by states without risking federal preemption.

I. THE SUPREME COURT'S DECISIONS IN *CONCEPCION* AND *ITALIAN COLORS*

To appreciate *Concepcion's* and *Italian Colors's* implications for arbitration law, it is useful to place them in the context of the law of federal preemption. There are two main types of preemption: express and implied.¹⁶ Because the FAA has no express preemption provision, the statute preempts state law through implied preemption.¹⁷ Under implied "obstacle" preemption, the FAA preempts state rules that interfere with or stand as an obstacle to achievement of the Act's purposes.¹⁸ However, where the issue touches an area of traditional state regulation, whether a state rule interferes with the FAA must be determined against the backdrop of the presumption against federal preemption.¹⁹ Consumer and employee protection is an area of traditional state regulation and thus the presumption against preemption should apply to most consumer and employment arbitration matters.²⁰

The FAA's primary purpose was to place arbitration clauses on "equal footing" with other contracts.²¹ Because the FAA was designed to overcome the prior "judicial hostility" to arbitration reflected in judicial refusal to enforce arbitration clauses simply because they were arbitration clauses, the statute has been interpreted to preempt state laws or rules that single out arbitration clauses for unfavorable treatment. Thus, a law that explicitly prohibits arbitration of a specific type of claim is preempted,²² as is a law "that takes its meaning precisely from the fact that a contract to arbitrate is at issue."²³

At the same time, the FAA expressly preserves generally applicable state-law contract principles from preemption. Section 2 of the Act states that arbitration clauses shall be enforceable, "save upon such grounds as exist at law or in equity

16. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). There also is a less prevalent form of preemption known as "field" preemption. *Id.*

17. *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 477 (1989).

18. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

19. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." (internal quotation omitted)).

20. See, e.g., *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.").

21. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) ("The FAA directs courts to place arbitration agreements on equal footing with other contracts . . ."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.").

22. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (stating that "[w]hen state law prohibits outright the arbitration of a particular type of claim," that rule is preempted by the FAA).

23. *Perry v. Thomas*, 482 U.S. 483, 492, n.9 (1987); see also *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (holding that the FAA preempted West Virginia's rule prohibiting enforcement of arbitration clauses in tort and wrongful death claims against nursing homes); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that the FAA preempted a Montana law requiring arbitration clauses, but not other contractual provisions, to be underlined and to appear on the first page of the contract).

for the revocation of any contract.”²⁴ This includes contract doctrines like unconscionability and public policy defenses.²⁵ Thus, prior to *Concepcion*, it had been widely understood that the FAA does not preempt generally applicable contract law principles such as unconscionability.²⁶

A. *Concepcion*

In *Concepcion*, the Supreme Court altered that traditional understanding of FAA preemption. It established for the first time that even generally applicable contract doctrines will be preempted if they interfere with the “fundamental attributes of arbitration,” a term the Court introduced for the first time but never defined.²⁷ In that case, the Court found that the FAA preempted California’s application of its generally applicable unconscionability doctrine to invalidate an arbitration clause’s class action waiver on the ground that requiring classwide arbitration would interfere with arbitration’s fundamental attributes.²⁸

Concepcion concerned a putative class action against AT&T Mobility alleging that AT&T advertised free phones but in fact charged customers \$30 in sales tax.²⁹ AT&T moved to compel arbitration based on the arbitration clause contained in the customers’ purchase agreements.³⁰ Moreover, although the litigation was filed as a class action, AT&T sought to compel each injured consumer to arbitrate individually, based on the arbitration clause’s ban on joint or class action proceedings.³¹ The consumers contended that the arbitration clause’s class action waiver was unconscionable because each consumer’s individual damages were so small to make individual arbitration infeasible.³² In essence, the consumers contended, the class action waiver served as a functional immunity provision for AT&T because no reasonable person would arbitrate on an individual basis.

The district court agreed with the plaintiffs and struck down the class action waiver as unconscionable, relying on the California Supreme Court’s holding in *Discover Bank v. Superior Court*³³ that class action bans in adhesive contracts are unconscionable when applied to small dollar claims.³⁴ The Ninth Circuit affirmed.³⁵ It rejected AT&T’s argument that the FAA preempted California’s *Discover Bank* rule, holding that the rule was simply an application of California’s general contract doctrine of unconscionability.³⁶ The court also noted that because the *Discover Bank* rule applied equally to class action waivers in arbitration clauses and in other contracts, the rule placed arbitration clauses on the “exact same footing” as other contracts.³⁷

24. 9 U.S.C. § 2 (2012).

25. *Concepcion*, 131 S. Ct. at 1746 (including unconscionability in a list of generally-applicable contract doctrines that can be applied to invalidate arbitration clauses).

26. See, e.g., Horton, *supra* note 8, at 1229-30.

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

28. *Id.*

29. *Id.* at 1744.

30. *Id.* at 1744-45.

31. *Id.*

32. *Id.* at 1745.

33. 113 P.3d 1100 (Cal. 2005).

34. AT&T Mobility, LLC v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011).

35. *Id.*

36. *Id.*

37. *Id.*

The United States Supreme Court reversed. The Court acknowledged the “equal footing” principle and specifically articulated that the FAA permits “agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud duress, or unconscionability.’”³⁸ At the same time, the Court noted that while generally applicable contract defenses ordinarily are not preempted, “the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress, or as relevant here, unconscionability, is alleged to have been applied in a manner that disfavors arbitration.”³⁹ Thus, the Court indicated that generally applicable contract defenses could be preempted where they “stand as an obstacle to the accomplishment of the FAA’s objectives.”⁴⁰

The Court held that the *Discover Bank* rule was preempted on the ground that “requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”⁴¹ The Court was less clear about what precisely constitutes the “fundamental attributes” of arbitration. In several places in the opinion, it focuses on choice—specifically, each party’s ability to freely negotiate their own rules so as to allow for “efficient, streamlined procedures tailored to the type of dispute.”⁴² At other points, it mentions various procedural outcomes, ranging from efficiency, greater procedural flexibility, arbitrator expertise, quicker resolution, lower cost, and finally, just general “informality.”⁴³

Although the Court did not clearly identify what constituted “fundamental attributes” of arbitration, it is clear that the majority determined that whatever those attributes might be, classwide arbitration ran afoul of them. Indeed, the Court has seemed especially troubled by the prospect of classwide arbitration, much more so than any other procedural constraint on arbitration. The Court has addressed classwide arbitration in some form four different times since 2010 (and just granted certiorari in another arbitration case involving a class action waiver), and in each decision emphasized how severely classwide arbitration deviates from the majority’s conception of traditional arbitration.⁴⁴ This is virtually unprecedented. In the past, the Court has not expressed the opinion that any particular procedural device was incompatible with arbitration. To the contrary, the Court’s default

38. *Id.* at 1746.

39. *Id.* at 1747.

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

41. *Id.*

42. *Id.* at 1749; *see also id.* at 1748 (describing the FAA’s purpose as “ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings”).

43. *Id.* at 1749 (stating that the purpose of allowing discretion in creating arbitration procedures is “efficient, streamlined proceedings”); *id.* at 1750-51 (referring to procedural formality, having the ability to choose arbitrators with subject-matter expertise, informality, and speediness).

44. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013) (holding that the trial court did not err in confirming arbitrator’s decision to allow classwide arbitration); *id.* at 2071-72 (Alito, J., concurring) (expressing discomfort with classwide arbitration procedures); *Concepcion*, 131 S. Ct. 1740; *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (holding that arbitrators exceeded their authority in ruling that the parties’ arbitration agreement permitted classwide resolution). The Court also just granted certiorari to decide whether a contract that references state law is governed by state law or the FAA in determining whether a class action waiver in an arbitration clause is enforceable. *DirecTV, Inc. v. Imburgia*, No. 14-162, S. Ct., 2015 WL 1280237 (U.S. Mar. 23, 2015).

presumption has been that it is up to the arbitrator to determine which procedural mechanisms the parties intended to apply to their arbitration proceedings.⁴⁵

Additionally, the *Concepcion* Court engaged in an extensive discussion of why it viewed class procedures as fundamentally incompatible with arbitration. The Court's primary concern was that classwide arbitration would theoretically bind absent class members, which raised significant questions about the arbitrator's authority over absent parties.⁴⁶ The Court also noted that (a) classwide arbitration limited each party's ability to choose subject-matter experts as arbitrators because they would need an arbitrator who was capable of addressing class certification questions; (b) that classwide arbitration sacrifices "informality" and "requires procedural formality" in order to protect absent parties; (c) that classwide arbitration is much slower than individual arbitration and will take a long time to get to final judgment, and (d) that class actions involve greater risks to defendants, who would be unlikely to agree to take such a risk, especially given the limited appellate review of arbitrator decisions.⁴⁷ Based on its extended analysis of the specific ways in which it viewed class procedures as incompatible with arbitration, the Court held that the FAA preempted California's *Discover Bank* rule.⁴⁸

Justice Thomas wrote a brief concurrence. He acknowledged that under the majority opinion, unconscionability and public policy defenses remained viable avenues for challenging arbitration clauses.⁴⁹ While expressing his disapproval of the doctrine of obstacle preemption upon which the majority relied, Justice Thomas read the text of the FAA to permit challenges only to the formation of an arbitration agreement, not challenges to the agreement's validity, such as challenges based on unconscionability and public policy.⁵⁰

B. *Italian Colors*

Other than reaffirming that courts ordinarily should enforce class action waivers, even where doing so would prevent a plaintiff from vindicating federal statutory rights, *Italian Colors* does not add significantly to the doctrine of FAA preemption. *Italian Colors*, which involved a claim under the federal Sherman Antitrust Act,⁵¹ was not a preemption case. The crux of its holding was that opponents of class action waivers could not use federal law to accomplish what they could not do under state law, namely, invalidate a class action waiver.⁵² In *Italian Colors*, the plaintiffs attempted to apply a "judge-made" doctrine under which

45. See, e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (holding that whether an arbitration clause authorized classwide arbitration was a question for the arbitrator rather than for the court); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (holding that procedural questions about the structure of arbitration generally are questions for the arbitrator to decide in the first instance, while "gateway" questions pertaining to the arbitrability of the dispute are presumptively for the court to decide in the first instance).

46. *Concepcion*, 131 S. Ct. at 1750; see also *Sutter*, 133 S. Ct. at 2071-72 (Alito, J., concurring) (raising concerns about whether an arbitrator can bind absent parties).

47. *Concepcion*, 131 S. Ct. at 1750-52; accord *Stolt-Nielsen*, 559 U.S. at 685-87 (expressing similar concerns about how class procedures may cause "fundamental changes" to the nature of arbitration).

48. *Concepcion*, 131 S. Ct. at 1753.

49. *Id.* (Thomas, J., concurring).

50. *Id.* at 1753-56.

51. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

52. *Id.* at 2312 (holding that "[t]he FAA does not sanction such a judicially created superstructure" as would arise from classwide arbitration).

courts would not enforce an arbitration clause that prevented a party from effectively vindicating federal statutory rights.⁵³ The Court rejected that doctrine as applied to class action waivers. As in *Concepcion*, the Court was concerned with how the class device disrupted the nature of arbitration, particularly through the effects on absent class members. It explained that the result in *Italian Colors* was virtually compelled by *Concepcion*, stating that “[t]ruth to tell, our decision in *AT&T Mobility [v. Concepcion]* all but resolves this case.”⁵⁴

As it did in *Concepcion*, the Court took care to indicate that other non-class-action-based public policy defenses remained viable, noting that the FAA might still permit invalidation of certain unfair provisions outside the class action arena, such as provisions providing for “filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”⁵⁵ Thus, *Italian Colors* simply reaffirmed that the Supreme Court viewed class procedures as incompatible with arbitration. It followed *Concepcion*’s view of FAA preemption, but did not change or expand it.⁵⁶ Because *Italian Colors* is not directly about preemption, this article focuses more heavily on *Concepcion*, which was a preemption case.

C. Conclusion

Although *Concepcion* and *Italian Colors* have seemed like dramatic opinions because of their implications for class actions, their reach outside of the class action context may be narrower than first predicted. While they undoubtedly have exerted a significant impact on class action waivers,⁵⁷ it is far from clear that they will have, or should have, an effect on other fact-specific unconscionability challenges to arbitration clauses. The next section attempts to distill some critical principles of *Concepcion* and *Italian Colors* in order to explain why they should not have a broad effect beyond class actions.

II. TAKEAWAYS FROM CONCEPCION AND ITALIAN COLORS

Boiled down, *Concepcion* stands for the proposition that the FAA does not preempt state unconscionability or public policy defenses as a general matter, but that it only preempts such defenses when they impose rules that are incompatible with fundamental attributes of arbitration or that are aimed at destroying arbitration. Because most fact-specific applications of state unconscionability principles do not run afoul of those criteria, they ordinarily will not be preempted. The following four principles derived from *Concepcion* underscore why *Concepcion* does not mandate preemption of all unconscionability and public policy challenges to

53. *Id.* at 2310.

54. *Id.* at 2312.

55. *Id.* at 2310-11 (citing *Green Tree Fin. Corp.—Alabama v. Randolph*, 531 U.S. 79, 90 (2000)).

56. *See, e.g.*, *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 208-11 (Cal. 2013) (explaining that *Italian Colors* does not change the analysis of FAA preemption or expand the holding of *Concepcion*), *cert. denied* 134 S. Ct. 2724 (2014).

57. *See, e.g.*, Christine Hines and Ellen Taverna, PUBLIC CITIZEN, CASES THAT WOULD HAVE BEEN: THREE YEARS AFTER *AT&T MOBILITY V. CONCEPCION*, CLAIMS OF CORPORATE WRONGDOING CONTINUE TO PILE UP 3-4 (April 2014), <http://www.citizen.org/documents/concepcion-third-anniversary-corporate-wrongdoing-forced-arbitration-report.pdf> (identifying 140 class actions that have been stopped from going forward because of *Concepcion* and *Italian Colors*).

arbitration clauses, and why there remain plenty of areas of state law that will still apply to arbitration clauses.

A. Unconscionability is Still Alive

Although some commentators initially predicted that *Concepcion* would lead to the preemption of all unconscionability or public policy challenges to arbitration clauses,⁵⁸ it is clear that the Court did not intend such a broad reading. First, the Court expressly identified unconscionability as one type of generally applicable doctrine of state contract law that can be used to invalidate an arbitration clause.⁵⁹ Second, soon after *Concepcion*, the Supreme Court decided *Marmet Health Care Center, Inc. v. Brown*, in which it held that the FAA preempted West Virginia's categorical rule against enforcement of arbitration clauses to claims against nursing homes and remanded the case for determination of whether the arbitration clause was "unenforceable under state common law principles that are not specific to arbitration and not pre-empted by the FAA."⁶⁰ If unconscionability or public policy defenses were necessarily inconsistent with arbitration, that language would have been unnecessary. Likewise, in *Italian Colors* the dispute was one of federal law and the parties did not raise state unconscionability doctrine.⁶¹ Thus, the decision does not limit or undermine the applicability of state unconscionability principles.

Finally, if *Concepcion* established that all public policy challenges were preempted, there would have been no need for Justice Thomas to write a concurrence, in contrast to the majority, stating that he would read the FAA to prohibit virtually all public policy challenges to the validity of arbitration agreements. Similarly, if the majority intended such a broad reading, it likely would have focused its opinion on public policy defenses in general instead of singling out the specific implications and drawbacks of classwide arbitration procedures for such extended discussion.

Consequently, as long as a state's "doctrine of unconscionability applies to arbitration and to other agreements according to the same basic criteria," unconscionability will not disfavor arbitration and will not be preempted.⁶² As a general matter, unconscionability does not interfere with the FAA's goal of procedural informality because unconscionability doctrine "determines enforceability of an agreement not by whether it includes procedures that are inconsistent with arbitration's formality, but by examining the one-sidedness of its provisions and the

58. See *supra* note 8 and accompanying text.

59. 131 S. Ct. at 1746 (stating that the savings clause in § 2 of the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue") (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

60. 132 S. Ct. 1201, 1203-04 (2012).

61. See generally *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

62. *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1277 (11th Cir. 2012); accord *Kilgore v. Key Bank Nat'l Ass'n*, 673 F.3d 947, 963 (9th Cir. 2012) (stating that "*Concepcion* did not overthrow the common law contract defense of unconscionability" but instead "reaffirmed" it); see also *Elite Logistics Corp. v. Hanjin Shipping Co.*, No. 12-56238, 2014 WL 4654383, at *2 (9th Cir. Sept. 19, 2014) ("Insofar as an application of state substantive unconscionability rules do not discriminate unfavorably against arbitration, they do not offend the FAA.").

circumstances in which it was formed.”⁶³ Thus, as explained below, many courts have continued to address unconscionability challenges to arbitration clauses after both *Concepcion* and *Italian Colors*.⁶⁴

B. Class Actions Uniquely Implicate “Fundamental Attributes of Arbitration”

It also appears, from reading *Concepcion* together with *Italian Colors* and the Court’s other recent arbitration opinions, that *Concepcion* was primarily concerned about classwide arbitration, not about unconscionability more generally. As previously mentioned, the Court has shown an outsized concern about classwide arbitration and the procedures it entails.⁶⁵ It has addressed classwide arbitration four times since 2010.

The frequency with which the Court has addressed class arbitration contrasts sharply with the way the Court has addressed other procedural rules relating to arbitration. In fact, it has typically refused to address questions regarding the appropriate procedural devices for arbitration, and has often concluded that the arbitrator best decides such questions.⁶⁶ This reinforces the point that most questions of arbitration procedure, unlike class processes, are consistent with the fundamental attributes of arbitration. If such procedures were incompatible with arbitration, it would be meaningless to say that arbitrators should address them because there would be nothing to address.

Moreover, the Court’s main concern in its classwide arbitration cases has always been the arbitrator’s authority to bind absent class members,⁶⁷ which it discussed in several places in *Concepcion*, and how the complexities of class certification questions would hinder the parties’ choice of arbitrators, issues which the Court also has raised in other decisions.⁶⁸ These issues are unique to the class action device and do not arise in other types of challenges to arbitration clauses. The Court’s repeated emphasis on the specific problems attendant to classwide arbitration procedures, and particularly the problem of binding absent class members, suggests that classwide arbitration is *sui generis*. As explained in further detail in Part III, *infra*, most other provisions in arbitration agreements that parties have challenged, such as shortened statutes of limitations, damages restrictions, biased arbitrator selection mechanisms, fee-shifting provisions, discovery restrictions, and confidentiality restrictions, do not implicate fundamental attributes of arbitration.

63. *In re Checking Account Overdraft Litig.*, 685 F.3d at 1278.

64. *See infra* Part III.

65. *See supra* note 44 and accompanying text.

66. *See supra* note 45 and accompanying text.

67. The concern about binding absent class members to a court judgment stems from due process principles about a judgment that binds a non-party to a dispute. *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (describing how binding absent class members can comport with due process when certain safeguards are provided). That is different from binding a non-signatory to an arbitration clause, something that courts routinely do. *See, e.g.*, Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 569-87 (2014) (describing certain situations in which non-signatories will be bound to an arbitration clause). Those cases arise when parties try to bind a non-signatory who is a party to the judicial action to the terms of the arbitration clause. This does not raise the same due process concern.

68. *See Concepcion*, 131 S. Ct. at 1750-52; *accord Italian Colors*, 133 S. Ct. at 2312; *Sutter*, 133 S. Ct. at 2071-72 (Alito, J., concurring); *Stolt-Nielsen*, 559 U.S. at 685-87.

*C. Fact-Specific Applications of Unconscionability Versus
Categorical Applications of Unconscionability.*

A third takeaway is that there is a difference between categorical rules declaring certain arbitration provisions unconscionable and fact-specific applications of unconscionability to a particular arbitration provision under a particular set of circumstances. From the Court's perspective, drawing a distinction between categorical rules and individualized assessment makes sense because categorical rules have the potential to disfavor arbitration while fact-specific applications do not.⁶⁹ For example, a rule that all limitations on discovery render an arbitration clause unconscionable without regard to whether the limitations in fact hindered the party in the case from obtaining necessary evidence would be a rule that disfavors arbitration. It indicates that arbitration itself is unfair because it limits discovery. As a result, that rule applies traditional unconscionability principles to arbitration in a different manner than to other contracts by invalidating the discovery limitation even where the limitation did not create an unconscionable result. By contrast, a specific finding in a specific case that a discovery limitation was unconscionable because it was so onerous that it made it impossible for the plaintiff to pursue a claim would be a valid application of unconscionability. It would treat arbitration clauses just like other contracts and thus would not be preempted.

Nothing about that latter, case-specific rule disfavors arbitration. Rather, it reinforces the point that arbitration clauses can limit discovery, though that limitation may become unenforceable in a particular case where the plaintiff meets his or her burden of demonstrating unconscionability. Such a reading best harmonizes *Concepcion*'s competing concerns about preserving generally applicable state law while also preventing states from discriminating against arbitration agreements.⁷⁰ If fact-specific applications of unconscionability were preempted (outside of the class action context where fact-specific applications of unconscionability may be incompatible with fundamental attributes of arbitration), then the Court's statements that unconscionability remains a valid ground for invalidating arbitration clauses would be an empty letter.⁷¹

The examples of invalid restrictions on arbitration that the *Concepcion* Court provided reinforce this distinction because each one involved a categorical rule. Those examples included rules declaring arbitration clauses unenforceable if they failed to provide for judicially monitored discovery, failed to require compliance with the Federal Rules of Evidence, or failed to allow for disposition by a jury,

69. *Concepcion*, 131 S. Ct. at 1747-48 (giving examples of categorical rules that sweep too broadly and consequently disfavor arbitration).

70. See, e.g., *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492 (Mo. 2012) (holding that "*Concepcion* permits state courts to apply state law defenses to the formation of the particular contract at issue on a case-by-case basis" and concluding that those defenses include generally applicable unconscionability principles); *Schnuerle v. Insight Commc'ns, Co.*, 376 S.W.3d 561, 580 (Ky. 2012) (Schroder, J., concurring in part and dissenting in part) ("The Supreme Court concluded that the *Discover Bank* rule 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.' *Concepcion*, 131 S. Ct. at 1748. Such interference is not present when, as here, a particular arbitration agreement is unconscionable under the unique facts of that particular case.").

71. See, e.g., *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 490-91 (Mo. 2012) (explaining that if the FAA preempted all unconscionability defenses, then the Court's extended discussion of unconscionability as a viable ground for invalidating arbitration clauses would be superfluous).

regardless of how those rules impacted a particular party in a particular case.⁷² The Court noted that even though all could be considered generally applicable principles, they would disfavor arbitration and exert a “disproportionate impact” on arbitration agreements.⁷³ Each of those examples involves a categorical rule that foregoes consideration of whether such limitations, when applied to a particular case, would impede a party’s access to arbitration and thus be unconscionable. Accordingly, such categorical rules would have an overbroad effect by invalidating arbitration agreements that were not actually unconscionable. In this way, such rules disfavor arbitration and are preempted.

Moreover, the Court seemed to treat the class action waiver at issue in *Concepcion* the same way. It noted that while California’s *Discover Bank* rule was ostensibly limited to particular circumstances, the conditions of the rule were so broad and malleable that it would functionally apply to almost any class action, even where there was evidence that the plaintiffs could individually litigate their claim. The Court concluded that it was far from clear that the plaintiff lacked incentive to individually litigate. It noted that the arbitration agreement provided that if a claimant proceeded in individual arbitration and obtained an award greater than AT&T’s last settlement offer, AT&T would pay a minimum of \$7,500 plus twice the claimant’s attorneys’ fees. Both the district court and the Ninth Circuit concluded that aggrieved plaintiffs had incentives to seek individual relief.⁷⁴ In other words, the *Discover Bank* rule was overbroad and applied even in situations where the facts did not satisfy California’s general unconscionability principles. In that way, the rule treated arbitration clauses differently from other contracts and thus impermissibly disfavored arbitration.

In one of the most thorough examinations of *Concepcion*, the California Supreme Court relied on this distinction to hold that the FAA does not preempt generally applicable unconscionability principles when applied in a fact-specific manner so as not to disfavor arbitration.⁷⁵ It determined that, while the FAA preempted California’s rule that any contract, arbitration or otherwise, prohibiting a wage and hour claimant from pursuing an administrative remedy known as a “Berman Hearing” was unconscionable, the FAA did not preempt California’s unconscionability doctrine generally and did not preclude a court from holding that a Berman waiver is unconscionable in a case where it prevented a claimant from seeking redress.⁷⁶ The California Supreme Court explained that the rule “categorically prohibiting waiver of a Berman Hearing” would delay the onset of arbitration and interfere with the goal of encouraging streamlined proceedings.⁷⁷ However, the court then went on to hold that if the Berman waiver prevented the plaintiff from vindicating his rights, the agreement could be unconscionable as a matter of California law and would not be preempted.⁷⁸ It explained that this application of California’s unconscionability would not impinge upon the fundamen-

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

73. *Id.*

74. *Id.* at 1753.

75. *See* *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013), *cert. denied* 134 S. Ct. 2724 (2014).

76. *Id.*

77. *Id.* at 199.

78. *Id.* at 200-08.

tal attributes of arbitration.⁷⁹ Other courts have agreed that *Concepcion* is concerned with categorical rules that have an overbroad reach, not with fact-specific applications of generally applicable unconscionability principles.⁸⁰

This does not mean that a rule is automatically preempted whenever it has a categorical impact. Rather, the concern is that categorical rules risk overbreadth—i.e. that they would invalidate arbitration clauses even when those clauses do not satisfy the traditional test for substantive unconscionability. As the provisions in arbitration agreements become increasingly restrictive or unfair, a categorical rule precluding their enforcement is less likely to be overbroad and to be preempted. One could imagine an arbitration clause that reduced the statute of limitations of bringing a claim from one year to one day. Such a clause would be unconscionable in virtually every case, and it is doubtful that anyone would suggest that it would be preempted simply because a court might say that a one-day statute of limitations is always unconscionable. There is nothing about a rule barring one-day statutes of limitations that disfavors arbitration.

In short, the sensible reading of *Concepcion* is that unconscionability survives when it is applied to arbitration in the same way that it is applied to other contracts. That ensures that unconscionability does not disfavor arbitration, and also ensures that the doctrine is not eliminated altogether.

D. A Disproportionate Impact on Arbitration Clauses Will Not, Standing Alone, Give Rise to FAA Preemption.

Some uncertainty has developed regarding whether the FAA preempts any rule that has a “disproportionate impact”⁸¹ on arbitration agreements. However, the most sensible reading of *Concepcion* is that a disproportionate effect, standing alone, is not enough to trigger FAA preemption. Rather, the rule must have a

79. *Id.* at 201-02 (discussing examples such as a provision requiring a \$50,000 amount-in-controversy threshold for receiving a right to appeal an arbitration award, provisions limiting damages, allowing only the drafting party to recover attorneys’ fees, or a provision imposing prohibitively expensive costs, as ones that do not affect fundamental attributes of arbitration); *see also* Noohi v. Toll Bros., Inc., 708 F.3d 599, 612-13 (4th Cir. 2013) (holding that a rule requiring an arbitration agreement be supported by independent consideration, irrespective of consideration in the rest of the contract, does not undermine arbitration or treat it differently from other contracts).

80. *Gandee v. LDL Freedom Enterp., Inc.*, 293 P.3d 1197, 1203 (Wash. 2013) (“When *Discover Bank* was applied in *Concepcion*, the rule, in essence, became an overbroad rule invalidating an arbitration clause that might otherwise be conscionable under California law. As our above analysis shows, the arbitration clause at issue here contained numerous unconscionable provisions based on the specific facts at issue in the current case.”); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 489-92 (Mo. 2012) (stating that *Concepcion* establishes that categorical rules which disfavor arbitration are preempted, but that factually-specific applications of Missouri’s unconscionability doctrine are not preempted); *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 502 (2012) (distinguishing the “categorical” *Discover Bank* rule from fact-specific unconscionability defenses in holding that an arbitration clause which unreasonably limited the statute of limitations and failed to impose reciprocal obligations on the parties was unconscionable and not preempted by *Concepcion*); *Schnuerle v. Insight Comm’ns, Co.*, 376 S.W.3d 561, 580 (Ky. 2012) (Schroder, J., concurring in part and dissenting in part) (“The Supreme Court concluded that the *Discover Bank* rule ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’ Such interference is not present when, as here, a particular arbitration agreement is unconscionable under the unique facts of that particular case.”) (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct 1740, 1748 (2011)).

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

disproportionate effect in a way that disfavors arbitration or that interferes with arbitration's fundamental attributes.

This uncertainty stems from the *Concepcion* Court's statement that categorical rules requiring litigation-style discovery and application of the Federal Rules of Evidence to all arbitration proceedings would be preempted.⁸² The Court noted that such rules are generally applicable, but have "a disproportionate impact on arbitration agreements."⁸³

Some commentators have suggested that this should mean that the FAA preempts any rule that has a "disproportionate impact" on arbitration.⁸⁴ However, that is an awkward and untenable reading of the decision. First, it is important to remember that the Court's examples of preempted rules were limited to categorically overbroad rules that went *beyond* traditional unconscionability, and therefore treated arbitration clauses differently from other contracts, rather than all rules that fell disproportionately on arbitration clauses.⁸⁵

Second, there are various types of rules that would have a disproportionate or even exclusive effect on arbitration provisions, but that are not preempted. Consider a challenge to an arbitration provision that allows the drafting party to choose the arbitrators and gives the opposing party no input into the selection process, or any other arbitrator selection provision that gives rise to a substantial risk of arbitrator bias. A rule invalidating such a provision as unconscionable will necessarily have a disproportionate effect on arbitration clauses because the rule involves arbitrator selection. Such a rule, however, does not conflict with the FAA.⁸⁶ Rather, it is fully consistent with the FAA, which identifies "evident partiality or corruption in the arbitrators" as a ground for vacating an arbitration award.⁸⁷ Similarly, a rule that an arbitration provision requiring the parties to split the costs of the arbitrator is unconscionable where it would make arbitration cost-prohibitive would necessarily have disproportionate effect on arbitration clauses.⁸⁸ Virtually any provision that seeks to contract around litigation rules and procedures will have a disproportionate effect on arbitration, because such provisions only come into play when parties bypass the litigation system and opt for some form of private dispute resolution.

Consequently, several courts have refused to find that a disproportionate impact on arbitration clauses, standing alone, will automatically give rise to FAA

82. *Id.*

83. *Id.*

84. See, e.g., Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 705 (2013) ("[S]tates may not alter the basic rules of contract in such a manner as to have a disproportionate impact on the enforceability of an arbitration agreement.").

85. *Id.*

86. *Chavarría v. Ralph's Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) (noting that a rule ensuring fairness in arbitrator selection will necessarily disproportionately affect arbitration "because the term is arbitration specific" but holding that it is not preempted because it does not disfavor arbitration); *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1277, n.10 (11th Cir. 2012) (holding that a South Carolina rule that requires arbitration to be "geared toward achieving an unbiased decision by a neutral decision-maker" to be fully consistent with and not preempted by the FAA because the FAA similarly seeks to ensure arbitrator impartiality).

87. 9 U.S.C. § 10(a)(1) (2012).

88. *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013) (giving example of an arbitration clause imposing prohibitive costs as one that is unrelated to fundamental attributes of arbitration), *cert. denied* 134 S. Ct. 2724 (2014).

preemption.⁸⁹ The California Supreme Court recently held that “a facially neutral state-law rule is not preempted simply because evenhanded application ‘would have a disproportionate impact on arbitration agreements.’”⁹⁰ The court held that a state-law rule is preempted only when it “interferes with fundamental attributes of arbitration.”⁹¹

Two recent Ninth Circuit decisions similarly demonstrate why a disproportionate impact, standing alone, is insufficient to give rise to FAA preemption. In *Mortensen v. Bresnan Communications, LLC*, the Ninth Circuit found that the FAA preempted a Montana rule declaring it against public policy for a contract to include a waiver of fundamental rights when the waiver is not within the party’s reasonable expectations.⁹² In finding the rule preempted, the court discussed how the rule disproportionately affects arbitration clauses.⁹³ But the court subsequently clarified in a later decision that *Concepcion* “cannot be read to immunize all arbitration agreements from invalidation, no matter how unconscionable they may be, so long as they invoke the shield of arbitration.”⁹⁴ Rather, the rule must be “unfavorable to arbitration” to be preempted.⁹⁵ Thus, the court found that a rule protecting a party against biased arbitrator selection had a disproportionate impact on arbitration but is not preempted because the rule does not disfavor arbitration; it merely requires the arbitration process to be fair.⁹⁶

Finally, the Fourth Circuit recently affirmed a finding that a defendant’s arbitration clause was unenforceable where it required plaintiffs to arbitrate their claims, but placed no reciprocal obligation on the defendant—meaning the defendant was free to bring any affirmative claims it wanted in court.⁹⁷ The court rested its decision on a Maryland contract rule requiring an arbitration clause be supported by consideration, regardless of whether the contract as a whole has

89. See, e.g., *Chavarria*, 733 F.3d at 927; *Noohi v. Toll Bros., Inc.*, 708 F.3d 599 (4th Cir. 2013); *Brown v. MHN Gov. Servs., Inc.*, 306 P.3d 948, 953 (Wash. 2013); *Figueroa v. THI of N.M. at Casa Arena Blanca, LLC*, 306 P.3d 480, 484-87 (N.M. Ct. App. 2012).

90. *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct 1740, 1747 (2011)).

91. *Id.* at 201; see also *Brown v. MHN Gov. Servs., Inc.*, 306 P.3d 948, 953 (Wash. 2013) (rejecting a “broad reading” of *Concepcion* and adopting a “narrower view” that generally applicable unconscionability principles are not preempted and that what the FAA instead preempts are “state rules specific to arbitration that interfere with the purposes of the FAA.”) (emphasis in original).

92. 722 F.3d 1151 (9th Cir. 2013).

93. *Id.* at 1161. This does not mean that the FAA preempts every state-law doctrine requiring a knowing, voluntary and intelligent waiver of fundamental rights. For example, many states have a constitutional right to a jury trial that can be waived only if the waiver is knowing, voluntary and intelligent. That constitutional right applies to any contract, not just arbitration clauses, and so is not preempted. See, e.g., *Siopes v. Kaiser Found. Health Plan, Inc.*, 312 P.3d 869, 892-96 (Haw. 2013) (Acoba, J., concurring) (explaining that the plaintiffs were not required to arbitrate because their waiver of a jury trial was not knowing and voluntary under the Hawaii Constitution).

94. *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013).

95. *Id.* (emphasis in original); accord *Newton v. Am. Debt Servs., Inc.*, 549 F. App’x 692 (9th Cir. 2013) (holding that arbitration agreement that had various unfair provisions was unconscionable and concluding that this result “harmonize[d]” with *Concepcion* because the decision was not founded on any policy unfavorable to arbitration but was “based on general California law respecting unconscionable contracts”).

96. *Chavarria*, 733 F.3d at 927; see also *Smith v. JEM Group, Inc.*, 737 F.3d 636 (9th Cir. 2013) (finding that FAA did not preempt finding that arbitration agreement in an attorney retainer agreement was procedurally unconscionable because the rule did not affect the arbitration process or otherwise single out arbitration for disfavor).

97. *Noohi v. Toll Bros., Inc.*, 708 F.3d 599 (4th Cir. 2013).

consideration.⁹⁸ The court noted that, while the Maryland rule “does single out an arbitration provision in a larger contract,” it was simply a specific application of the general doctrine of consideration and thus was not preempted.⁹⁹ It also held that a rule requiring reciprocal arbitration obligations does not disfavor arbitration but instead encourages arbitration by binding both parties to arbitrate.¹⁰⁰

This reasoning underscores that a disproportionate impact on arbitration agreements is not determinative. Rather, the preemption question turns on whether the rule is incompatible with fundamental attributes of arbitration or singles out arbitration unfavorably. While a disproportionate impact may be relevant to that assessment in certain circumstances, it is not a justification for preemption on its own.

Moreover, there may be several other reasons why a disproportionate effect standing alone should not be a basis for invoking preemption. First, the language of “disproportionate impact” is adopted from anti-discrimination law, but under anti-discrimination law, disparate impact is the beginning of the story, not the end of it. In the employment context, a disparate impact will be found non-discriminatory if the employer has a legitimate justification for the practice that gives rise to it and that justification is not pretextual.¹⁰¹ In other words, not all rules that exert a disparate impact are unlawful. Only unjustified disparate impact is unlawful. Analogizing to arbitration means that a rule that disproportionately impacts arbitration clauses should not automatically be preempted. As other scholars have argued, a rule should be preserved from preemption unless there is no valid justification for the rule or the rule is just an attempt to intentionally discriminate against arbitration.¹⁰²

Second, a disproportionate impact framework would have the odd result of placing the scope of preemption into the hands of drafting parties. If more parties put a particular provision in an arbitration clause, any rule finding that provision unconscionable would be increasingly likely to create a disproportionate impact on arbitration. Similarly, the expansion of the use of arbitration would make arbitration clauses more common and would give rise to disproportionate impact arguments when those clauses are challenged. In essence, such a rule would tie preemption to what drafting parties choose to include or not include in their arbitration clauses. This seems to run directly counter to the Court’s focus on the fundamental attributes of arbitration—that is, those features essential to arbitration regardless of the parties’ intent. This further undermines the notion that disproportionate impact, standing alone, gives rise to FAA preemption.

At bottom, the fairest reading of *Concepcion* is that preemption occurs only when a rule conflicts with arbitration’s fundamental attributes or is specifically aimed at destroying arbitration. As the next section addresses, most unconsciona-

98. *Id.* at 606-07.

99. *Id.*

100. *Id.* at 612-13; *accord* *Figueroa v. THI of N.M. at Casa Arena Blanca, LLC*, 306 P.3d 480, 484-87 (N.M. Ct. App. 2012) (holding a non-mutual arbitration clause unconscionable and not preempted by the FAA because the court was applying New Mexico’s general contract law of unconscionability, even if the particular manner in which it applied that doctrine pertained to an arbitration clause).

101. *Griggs v. Duke Power Co.*, 424 U.S. 404 (1971).

102. *See, e.g.*, *Aragaki*, *supra* note 14; *Horton*, *supra* note 8. Moreover, in anti-discrimination claims, the disparate impact will not be assumed. Rather it is the plaintiff’s burden to demonstrate disparate impact, and they often must utilize detailed statistical analysis to meet their burden. *See, e.g.*, *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 993-99 (1988) (discussing the plaintiff’s evidentiary burden).

bility challenges to the terms of arbitration provisions do not implicate fundamental attributes of arbitration and should not be preempted.

III. APPLYING *CONCEPCION*

What the above-described principles indicate is that *Concepcion* should not be read as broadly preemptive of all or even most unconscionability defenses. Consequently, it is important to be aware of the danger of reading *Concepcion* at a level of generality so high—as many commentators have—that it would preempt almost any challenge to an arbitration clause.¹⁰³ *Concepcion* identifies some of the perceived benefits of arbitration as including “lower costs, greater efficiency, and speed,” as well as “informality,” and “the ability to choose expert adjudicators to resolve specialized disputes.”¹⁰⁴ When read at a high enough level of abstraction, almost any restraint on what terms parties may place in an arbitration agreement can be seen as conflicting with those principles.¹⁰⁵ One could say, for example, that rules requiring shortening a statute of limitations to two days is unconscionable conflicts with the goal of speedy dispute resolution; that rules requiring mutuality of obligation—i.e. that both sides bind themselves to arbitration—arguably demand a level of formality by restricting a party’s choices; that rules finding particular discovery limitations unconscionable could be seen as conflicting with the goal of lower costs or decreased formality; and that rules against provisions insulating parties from punitive damages or other damages may be seen as conflicting with the goal of lower costs. On some level, any restraint increases formality, because it places a procedural restriction on the party’s ability to set whatever rules it likes for arbitration, no matter how one-sided those rules may be.

If increased formality were enough to give rise to preemption, then almost every challenge is preempted and if so, there is nothing that would stop a drafting party from writing an arbitration clause in a way that fully insulates itself from all relief. Take the example of a provision shortening the statute of limitations. If the FAA preempted any restriction on a party’s ability to shorten a statute of limitations, on the ground that such a restriction interfered with the goal of speedier dispute resolution, then nothing would prevent parties from reducing statutes of limitations from three years to three days, or even one day. As one court noted, even after *Concepcion*, “[f]ederal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power.”¹⁰⁶

The following section applies *Concepcion* to the terms of arbitration provisions that most commonly give rise to unconscionability or public policy challenges, and suggests that such provisions may be invalidated under state law without interfering with the FAA’s purposes.

103. See *supra* note 9 and accompanying text.

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

105. See *Sura & DeRise*, *supra* note 8, at 447 (“At a high enough level of abstraction, unconscionability rules level the playing field between disputing parties of unequal bargaining power. Thus, there is good reason to believe that, at least as those rules relate to arbitration, they will tend to result in more process, not less. The flipside of that coin is that unconscionability rules tend to sacrifice efficiency, and thus fall afoul of *Concepcion*’s logic.”).

106. *Chavarría v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013).

A. Mutuality

Non-mutual arbitration clauses are ones where the drafting party requires the opposing party to arbitrate all claims but reserves its own right to pursue affirmative claims in court. There is nothing fundamental to arbitration about a provision that requires one side to forego its right to a judicial action and pursue arbitration, but permits the other party to go to court. Thus, many courts have found that such provisions can be struck down as unconscionable, even after *Concepcion*.¹⁰⁷ If anything, as the Fourth Circuit found, requiring mutuality encourages arbitration by giving both sides a reason to utilize it.¹⁰⁸

B. Damages Caps

Many courts have found that provisions precluding an arbitrator from awarding punitive damages or damages specifically authorized by statute can be struck down as unconscionable or against public policy without creating preemption concerns.¹⁰⁹ Although one might assert that damages caps help reduce costs and

107. *Noohi v. Toll Bros., Inc.*, 708 F.3d 599 (4th Cir. 2013) (holding an arbitration clause that obligated one side to arbitrate but allowed the other to pursue all claims in court lacked consideration and also was not preempted by the FAA); *Day v. Fortune Hi-Tech Mktg., Inc.*, 536 F. App'x 600, 604 (6th Cir. 2013) (holding an arbitration clause to be illusory and unenforceable for lack of consideration where the plaintiff was required to arbitrate but where the “[d]efendant retained the ability to modify any term of the contract, at any time”); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 494-95 (Mo. 2012) (striking down arbitration clause that bound the consumer to individual arbitration but allowed the Title Lender to go to court to bring repossession actions, and holding that the FAA did not preempt its application of Missouri unconscionability law); *Figueroa v. THI of N.M. at Casa Arena Blanca, LLC*, 306 P.3d 480 (N.M. Ct. App. 2012) (holding non-mutual arbitration clause unconscionable and not preempted by the FAA); *Samaniago v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 499-500 (2012) (holding that while not every lack of mutuality would render an arbitration clause unconscionable, the fact that the arbitration clause both (a) requires the employee to arbitrate all claims while allowing the employer to bring claims for declaratory and injunctive relief to protect proprietary information in court, and (b) “requires plaintiffs to pay any attorneys’ fees incurred by Empire, but imposes no reciprocal obligation on Empire” was unconscionable and unenforceable under the facts of that case); *Lou v. Ma Labs., Inc.*, No. C-12-05409-WHA, 2013 WL 2156316, at *4 (N.D. Cal. May 17, 2013) (holding arbitration clause substantively unconscionable where employer was authorized to bring claims for injunctive relief in court but employee could not); *McFarland v. Almond Bd. of California*, No. 2:12-CV-02778-JAM-CKD, 2013 WL 1786418, at *7-8 (E.D. Cal. Apr. 25, 2013) (holding arbitration clause illusory where plaintiff was required to arbitrate but the defendant reserved the right to alter the arbitration policy at any time, meaning defendant could “modify the agreement on the fly, picking and choosing when the arbitration policy applies and when it does not”); *see also Alltel Corp. v. Rosenow*, 2014 Ark. 375 (2014) (treating lack of mutuality as evidence that a valid arbitration agreement was never formed, and concluding that the FAA did not preempt its interpretation of state law). *But see THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162 (10th Cir. 2014) (finding the FAA preempted a state rule that non-mutual arbitration clauses are unconscionable on the ground that such a view is predicated on the assumption that arbitration is an inferior alternative to litigation).

108. *Noohi*, 708 F.3d at 612-13.

109. *See, e.g., Newton v. Am. Debt Servs., Inc.*, 549 F. App'x 692, 692 (9th Cir. 2013) (finding unconscionability in part because “the arbitration agreement limits damages otherwise available to Newton under [the] statute”); *Franks v. Bowers*, 116 So.3d 1240 (Fla. 2013) (holding an arbitration clause’s limitation on damages violated the state’s Medical Malpractice Act, and was therefore void as against public policy); *Ajajian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 798-99 (2012) (holding substantively unconscionable an arbitration provision that precluded arbitrators from awarding special or punitive damages, but permitted the corporate party to recover liquidated damages on top of other damages); *Zaborowski v. MHN Gov. Servs., Inc.*, 936 F. Supp. 2d 1145, 1155 (N.D. Cal. 2013) (finding unconscionable a provision barring arbitrators from awarding punitive damages). *See also Brown*

therefore are fundamental to arbitration, that is not the case. First, the arbitration goal of reducing costs refers to procedural costs, not the ultimate remedy the arbitrator might award. Supporters of arbitration assert that arbitration is more cost-effective and efficient than litigation in the manner that proceedings are conducted, and the *Concepcion* Court's discussion of how the class certification process would undermine the goal of a procedurally cost-effective arbitration process reinforces that point.¹¹⁰

Second, the Supreme Court has emphasized that the default presumption is that arbitrators are fully capable of addressing the same claims, and awarding the same relief, as courts. One of the basic notions of arbitration is that it does not require a party to forego any claims or remedies, but simply shifts the resolution of those claims into a different forum.¹¹¹ In *Mastrobuono v. Shearson Lehman Hutton*, the United States Supreme Court held that the FAA preempted a New York rule allowing courts to award punitive damages, but that barred arbitrators from doing the same.¹¹² In that case, the Court took pains to construe an arbitration clause with a New York choice-of-law provision (thus incorporating the above rule) to also incorporate otherwise applicable federal law, which it construed as authorizing an award of punitive damages.¹¹³ In other words, the arbitrator's ability to award the same relief a judge might award is part of the basic background fabric of arbitration. This does not mean that in every case the FAA would preempt a rule limiting punitive damages, but it does show that limiting punitive or other damages is in no way essential to arbitration.

C. Statute of Limitations

Courts have found provisions greatly reducing the statute of limitations for bringing a claim can be struck down as unconscionable or against public policy without running afoul of the FAA.¹¹⁴ There is no reason to think that a shortened

v. MHN Gov. Servs., Inc., 306 P.3d 948, 955-56 (Wash. 2013) (refusing to find a bar on punitive damages unconscionable where it remained unclear whether the plaintiff could still obtain statutory double damages).

110. AT&T Mobility LLC v. Concepcion, 131 S. Ct 1740, 1745 (2011).

111. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum").

112. 514 U.S. 52, 59 (1995).

113. *Id.* at 59-61. Notably, the Revised Uniform Arbitration Act, which has served as a model for many state arbitration statutes, authorizes arbitrators to award punitive damages. Revised Uniform Arbitration Act, § 21, 7 U.L.A. 60-61 (2003).

114. *See, e.g.*, *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635 (Wash. 2013) (holding that significantly shortened statutes of limitation in arbitration provision were unconscionable); *Gandee v. LDL Freedom Enterp., Inc.*, 293 P.3d 1197, 1201 (Wash. 2013) (striking down provision reducing statute of limitations from several years to thirty days); *Brown*, 306 P.3d at 956 (Wash. 2013) (holding clause reducing statute of limitations from three years to six months unconscionable); *Potiyevskiy, v. TM Transp., Inc.*, No. 1-13-1864, 2013 IL App (1st) 131864-U, at *7-8 (Ill. Ct. App. Nov. 25, 2013) (holding arbitration provision's ten-day statute of limitations unreasonable as applied to the facts of the case and unenforceable as a matter of generally applicable state law and not preempted by *Concepcion*); *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 499 (2012) (holding an arbitration provision limiting the statute of limitations to six months was unconscionable when considered in conjunction with other unfair provisions in the arbitration clause); *Zaborowski*, 936 F. Supp. 2d at 1153 (N.D. Cal. 2013) (holding six-month statute of limitations unconscionable as applied to plaintiff's Fair Labor Standards Act claim in part, because in the employment context, "the cause of action may not be discovered for a long period of time").

statute of limitations is a fundamental feature of arbitration, especially where the limitations period is so short to make it virtually impossible for a plaintiff to file a timely claim.

D. “Loser Pays” Rules

Another type of provision that frequently is challenged as unconscionable is a provision that requires the losing party to pay the other side’s attorneys’ fees and costs, or that shifts fees in ways inconsistent with relevant statutes.¹¹⁵ Such provisions can be unconscionable because placing the risk of being held accountable for the opposing party’s attorneys’ fees and costs on the financially weaker party creates a significant disincentive for that party to pursue a claim. Courts have noted that provisions bypassing statutory fee and cost-shifting provisions and instead imposing loser-pays rules seem to be specifically designed “to impose upon the employee a potentially prohibitive obstacle to having her claim heard.”¹¹⁶

Rules finding such provisions unconscionable in appropriate circumstances do not undermine the goal of reducing costs.¹¹⁷ They merely shift the costs and fees of arbitration from one party to the other. Thus, application of general contract principles to invalidate such provisions does not interfere with the FAA.

E. Fees and Costs

Arbitration provisions that make the arbitration process so onerous or expensive as to functionally deny access to the arbitral forum often give rise to unconscionability challenges. These provisions take any number of forms. They may require the parties to split the costs of the arbitrators’ fees in cases where those

115. *Brown*, 306 P.3d at 957-58 (holding fee-shifting provision inconsistent with state statutes substantively unconscionable); *Newton v. Am. Debt Servs., Inc.*, 549 F. App’x 692 (9th Cir. 2013) (finding arbitration clause unconscionable in part because “the arbitration agreement increases Newton’s potential liability for attorney’s fees as compared to California’s codified fee shifting regime”); *Gandee*, 293 P.3d at 1200-01 (striking down “loser pays” rule as unconscionable as applied to the plaintiff); *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1276-81 (11th Cir. 2012) (holding arbitration provision that required a bank customer to bear all of the bank’s costs, fees and expenses incurred in connection with any dispute, regardless of which side prevails, was unconscionable); *Ajajian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 799-800 (Cal. Dist. Ct. App. 2012) (holding provision which required employee to pay employer’s attorneys’ fees if the employer prevailed but did not allow employee to collect attorneys’ fees if she prevailed was non-mutual and also unconscionable because it was inconsistent with state law prohibiting the employee from having to pay an employer’s attorneys’ fees regarding certain claims); *Lou v. Ma Labs., Inc.*, No. C-12-05409-WHA, 2013 WL 2156316, at *5 (N.D. Cal. May 17, 2013) (holding that an agreement allowing an arbitrator to allocate attorney and arbitrator fees across one or both parties without providing guidelines for when the arbitrator would do so, was unconscionable as it created a significant disincentive for an employer to pursue arbitration); *Zaborowski*, 936 F. Supp. 2d at 1154 (holding that fee-shifting provision had the potential to make the plaintiff liable for fees in violation of relevant statutory law and thus was unenforceable); *Winston v. Academi Training Center, Inc.*, No. 1:12-CV-767, 2013 WL 989999, at *2 (E.D. Va. Mar. 13, 2013) (refusing to enforce arbitration provision that required plaintiffs to pay all fees and costs even though the False Claims Act allows prevailing plaintiffs to collect attorneys’ fees).

116. *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 925 (9th Cir. 2013).

117. *See, e.g., In re Checking Account*, 685 F.3d at 1277-78 (holding that applying South Carolina’s generally applicable unconscionability doctrine to invalidate a contractual fee-shifting provision did not “interfere with the procedural informality” of arbitration).

fees dwarf the amount at stake in the dispute or substantially exceed the cost of judicial proceedings.¹¹⁸ Or they may require a party to travel to a venue so far away that the costs of getting to the arbitral venue far exceed the damages at stake.¹¹⁹

These rules do not conflict with arbitration's fundamental values. If anything, applying unconscionability or public policy doctrines to rein in such clauses when they deny an individual the ability to seek relief reinforces the goal of reducing costs and of providing an affordable alternative to litigation.¹²⁰ In *Italian Colors*, the United States Supreme Court explicitly noted that a provision requiring the plaintiff to pay costs and fees so high as to make the arbitral forum inaccessible could still be a valid ground for invalidating an arbitration clause.¹²¹ Thus, the FAA should not preempt state-law challenges to such provisions.

F. Confidentiality

Not every confidentiality provision in an arbitration clause is necessarily unconscionable. However, provisions requiring parties to keep information confidential can be struck down as unconscionable or against public policy when they give one side an extremely unfair advantage. Confidentiality agreements threaten to tilt the playing field by giving repeat players an information advantage and by preventing the other party from obtaining information that would level it.¹²²

Although many may instinctively associate arbitration with confidentiality, forced secrecy is not a fundamental attribute of arbitration, and thus the FAA

118. See, e.g., *Chavarria*, 733 F.3d at 925-26 (striking down provision requiring the parties to evenly split arbitrators' fees where plaintiff showed that he would likely have to pay \$3,500-\$7,000 in fees, an amount the court found "likely dwarfs the amount of Chavarria's claims"); *Gandee*, 293 P.3d at 1200 (holding an arbitration provision unconscionable because plaintiff met her burden of showing costs of travel to a distant venue plus costs of the arbitrators' fees would exceed the damages at stake and her ability to pay); *Clark v. Renaissance W., LLC*, 307 P.3d 77, 81-82 (Ariz. Ct. App. 2013) (holding arbitration provision requiring parties to split arbitrator fees unconscionable where plaintiff built a detailed factual record showing that the costs of arbitrators, based on the estimated length of the hearing, made arbitration prohibitively expensive in light of plaintiff's limited and fixed income); *Potiyevskiy v. TM Transp., Inc.*, No. 1-13-1864, 2013 IL App (1st) 131864-U, at *8 (Ill. Ct. App. Nov. 25, 2013) (striking arbitration provision as unconscionable where the arbitrators' fees, which the parties were required to split, would be at least \$975 for claims that might be as small as \$25); *Zaborowski*, 936 F. Supp. 2d at 1154 (N.D. Cal. 2013) (finding arbitration clause unconscionable where the \$2,660 arbitration filing fee was seven times greater than the filing fee in court and almost fifteen times greater than the arbitration fee for employment disputes).

119. See, e.g., *Newton v. Am. Debt Servs., Inc.*, 549 F. App'x 692 (9th Cir. 2013) (finding unconscionability in part because "the arbitration forum provision requires Newton, who resides in California, to arbitrate in Tulsa, Oklahoma—Global Client Solutions' headquarters."); *Potiyevskiy v. TM Transp., Inc.*, No. 1-13-1864, 2013 IL App (1st) 131864-U, at *8 (Ill. Ct. App. Nov. 25, 2013) (holding arbitration clause's choice of Illinois as a forum was not per se unconscionable, but that under the facts of the case, "requiring the drivers to make repeated trips to Illinois from out of state to arbitrate numerous low-dollar-amount claims is [unconscionable].").

120. See, e.g., *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 202 (Cal. 2013) (giving example of an arbitration clause requiring the plaintiff to pay \$8,000 in fees, which was well beyond her ability to pay, as an issue that has nothing to do with fundamental attributes of arbitration).

121. 133 S. Ct. at 2310-11; *Chavarria*, 733 F.3d at 926-27 (relying on *Italian Colors* in concluding that the FAA did not preempt applying state unconscionability law to strike down a fee-sharing provision that made arbitration prohibitively expensive).

122. See, e.g., *Chavarria*, 733 F.3d at 924.

should not preempt state law challenges to confidentiality provisions.¹²³ Significantly, the *Concepcion* Court identified confidentiality not as an essential feature of arbitration, but rather as one of the many optional features that, depending on the nature of the relationship of the parties and the type of dispute involved, may or may not be included in an arbitration provision.¹²⁴ The Court noted that, under the FAA, parties might specify, if they wish, “that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets.”¹²⁵ Just as arbitrator specialization is an option, but not a fundamental attribute of arbitration, so too is confidentiality.

The FAA’s text and structure appear to support the conclusion that confidentiality is not a fundamental attribute of arbitration. The FAA appears to presume that arbitration materials could become public, even if the arbitration provision includes a forced confidentiality clause. The Act allows parties to go to court to seek to confirm or vacate an arbitration award, and requires parties to file certain documents when doing so.¹²⁶ The information submitted in arbitration will likely be relevant to that determination, and thus will become a public record as part of the court proceeding, subject to any protective order that the trial court might impose.

It appears that empirical evidence also supports this result.¹²⁷ One review found that arbitration communications are generally admissible in court and are not automatically privileged.¹²⁸ This stands in contrast to mediation, which is more protective of confidentiality. The Uniform Mediation Act, for example, creates an evidentiary privilege against disclosure of mediation communications.¹²⁹ Thus, confidentiality is not an essential feature of arbitration.

G. Discovery Limitations

Not every provision that limits discovery in arbitration will be unconscionable. Parties are certainly entitled to agree to limit the amount of discovery that can be conducted in arbitration.¹³⁰ As courts have held, provisions restricting discov-

123. See, e.g., *Schnuerle v. Insight Commc’ns, Co.*, 376 S.W.3d 561, 578 (Ky. 2012) (striking down an arbitration clause’s confidentiality provision where it gave the drafting party an unfair advantage and concluding that *Concepcion* does not require upholding confidentiality provisions).

124. See *Sura & DeRise*, *supra* note 8, at 463 (noting that *Concepcion* identified confidentiality “as a benefit that parties could choose for themselves”).

125. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct 1740, 1749 (2011).

126. 9 U.S.C. § 13 (2012) (requiring the party seeking to confirm, vacate or modify an award to submit various documents to the court including the arbitration agreement, the arbitration award, the identities of the arbitrators, as well as notices and affidavits and other papers used in support of the motion); see also *Drahozal*, *supra* note 9, at 167 (noting that “under U.S. law, the privacy of arbitration does not extend to precluding a party’s disclosure of the existence of the arbitration or even its outcome”).

127. See Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1281 (2006) (suggesting that “confidentiality is not an essential characteristic of arbitration in that a rule of evidentiary exclusion is not necessary to the functioning of arbitration as an adversarial process”).

128. See *id.* at 1273 (noting that “[t]he overwhelming majority of states do not have statutes or court rules that generally preclude the admission of arbitration in formal legal proceedings”).

129. Uniform Mediation Act, § 4, 7A U.L.A. 104, 122 (2003).

130. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (indicating that reduced discovery may be part of the tradeoff that comes with choosing arbitration over litigation).

ery can be unconscionable and not preempted, when they are so limiting that they preclude a party from pursuing relief.¹³¹

Intuitively, one might think that arbitration is designed to be a speedier and more informal alternative to court, and thus that discovery should be limited. The *Concepcion* Court provided the hypothetical example of a rule requiring judicially monitored discovery in all disputes as an example of a generally applicable rule that could be preempted by the FAA.¹³² As explained above, the Court's hypothetical involved a categorical rule that would require extensive discovery in all cases, regardless of whether the lack of discovery prevented the plaintiff from raising a claim.¹³³

By contrast, a fact-specific application of unconscionability principles to discovery limitations that prevent a plaintiff from pursuing a claim does not interfere with any fundamental attribute of arbitration.¹³⁴ Discovery is not inherently inconsistent with arbitration. Rather, the FAA itself contemplates that parties to an arbitration agreement would be permitted to conduct some fact gathering. For example, Section 4 of the Act requires a court to hold a jury trial when there is a dispute over whether an arbitration agreement has been validly formed.¹³⁵ Once the validity of the arbitration agreement is questioned, "[t]he FAA provides for discovery and a full trial in connection with a motion to compel arbitration."¹³⁶ Similarly, once a dispute actually gets to arbitration, the FAA grants the arbitrator power to develop evidence, including the power to subpoena witnesses and to require witnesses to bring "any book, record, document, or paper which may be deemed material as evidence in the case."¹³⁷ Thus, the FAA itself indicates arbi-

131. See, e.g., *Winston v. Academi Training Center, Inc.*, No. 1:12-CV-767, 2013 WL 989999, at *2 (E.D. Va. Mar. 13, 2013) (holding arbitration clause prohibiting any discovery in arbitration precluded plaintiff from vindicating federal statutory rights when applied to plaintiff's False Claims Act (FCA) claim because "FCA claims are often document intensive," making it "difficult, if not impossible, to prove those claims" without access to the allegedly falsified documents that form the basis of the claim); *Unimax Express, Inc. v. Cosco N. Am., Inc.*, No. CV-11-02947-DDP (PLAx), 2011 WL 5909881, at *4 (C.D. Cal. Nov. 28, 2011) (holding an arbitration clause substantively unconscionable when it did not allow party bringing a claim any right to discovery in order to rebut the opposing party's response); see also *Zaborowski v. MHN Gov. Servs., Inc.*, 936 F. Supp. 2d 1145, 1154 (N.D. Cal. 2013) (holding that, although a discovery limitation could be unconscionable if it precluded plaintiffs from having a realistic opportunity to pursue their claims, the plaintiffs in this case failed to meet their burden); but cf. *Lucas v. Hertz Corp.*, 2012 WL 5199384, at *2-3 (N.D. Cal. Oct. 22, 2012) (questioning whether rules regulating limits on discovery in arbitration survive *Concepcion*); *Tierra Right of Way Servs., Ltd. v. Abengoa Solar Inc.*, 2012 WL 2292007, at *5 (D. Ariz. June 9, 2011) (enforcing blanket discovery prohibition against unconscionability challenge where party asserting unconscionability failed to "allege how an inability to conduct discovery or demand production of documents will render it incapable of presenting and proving its case, particularly when its similarly situated corporate opponent also is so limited."). Numerous courts have permitted parties to take discovery regarding the validity of an arbitration clause. See F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS, § 2.4.2 (NCLC 6th ed. 2011).

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

133. See *supra* note 131 and accompanying text.

134. See *Gilmer*, 500 U.S. at 31 (noting that the arbitration regime at issue provided for some discovery in determining that the plaintiff would be able to pursue his claim in arbitration).

135. 9 U.S.C. § 4 (2012).

136. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999).

137. 9 U.S.C. § 7 (2012). The Revised Uniform Arbitration Act (RUAA), which is a model for many state arbitration statutes, also authorizes arbitrators to subpoena witnesses and order discovery. Revised Uniform Arbitration Act, § 17, 7 U.L.A. § 61. Moreover, the RUAA's provisions permitting arbitrators to issue subpoenas and order depositions are non-waivable, meaning that the parties cannot limit the arbitrator's discovery authority by contract. *Id.*, § 17(a)-(b).

tration does not necessarily require that parties cannot conduct any discovery, or can only conduct limited discovery.

Second, the assumption that arbitration is synonymous with limited discovery is incorrect. Studies of contemporary arbitration provisions indicate that “proceedings under standard arbitration rules are likely to include prehearing motion practice and extensive discovery,” and that “[a]rbitration proceedings are now often preceded by extensive discovery, including depositions.”¹³⁸ The fact that sophisticated parties in particular are increasingly choosing to include discovery as a component of their arbitration regimes reinforces the point that limiting or prohibiting discovery is not a fundamental component of arbitration.

H. Arbitrator Selection

Many courts have found that provisions establishing biased or partial processes for arbitrator selection can be struck down as unconscionable or against public policy without giving rise to FAA preemption.¹³⁹ As explained above,¹⁴⁰ regulating against arbitrator bias does not interfere with the FAA. Rather, it is fully consistent with the FAA, which itself permits invalidation of an arbitration award on the ground of bias.¹⁴¹

IV. WHAT IS FUNDAMENTAL TO ARBITRATION?

Concepcion directs us to think about what it is that truly is “fundamental” to arbitration. Doing so shows that when carefully read, *Concepcion* might significantly limit FAA preemption instead of expanding it. What the above discussion suggests is that, perhaps with the exception of the absence of class proceedings, there is no particular procedure, rule, device, or structure that is an essential or necessary part of arbitration. Rather, society’s idealized notion of what arbitration looks like—speedy, informal, less costly—is not an accurate reflection of what

138. Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 6, 13 (2010); see also Lawrence W. Newman, *Agreements to Arbitrate and the Predictability of Procedures*, 113 PENN. ST. L. REV. 1323, 1323 (2009) (noting that business arbitration “has become more similar to litigation—particularly U.S.-style litigation in United States courts—in large part because of increased procedural activity, including discovery”).

139. See, e.g., *Brown v. MHN Gov. Servs., Inc.*, 306 P.3d 948, 957 (Wash. 2013) (provision allowing one party to select pool of three arbitrators was “overly harsh and one-sided” and thus unconscionable); *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-24 (9th Cir. 2013) (striking down provision that effectively ensured drafting party would be able to choose the arbitrator); *Newton v. Am. Debt Servs., Inc.*, 549 F. App’x 692 (9th Cir. 2013) (finding arbitration clause unconscionable in part because “the arbitration agreement reserves the selection of an arbitrator solely to defendants”); *Zaborowski v. MHN Gov. Servs., Inc.*, 936 F. Supp. 2d 1145, 1153 (N.D. Cal. 2013) (holding arbitration provision unconscionable where the provision gave drafting party unilateral control over pool of arbitrators).

140. See *supra* notes 81-85 and accompanying text.

141. In addition, courts have rejected preemption arguments related to various other types of rules when applied to arbitration clauses. See, e.g., *Rent-A-Center, Inc. v. Iowa Civil Rights Comm’n*, 843 N.W.2d 727 (Iowa 2014) (holding provision of Iowa Civil Rights Act permitting Iowa Civil Rights Commission to bring enforcement actions against employers was not preempted by the FAA when the Commission brought an enforcement action in court on behalf of an individual who signed an arbitration provision); *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013) (holding the FAA did not necessarily preempt application of state law unconscionability principles to invalidate arbitration clause that prevents a party from pursuing administrative remedy prior to arbitration).

actually takes place in arbitration or of what Congress envisioned when enacting the FAA.¹⁴²

Arbitration “is not a monolith.”¹⁴³ It takes all shapes and sizes, and in many cases looks precisely the opposite of our mythologized view.¹⁴⁴ Although we think of arbitration as informal, it is common for arbitration provisions to include “trial-like procedures for discovery,” and to incorporate judicial litigation rules including the Federal Rules of Civil Procedure.¹⁴⁵ Although we think of arbitration as cost-effective, it often ends up being as expensive or more expensive than litigation, especially when accounting for the fact that parties must pay the cost of the arbitrators themselves.¹⁴⁶ Ironically, the limits on collective, consolidated or other multi-party proceedings that *Concepcion* authorized have resulted, at least in business arbitrations, in greater costs and inefficiencies by requiring multiple arbitrations rather than a single proceeding.¹⁴⁷ Although we often think of arbitration as being speedy, the parties in many cases agree to procedures that make the proceedings end up being lengthier than court proceedings would, and some arbitrators may be less inclined than judges to use procedures like summary judgment to resolve a case more quickly.¹⁴⁸ Different arbitration agreements embed different procedures. Some provisions require confidentiality, some do not; some limit discovery, some do not; some call for truncated proceedings, some do not.

There is no one procedural device that is necessary for arbitration. In the words of Professor Thomas Stipanowich, “[c]hoice is what sets arbitration apart

142. Some Justices have similarly criticized the Supreme Court’s arbitration doctrine as having “abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.” *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

143. Sura & DeRise, *supra* note 8, at 425 (“Arbitration, like litigation, is not a monolith, and can vary greatly depending on the nature of the dispute.”).

144. See, e.g., Alexander J.S. Colvin and Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO ST. J. DISPUTE RESOL. 59, 80 (2014) (“It is also striking the degree to which some of the structural features of the litigation system for how cases proceed are replicated in arbitration.”).

145. Stipanowich, *supra* note 138, at 13; Alexander J.S. Colvin, *Mandatory Arbitration and the Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LABOR L. 71, 81 (2014) (noting increased use of summary judgment procedures in employment arbitration, and suggesting “that the differences from litigation in this area are diminishing”).

146. See, e.g., Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 133-144 (2004); PUBLIC CITIZEN, *THE COSTS OF ARBITRATION* (2002), available at <http://www.citizen.org/publications/publicationredirect.cfm?ID=7173#o> (asserting that arbitration often is as costly or more costly than litigation); see also Benjamin J.C. Wolf, *On-Line but Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT’L & COMP. L. 281, 306-07 (2006) (complaining that arbitration has become just as expensive as litigation).

147. Stipanowich, *supra* note 138, at 22; see also *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1287-88 (D. Colo. 2011) (enforcing arbitration clause’s class action waiver despite the fact that individualized arbitrations would require the same witnesses to testify in 800 different individual proceedings rather than in a single consolidated proceeding).

148. Stipanowich, *supra* note 138, at 15-16; Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer’s Perspective*, 25 ABA J. LAB. & EMP. L. 227, 235-37 (2010) (indicating that in many disputes, particularly ones involving pro se litigants, arbitration is likely to cost more and take longer than going to court); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Spector of Neoliberalism*, 41 HARV. INT’L L.J. 419, 434-35 (2000) (arguing that international arbitration has become just as lengthy as litigation and identifying the cause as the American arbitration model of including many of the procedural protections of litigation).

from litigation,”¹⁴⁹ and that means freely-negotiated, real choice exercised by both parties to the transaction. Unlike litigation which sets unwaivable default rules of procedure, the parties in arbitration can themselves negotiate the particular facets of the arbitration process that they think best fit their business relationship and the types of disputes that are likely to arise. Parties can design streamlined arbitration procedures aimed at reaching a quick result, or can design more extensive proceedings if they want to preserve various procedural protections—within the confines set by the FAA itself.¹⁵⁰

Concepcion recognized the importance of true choice exercised by both parties. It described the FAA not as necessarily mandating speedy and cheap dispute resolution, but rather as “affording parties discretion in designing arbitration processes” to “allow for efficient streamlined proceedings tailored to the type of dispute.”¹⁵¹ In other words, different types of disputes may demand different types of proceedings, and arbitration provides parties a real opportunity to negotiate and choose those procedures that they believe align best with the dispute at issue.¹⁵² Notably, by referring to “parties” rather than “party,” the Court indicated that all parties would be able to play a role in designing the agreement, in contrast to the situation where one party imposes arbitration terms on the other in a non-negotiable, take-it-or-leave-it adhesion contract.

If arbitration is about preserving meaningful choice, then the characteristic that conflicts with the “fundamental attributes” of arbitration is the absence of choice—i.e. adhesion. Adhesion contracts, particularly in situations of unequal bargaining power, reflect an absence of meaningful choice. Parties have little or no opportunity to collectively design the terms of their arbitration process. Rather, one side imposes its arbitration process on the other. As the Sixth Circuit recently recognized in addressing an unconscionability challenge to an arbitration clause, “[t]he idea that the arbitration agreement in this case reflects the intent of anyone but [the drafting party] is the purest legal fiction.”¹⁵³ This is not the “choice” that the FAA’s framers envisioned.

There is evidence that it is the adhesion regime of consumer and employment arbitration provisions that is at odds with arbitration’s fundamental nature. Several scholars have addressed how the FAA was intended for commercial transactions between sophisticated parties with roughly equal bargaining power rather than for take-it-or-leave-it business-to-consumer transactions.¹⁵⁴ Other scholars

149. See Stipanowich, *supra* note 138, at 51; see also Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. (forthcoming 2014) (describing the prevailing view among arbitration scholars that the goal of the FAA was to preserve private autonomy and choice). Choice may not be the only attribute that is fundamental to arbitration—some might argue that adjudication is fundamental to arbitration, in the sense that a required adjudication sets arbitration apart from other alternative dispute resolution processes, such as mediation or negotiation.

150. The parties’ choice, however, is not unfettered under the FAA. For example, the FAA prohibits the parties from contracting for greater judicial review than provided in the statute itself. See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

151. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011).

152. Not everyone agrees that the essence of arbitration is choice. Some assert that the goal of the FAA was not to preserve party choice, but that it was designed as a procedural reform during the era of overly-technical litigation rules that predated the adoption of the Federal Rules of Civil Procedure. See Aragaki, *supra* note 149.

153. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 600 (6th Cir. 2013).

154. See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking The Supreme Court’s Preference for Arbitration*, 74 WASH. U. L.Q. 637, 647 (1996) (“Most commentators have concluded

have addressed how the FAA's enactors envisioned that public policy defenses would be applied to arbitration clauses just as they are to other contracts.¹⁵⁵

Similarly, scholars who examine comparative arbitration practices have noted how the United States is "exceptional" and virtually unique in the way that it rigidly enforces forced arbitration agreements in adhesive contracts and limits a state's ability to regulate such agreements in order to protect the weaker party.¹⁵⁶ By contrast, "many other countries refuse or strictly limit arbitration enforcement in Business-to-Consumer (B2C) relationships, due to concerns regarding power imbalances and public enforcement of consumer protections."¹⁵⁷ Several European countries and the European Union have placed significant restrictions on the enforcement of arbitration clauses in B2C contracts because of the imbalance of bargaining power and ensuing risk of unfairness.¹⁵⁸ That the United States stands alone in its treatment of adhesive arbitration agreements reinforces that the absence of real choice is what is inconsistent with arbitration.

As a result, *Concepcion* suggests the FAA does not preempt state regulation of arbitration clauses in adhesion contracts. If adhesion contracts are anathema to the fundamental attributes of arbitration, and if interference with arbitration's fundamental attributes triggers FAA preemption, then regulation of adhesion contracts is not preempted by the FAA because it does not interfere with the FAA's goal of protecting true choice on the part of all parties. If anything, interpreting *Concepcion* in such a manner will promote private choice by allowing states to look skeptically at arbitration agreements that deny choice, i.e., ones that are unilaterally imposed in contracts of adhesion. If courts interpret the FAA to give states greater authority to regulate adhesive arbitration agreements than they previously had, that may encourage parties that wish to use arbitration agreements to give contracting parties greater negotiating power over the arbitration provision's terms.

Such an interpretation does not mean that forced arbitration provisions contained in adhesive contracts are never enforceable. It simply means that, under *Concepcion*, states should be free to regulate adhesive arbitration provisions without interfering with the FAA. The one likely exception concerns adhesive class action waivers. To be sure, the class action waiver that the *Concepcion* Court found enforceable was contained in an adhesive arbitration agreement, but that has to do with the unique concerns created by class arbitration. Classwide arbitration can be viewed as inconsistent with free choice, regardless of whether it is contained in an adhesive or non-adhesive contract, by imposing an award or decision

that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power and not necessarily to transactions between a large merchant and a much weaker and less knowledgeable consumer."); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 75-81 (arguing that the framers intended the FAA to be limited to commercial disputes between business entities).

155. See Horton, *supra* note 8, at 1255-61 (explaining how public policy was a common contract defense at the time of the FAA's enactment, and that members of Congress would have understood it as a general contract doctrine applicable to contracts for arbitration).

156. See Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 81, 82 (2012).

157. *Id.*

158. *Id.* at 94-99 (describing different approaches).

on absent parties who did not choose to be part of the proceeding.¹⁵⁹ Thus, even though *Concepcion* arose from an adhesion contract, its reasoning is consistent with the notion that the FAA ordinarily does not preempt regulation of adhesion contracts. The FAA only bars states from regulating away the fundamental aspects of arbitration.

Moreover, giving states authority to regulate arbitration provisions that are part of adhesive contracts does not mean that states lack authority to regulate arbitration in non-adhesive, freely-negotiated contracts. Such contracts are still governed by generally applicable contract principles in the same way as any other non-adhesive contract. The FAA's savings clause makes it clear that any arbitration clause, adhesive or non-adhesive, can be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract."¹⁶⁰ Because adhesive contracts fall outside the sphere of what the FAA seeks to protect, regulation of adhesive contracts does not necessarily interfere with the FAA and should not be preempted by it.¹⁶¹

CONCLUSION

Despite concern that the Supreme Court's recent decisions in *Concepcion* and *Italian Colors* dramatically altered the arbitration landscape, a close reading of those cases suggests a different conclusion. While *Concepcion*'s focus on protecting arbitration's "fundamental attributes" from state regulation may exert a significant effect on unconscionability challenges to class action waivers in arbitration clauses, in reality it should have little effect on fact-specific applications of general contract doctrines, like unconscionability, to arbitration agreements that are so unfair as to prevent a party from pursuing his or her rights. Moreover, examination of arbitration's "fundamental attributes" reveals that the characteristic most inconsistent with arbitration is not any particular procedure or rule, but adhesive agreements that deny parties a voice in designing the terms and conditions of arbitration. *Concepcion* thus enables us to re-examine what is and is not fundamental to arbitration and, when fairly read, authorizes state courts and legislatures to regulate adhesive agreements in a way that preserves choice instead of taking it away.

159. See Aragaki, *supra* note 149 (arguing that the *Concepcion*'s Court's problem with classwide arbitration was that it "effectively imposed class arbitration on parties who did not consent to it"); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010) (explaining how class arbitration fundamentally changes arbitration, in part because "[t]he arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well").

160. 9 U.S.C. § 2 (2012).

161. That states are free to regulate arbitration provisions contained in contracts of adhesion does not mean that states lack power to regulate arbitration in non-adhesive, freely-negotiated contracts. Such contracts are still governed by generally applicable contract principles in the same way that any other non-adhesive contract is. The FAA's savings clause makes it clear that any arbitration clause, adhesive or non-adhesive, can be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012).